PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Abigail Noel Fisher.

Respondents are the University of Texas at Austin; David B. Pryor, Executive Vice Chancellor for Academic Affairs in His Official Capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; James R. Huffines, as Member of the Board of Regents in His Official Capacity; Janiece Longoria, as Member of the Board of Regents in Her Official Capacity; Colleen McHugh, as Chair of the Board of Regents in Her Official Capacity; Robert L. Stillwell, as Member of the Board of Regents in His Official Capacity; James D. Dannenbaum, as Member of the Board of Regents in His Official Capacity; Paul Foster, as Member of the Board of Regents in His Official Capacity; Printice L. Gary, as Member of the Board of Regents in His Official Capacity; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; Francisco G. Cigarroa, M.D., Interim Chancellor of the University of Texas System in His Official Capacity.

Plaintiff-Appellant below Rachel Multer Michalewicz is being served as a respondent herein.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Abigail Fisher ("Petitioner") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is available at 631 F.3d 213 and is reprinted in the Appendix ("App.") at 1a-114a. The order of the United States Court of Appeals denying rehearing en banc and the opinion dissenting from the denial of rehearing en banc are available at 2011 WL 2420984 and are reprinted at App. 172a-184a. The opinion of the United States District Court for the Western District of Texas is available at 645 F. Supp. 2d 587 and is reprinted at App. 115a-171a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its decision on January 18, 2011. App. 1a. A timely petition for rehearing en banc was denied on June 17, 2011. App. 172a-184a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

Petitioner Abigail Fisher, a Caucasian female, applied for undergraduate admission to the University of Texas at Austin ("UT") in 2008. Ms. Fisher was not entitled to automatic admission under the Texas Top Ten Percent Law. She instead competed for admission with other non-Top Ten in-state applicants, some of whom were entitled to racial preference as "underrepresented minorities." Although Ms. Fisher's academic credentials exceeded those of many admitted minority candidates, UT denied her application. Having "'suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection,'" *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995)), Ms. Fisher brought this challenge to the use of race in UT's undergraduate admissions process seeking monetary and injunctive relief.

The Fifth Circuit affirmed the district court's grant of summary judgment to UT in a decision that sharply divided the Circuit bench. Judge Higginbotham, writing for the panel, acknowledged that UT's use of race was subject to strict scrutiny. He nevertheless concluded that "*Grutter*'s 'serious, good faith consideration' standard" applied, refused to "second-guess the merits of the University's decision" and "instead scrutinize[d] the University's decisionmaking process" to ensure that the

University "acted in good faith." App. 36a. The panel majority also held that strict scrutiny's "narrow-tailoring inquiry ... is undertaken with a degree of deference" in the academic context so that, under *Grutter*, "a university admissions program is narrowly tailored" so long as it avoids express quotas or specified preference points and "allows for individualized consideration of applicants of all races." App. 37a, 11a. The panel endorsed UT's "good faith" determination that the use of race would further UT's interests in having its already diverse student population mirror the racial demographics of Texas and in attaining "classroom diversity." App. 23a-24a.

Judge Garza specially concurred. He reluctantly agreed that the panel's judgment adhered to *Grutter* and wrote to protest the consequent elimination of "meaningful judicial review." App. 77a, 81a, 83a. Among other things, Judge Garza objected to the panel's decision to ratify "the University's reliance on race at the departmental and classroom levels, [which] will, in practice, allow for race-based preferences in seeming perpetuity." App. 87a. He expressed doubt that UT's system could survive "strict scrutiny before or after *Grutter*" because "[UT]'s use of race has had an infinitesimal impact" on minority enrollment and thus could not be "narrowly tailored" when "the University's highly suspect use of race provides no discernible educational impact." App. 107a-108a.

The Fifth Circuit denied rehearing en banc by a vote of nine to seven. Writing for five of the dissenting judges, Chief Judge Jones faulted the panel's finding that UT's admissions program was justified by *Grutter*. In her view, the panel decision "essentially abdicates judicial review of a race-conscious admissions program for undergraduate [UT] students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." App. 174a. She believed that the panel had improperly extended *Grutter* by "watering down" strict scrutiny to authorize the use of race in college admissions when "a race-neutral state law (the Top Ten Percent Law) had already fostered increased campus racial diversity," and by validating UT's "unachievable and unrealistic goal of racial diversity at the classroom level to support the University's race-conscious [admissions] policy." App. 174a-175a. She warned that the decision "gives a green light to all public higher education institutions in this circuit, and perhaps beyond," to resort to race-based admissions plans "without following the narrow tailoring that *Grutter* requires." App. 175a.

As this divide shows, and as the participation of the United States and 28 other organizations as amicus curiae before the Fifth Circuit underscores, this Petition presents important constitutional questions.[1] Especially significant is the panel's interpretation of *Grutter* as a blanket endorsement of racial preference in UT's so-called "holistic" admissions program without any regard to UT having been one of the most racially diverse universities in the nation before race was considered.

If any state action should respect racial equality, it is university admission. Selecting those who will benefit from the limited places available at state universities has enormous consequences for their futures and the perceived fairness of governmental action. The Fourteenth Amendment requires an admissions process untainted by racial preferences absent a compelling, otherwise unsatisfied, government interest and narrow tailoring to advance that interest without undue infringement on the rights of non-preferred applicants. This Court should grant the petition and review the Fifth Circuit's decision, which authorizes public universities to increase the use of racial admissions preferences precisely when that use should be abating.

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[1] The United States participates as an amicus at the court-of-appeals level only at the authorization of the Solicitor General, *see* 28 C.F.R. § 0.20(c), and only in cases of great national importance.

STATEMENT OF THE CASE

A. History Of UT's Admissions Program

Because approximately four times as many in-state students as can enroll in UT's freshman class apply each year, UT employs a selective admissions process. That admissions process (and its consideration of race) has changed several times in response to judicial decisions. App. 120a-121a, 125a. Before the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), UT based admission on an Academic Index ("AI") computed from high school class rank and standardized test scores adjusted by consideration of race. App. 15a. In 1996, the last year UT used this system, the entering freshman class was 18.6% African-American and Hispanic. App. 18a-19a.

After *Hopwood* struck down the University of Texas School of Law's use of race, UT eliminated race as a factor in its undergraduate admissions process and instead sought "to increase minority enrollment" through race-neutral means. App. 18a. To this end, UT incorporated a new metric—a Personal Achievement Index ("PAI")—into its admissions process. App. 17a-18a. The PAI originally was a composite of written essay and race-neutral "personal achievement" scores, weighted by "special circumstances," some of which "disproportionately affect minority candidates, [such as] the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household." App. 121a. Under this system, the 1997 entering freshman class was 15.3% African-American and Hispanic. App. 121a-122a.

In 1997, the Texas legislature enacted a law requiring UT to admit all Texas high school seniors ranking in the top ten percent of their classes. *See* H.B. 588, Tex. Educ. Code § 51.803 (1997) (the "Top Ten Percent Law"). The law was intended, in part, to overcome *Hopwood* by ensuring admission to "a large well qualified pool of minority students."[2] App. 123a. Under the Top Ten Percent Law, UT continues to calculate AI and PAI scores for all in-state applicants, which it plots on grids (AI on the horizontal axis, PAI on the vertical). The grids are used to determine placement in particular schools and majors for applicants automatically admitted under the Top Ten Percent Law, and to determine both admission and placement in schools and majors for non-Top Ten Percent Law applicants.

UT officials lauded the impact of this race-neutral admissions process on minority enrollment and retention. By 2000, UT had returned "enrollment levels for African American and Hispanic freshman ... to those of 1996, the year before the *Hopwood* decision." And UT credited its race-neutral system for "helping us to create a more representative student body and enroll students who perform well academically" as evidenced by the fact that "minority students earned higher grade point averages ... than in 1996 and ha[d] higher retention rates."[3] By 2003, the race-neutral regime had "brought a higher number of freshman minority students—African Americans, Hispanics and Asian Americans—to the campus than were enrolled in 1996."[4] Admissions statistics verified UT's conclusion. In 2004, the entering freshman class was 21.4% African-American and Hispanic, thus significantly exceeding the minority enrollment rates achieved under UT's pre-*Hopwood* race preference system. App. 62a.

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[2] UT also uses numerous race-neutral outreach efforts and scholarship programs to increase minority applications and enrollment. App. 18a.

Notwithstanding the success of this race-neutral approach, on the very day that *Grutter* was decided, UT signaled that it would reintroduce race into its admissions process: "[t]he University of Texas at Austin will modify its admissions procedures to ... combine the benefits of the Top 10 Percent Law with affirmative action programs that can produce even greater diversity."[5] Shortly thereafter, UT investigated "whether to consider an applicant's race and ethnicity" in admissions "in accordance with the standards enunciated in" *Grutter*. App. 21a. Finding "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population" and a lack of diversity in its "classrooms," UT added race as an explicit factor in its pre-existing PAI scoring with the goal of increasing undergraduate enrollment of "underrepresented" African-American and Hispanic minorities. App. 23a (citation omitted).

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[3] Dr. Larry Faulkner, *The "Top 10 Percent Law" is Working for Texas* (Oct. 19, 2000), *available at* http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html (last visited Sept. 15, 2011).

[4] *Enrollment of first-time freshman minority students now higher than before Hopwood court decision* (Jan. 29, 2003), *available at* http://www.utexas.edu/news/2003/01/29/nr_diversity (last visited Sept. 15, 2011).

[5] *The University of Texas at Austin reacts to the Supreme Court's affirmative action decisions* (June 23, 2003), *available at* http://www.utexas.edu/news/2003/06/23/nr_affirmativeaction (last visited Sept. 15, 2011).

Under this revised program, UT continues to admit the bulk of its class pursuant to the Top Ten Percent Law (with AI and PAI scores still affecting program placement). App. 31a. In 2008, for example, Top Ten Percent Law admissions accounted for approximately 81% of the entering class.[6] UT fills the remainder of the in-state freshman class through consideration of AI and race-affected PAI scores. *Id.*

Every UT applicant thus is given an AI and PAI score and classified by race. Race is identified on the first page of every admissions file and "reviewers are aware of it throughout the evaluation." App. 134a. Because UT uses the composite AI/PAI score both to make non-Top Ten Percent Law admission decisions and to assign incoming freshmen to schools and majors, race has an impact on the ultimate disposition of each in-state application. UT officials confirmed that an applicant's race "can make a difference" in admissions decisions. App. 33a. The district court agreed. App. 163a.

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[6] During the pendency of this litigation, the Texas legislature amended the Top Ten Percent Law to limit the number of mandatory admissions to 75% of UT's overall freshman class. *See* Tex. Educ. Code § 51.803(a-1). Under this amendment, if a court ruling were to prohibit UT from considering race as a factor in admissions decisions, the 75% cap on the Top Ten Percent Law would be eliminated and the Top Ten Percent Law would become fully operative. *Id.* § 51.803(k)(1).

In 2007, the last admissions year before Petitioner applied to UT, the incoming "freshman class [wa]s 19.7 percent Hispanic, 19.7 percent Asian American and 5.8 percent African American." As UT proudly announced, "[t]hese [we]re record highs for each group." Yet, UT continued to use race in Petitioner's admissions cycle.[7]

UT does not attempt to measure the effect of race on admissions decisions and is unable to quantify the increase in "underrepresented" minority enrollment attributable to consideration of race. App. 104a. The available data, however, indicate that any increase has been negligible. Out of 2008's enrolled freshman class of 6,332 in-state students, 1,208 were admitted outside the operation of the Top Ten Percent Law. App. 102a-103a. Within that group, there were 58 African-American and 158 Hispanic students, some of whom were admitted based solely on AI scores. App. 103a. Moreover, UT's annual enrollment of hundreds of non-Top Ten African-American and Hispanic students before race was reintroduced into its admissions process indicates that many of the 216 non-Top Ten "underrepresented" minority students enrolled in 2008 would have been admitted without consideration of race. App. 103a.

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[7] Campus 2 Counselor, News from The University of Texas at Austin, *Enrollment Figures Show Record Diversity, Increased Enrollment* (Fall 2007), *available at* http://bealonghorn.utexas.edu/counselors/hs/ctoc (last visited Sept. 15, 2011).

One measure of the impact of UT's use of race in admissions on the enrollment of "underrepresented" minorities is to compare the percentage of non-Top Ten "underrepresented" minority students enrolled in the years when race was not part of the admissions calculus to the percentage of non-Top Ten "underrepresented" minority students enrolled in 2008. From 1998 to 2004, when race was not a factor in admissions, an average of 15.2% of the non-Top Ten Texas enrollees each year were African-American or Hispanic. In 2008, 17.9% of the non-Top Ten Texas enrollees were African-American or Hispanic.[8] Even attributing this increased percentage entirely to race, race was decisive for only 33 African-American and Hispanic students—approximately 0.5% of the 6,322 in-state students enrolled in UT's 2008 freshman class and a far lower percentage of the tens of thousands of in-state applicants that year, all of whom were subjected to racial classification.[9]

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[8] *Implementation and Results of the Texas Automatic Admissions Law: Report 11*, at 7 (Oct. 28, 2008), *available at* http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf (last visited Sept. 15, 2011).

[9] UT likewise has not shown that its use of race has increased "classroom diversity." In fact, the evidence indicates that increasing minority enrollment does not necessarily translate into increased "classroom diversity." From 1996 through 2002, while minority enrollment was steadily increasing, "classroom diversity" decreased—that is, a higher percentage of classes had fewer than two African-American, Hispanic, or Asian-American students. For example, in the Fall of 1996, nearly 73% of all classes with five or more students had fewer than two African-American students; in the Fall of 2002, the percentage had increased to 79%. *Diversity Levels of Undergraduate Classes at [UT], 1996-2002*, at 7 (Nov. 20, 2003), *available at* http://www.utexas.edu/

B. Proceedings Below

1. Petitioner commenced this action in the United States District Court for the Western District of Texas, challenging UT's use of race in admissions as a denial of equal protection under the Fourteenth Amendment and a violation of Section 1983 of Title 42 of the United States Code. UT defended its use of race as a narrowly tailored means of pursuing greater diversity, which it deemed essential to its mission as Texas's flagship institute of higher education. App. 144a-147a. UT argued that its use of race was lawful because it had been modeled after the admissions program at the University of Michigan Law School (UMLS), which was upheld as constitutional in *Grutter*. App. 148a.

UT's admissions data showed that the combined effect of the Top Ten Percent Law and its pre-existing race-neutral AI/PAI admissions program had steadily increased minority enrollment and reliably resulted in admission of 20% or more African-American and Hispanic applicants. App. 124a. UT nevertheless claimed that it had not yet attained the "critical mass" of "underrepresented" minorities validated as a legitimate diversity goal in *Grutter* because: (1) the percentage of incoming African-American and Hispanic freshmen was below the percentage of African-Americans and Hispanics in the Texas population; and (2) a large number of its small

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student/admissions/research/ClassroomDiversity96-03.pdf (last visited Sept. 15, 2011). UT acknowledged that at least "some of the increase [in these percentages] [wa]s due to the larger number of sections observed (from 4,742 in 1996 to 5,631 in 2002)," which "'spread out' [minority students] in more classes, leaving many sections with little or no representation." *Id.* at 5.

classes (courses with between 5 and 24 students) lacked "classroom diversity," *i.e.*, had fewer than two students of any minority race. App. 156a-157a.

UT argued that its use of race was "narrowly tailored" to pursue "critical mass" because: (1) as in *Grutter*, its PAI scoring was "holistic"; (2) it did not set aside specific places for African-American and Hispanic applicants or otherwise use a quota; (3) it did not award additional points or other specific advantages to African-American and Hispanic applicants; (4) it had considered in good faith and rejected alternative means of achieving a "critical mass" of "underrepresented minorities"; and (5) it was committed to review its use of race in admissions at five year intervals beginning in 2009. App. 161a-167a.

On cross-motions for summary judgment, the district court found that UT had adhered to *Grutter* and granted it summary judgment. The district court specifically held that UT's pursuit of demographically proportional African-American and Hispanic admissions was within *Grutter's* concept of "critical mass" and endorsed UT's reliance on its so-called "classroom diversity" study. App. 155a, 157a. Narrow tailoring, in the district court's view, only required UT to use a "holistic" process, avoid quotas and fixed scoring preferences, and conduct periodic review. App. 158a-159a, 167a. Per the district court, Petitioner could be right only if *Grutter* were wrong. App. 169a.

2. The Fifth Circuit affirmed. The panel acknowledged that "as UT's *Grutter*-like admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny with its requirement of narrow tailoring." App. 35a. However, the panel declared

that UT's "educational judgment in developing diversity policies is due deference," *id.*, and announced a special standard of review for university admissions programs:

> Rather than second-guess the merits of the University's decision, a task we are ill-equipped to perform, we instead scrutinize the University's decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the University acted in good faith, a presumption Appellants are free to rebut.

App. 36a.

The panel extended its deferential standard to the means by which UT used race in its admission process, holding that "the narrow tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment." App. 37a. The panel viewed this Court's more rigorous application of strict scrutiny to racial preferences in state employment and contracting decisions as inapposite to state university admissions decisions. App. 38a-40a.

Further deferring to UT, the panel held that UT's decision to "reintroduce race as a factor in admissions was made in good faith" notwithstanding UT's reliance on racial demographics, rather than educational dynamics, "to determine whether UT had sufficient minority representation." App. 47a. In the panel's view, UT's "attention to the community it serves [is] consonant with the educational goals outlined in *Grutter* and [does] not support a finding that the University was engaged in improper racial balancing during our time frame of review." App. 48a. Per the panel: "Although a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account." App. 51a.

The panel further deferred to UT's conclusion that it was not enrolling a critical mass of minorities when it reintroduced race into admissions in 2004. App. 66a-67a. The panel rejected, however, UT's argument that the state-mandated Top Ten Percent Law was "entirely irrelevant" to the legal analysis, holding that it could not "ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texas freshman." App. 55a. Thus, the panel focused on whether it was constitutional for UT to "overlay" its system of racial preferences on "the Top Ten Percent Law" given the law's "substantial effect on aggregate minority enrollment at the University." App. 62a.[10]

The panel held that Petitioner had not rebutted UT's "good faith conclusion" that the race-neutral system had not produced a critical mass of minority students because Hispanic enrollment remained "low … considering the vast increases in the Hispanic population of Texas." App. 65a.

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[10] Although Judge Higginbotham was highly critical of the Top Ten Percent Law, Judge King's special concurrence explained that "[n]o party challenged … the validity or the wisdom of the Top Ten Percent Law," and she "decline[d] to join Judge Higginbotham's opinion insofar as it addresse[d] those subjects." App. 72a.

The panel also concluded that the race-neutral admissions program failed to produce "diverse classrooms" because, although it "may have contributed to an increase in overall minority enrollment, those minority students remain[ed] clustered in certain programs, severely limiting the beneficial effects of educational diversity." App. 86a. Thus, the panel held that UT "properly concluded that race-conscious admissions measures would help accomplish its goals" when added to its preexisting race-neutral system. App. 68a.

Finally, the panel rejected the argument that, under *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), UT's use of race was not justified because the race-neutral admissions program worked about as well as the race-affected admissions program given the "minimal effect" that using race had on minority enrollment levels and the disconnect between the use of race and the goal of increasing classroom diversity levels. App. 69a. The panel found that "*Parents Involved* does not support the cost-benefit analysis that Appellants seek to invoke" as the decision instead turned on the "'extreme approach'" used by the school districts in that case. *Id.* (quoting *Parents Involved*, 551 U.S. at 735). In the panel's view, *Parents Involved* "did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small." *Id.*

4. Judge Garza specially concurred at length. He characterized the panel opinion as "a faithful, if unfortunate, application of" what he considered *Grutter*'s erroneous "digression in the course of constitutional law." App. 72a. In particular, Judge Garza viewed *Grutter* as

"abandon[ing] [strict scrutiny] and substitut[ing] in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades." App. 109a. Judge Garza warned that the panel's "decision ratifies the University's reliance on race at the departmental and classroom levels, and will, in practice, allow for race-based preferences in seeming perpetuity." App. 87a. He could not "accept that the Fourteenth Amendment permits this level of granularity to justify dividing students along racial lines." *Id.*

Judge Garza also was troubled by the fact that UT's "use of race has had an infinitesimal impact on critical mass in the student body as a whole." App. 107a. He estimated the number of "underrepresented" minority students admitted on the basis of race and found that they could amount to no more than 1% of the freshman class in 2008. App. 105a. He therefore concluded that UT's use of race has been "completely ineffectual in accomplishing its claimed compelling interest." App. 106a. As a result, Judge Garza could not "find that the University of Texas's use of race is narrowly tailored where the University's highly suspect use of race provides no discernible educational impact." App. 108a. He concluded that, "[l]ike the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles." App. 114a.

5. The Fifth Circuit denied rehearing en banc by a vote of nine to seven. App. 173a. Five dissenters joined in an opinion by Chief Judge Jones. App. 174a. She lamented

that the panel "extend[ed] *Grutter* in three ways," and in so doing "abdicate[d] judicial review of a race-conscious admissions program for undergraduate [UT] students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." *Id.* In her view, the panel's decision "in effect gives a green light to all public higher institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires." App. 175a.

Chief Judge Jones criticized the panel for deferring to UT both on the necessity of employing a race-based system to pursue diversity and whether UT's use of race was narrowly tailored. As she explained, "*Grutter* does not countenance 'deference' to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications." App. 178a. The dissent found that the "panel's 'serious, good-faith consideration' standard distorts narrow tailoring into a rote exercise in judicial deference" and that "*Grutter* nowhere countenances this radical dilution of the narrow tailoring standard." App. 180a.

The dissent also found that only "wholesale deference" to the University could result in a conclusion that the admissions plan is narrowly tailored because it led to the admission of "no more than a couple hundred out of more than six thousand new students." App. 180a-181a. "Contrary to the panel's exercise of deference, the Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment." App. 182a (citing *Parents Involved*, 551 U.S. at 734-35). Here, the "additional diversity contribution of the University's race-conscious admissions program is tiny, and far from 'indispensible.'" *Id.* Chief Judge Jones thus rejected the panel's decision "to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." *Id.*

Finally, the dissent rejected classroom diversity as a constitutional justification for racial preferences. App. 182a-184a. "The panel opinion opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be 'underrepresented.' It offers no stopping point for racial preferences despite the logical absurdity of touting 'diversity' as relevant to every subject taught" at UT and it "offers no ground for serious judicial review of a terminus of the racial preference policy." App. 183a (citation omitted). Chief Judge Jones concluded that the classroom-diversity rationale is "without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs." App. 184a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Fifth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c).

I. The Constitutional Issues In This Case Are Critically Important.

The Fifth Circuit's wholesale deference to UT's "good faith" diversity judgments shifts responsibility for ensuring equal protection from the courts to university administrators. But university administrators should have no claim to an exemption from judicial oversight when individual rights are at stake. "Because even University administrators can lose sight of the constitutional forest for the academic trees, it is the duty of the courts to scrutinize closely their 'benign' use of race in admissions." App. 176a (Jones, C.J.). Thus, "when governmental decisions 'touch upon an individual's race or ethnic background, [s]he is entitled to a judicial determination that the burden[s] he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'" *Grutter*, 539 U.S. at 323 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)); *id.* at 388 (Kennedy, J., dissenting) ("Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.").

Whether racial preference has arisen in the context of university admissions, public employment, or public contracting, this Court has not retreated from its duty to ensure that government officials honor constitutional guarantees. *See Bakke*, 438 U.S. at 289-90, 313; *Wygant* *v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand*, 515 U.S. at 229-30; *Grutter*, 539 U.S. at 353; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Parents Involved*, 551 U.S. at 790. That noble tradition underlines the importance of the issues that so deeply divided the Fifth Circuit in this case.

1. The Fifth Circuit expressly substituted a good faith process-oriented review standard for the strict scrutiny constitutionally required when racial preferences foist unequal treatment on non-preferred applicants. App. 36a. Whether or not UT acted in "good faith," it should bear the burden of defining a compelling state diversity interest and proving that its means of pursuing that interest were narrowly tailored. As Chief Judge Jones explained, allowing the Fifth Circuit's departure from that standard would result in the evisceration of judicial review for every public university in Texas, Louisiana, and Mississippi (and likely beyond given the prominence of this case). App. 184a.

2. *Grutter* recognized a compelling state interest in pursuing racial diversity in admissions for educational benefit. The panel stretched that interest to include pursuit of general community interests unrelated to educational quality. No decision of this Court has ever suggested that a state university has a compelling interest in using race to further general welfare. By recognizing that interest, the Fifth Circuit went far outside this Court's nuanced delineation of the permissible goal of student body diversity in *Grutter*. Validating a compelling state interest in aligning racial demographics and the UT student population could affect admissions in public universities throughout the country. UT's amici

themselves have emphasized that the Fifth Circuit's decision is an "important precedent" that will "guid[e] those institutions that choose to pursue [diversity]." Brief Amicus Curiae of American Council of Education, et al., *Fisher v. Univ. of Texas at Austin*, No. 09-50822 (5th Cir. filed Mar. 15, 2010), at 32.[11]

3. UT's reliance on non-academic, societal interests to justify its reintroduction of race into the undergraduate admissions process is particularly troublesome given the Top Ten Percent Law's demonstrated success in increasing undergraduate minority enrollment. That law is the primary means by which Texas high school students are admitted to UT and its impact has been impressive. Since 2004, African-American and Hispanic students have accounted for over 25% of UT's Top Ten admits, and the number of minority freshmen, including Asian-American students, has been over 40% and increasing during this time. UT recently announced that it is now a majority-minority university: "[n]early 52% of the incoming freshmen were African American, Asian American, Hispanic, mixed race, or international students."[12]

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[11] The importance of this issue goes beyond public education. *Grutter*'s diversity rationale has been exported into other contexts, most notably into the public contracting and public employment sectors. *See, e.g.*, *Petit v. City of Chi.*, 352 F.3d 1111, 1115 (7th Cir. 2003) ("[A]s did [UMLS], the Chicago Police Department had a compelling interest in diversity ... to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.").

[12] Dr. Gregory J. Vincent, Vice President for Diversity and Community Engagement, *Incoming freshman class is majority minority at UT*, The Austin Times (Jan. 19, 2011), *available at* http://theaustintimes.com/2011/01/incoming-freshmen-class-is-majority-minority-at-ut/ (last visited Sept. 15, 2011).

Not surprisingly, UT has trumpeted its racial diversity in marketing materials and in accepting accolades for building a campus environment that allows minority students to flourish.[13] Nevertheless, the panel accepted UT's "good faith" contention that the Top Ten Law and race-neutral PAI system did not produce a critical mass of minority students without first requiring UT to demonstrate a "'strong basis in evidence'" that its race-neutral regime was insufficient. App. 38a (quoting *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009)) (other citations omitted). Whether a public university can layer racial preferences over a non-racial admissions plan that ensures very substantial levels of minority enrollment is a question which itself warrants review by this Court.

4. The panel's acceptance of "classroom diversity" as a constitutional justification for using race trips an additional Constitutional alarm. Here too, the panel deferred to a novel state interest that no Court had previously recognized, let alone deemed compelling. As Judge Garza noted, treating "classroom diversity" as a compelling interest would permit virtually unlimited racial admissions gerrymandering.

5. Whatever measure of academic deference applies in reviewing a university's diversity goal, the university should still bear the burden of demonstrating that its use of race in admissions is narrowly tailored to meet that end. The panel, however, exempted UT from this obligation, merely requiring UT to show that its use of

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[13] *The University of Texas at Austin ranked fifth-best producer of degrees for minority undergraduates* (July 15, 2005), *available at* http://www.utexas.edu/news/2005/07/12/rankings (last visited Sept. 15, 2011).

race was integrated into a holistic admissions program and was not based on quotas or fixed point additions. The panel stated flatly "that a *Grutter*-style admissions system standing alone" is *always* constitutional irrespective of the context in which the decision to employ race is made. App. 62a. As Chief Judge Jones explained, "the panel disturbingly implies that only procedural, not substantive, consideration of a university's race-conscious admissions program is necessary." App. 180a.

In turning its back on narrow tailoring, the panel ignored the negligible increase in minority enrollment and the absence of any impact on classroom diversity arising from UT's pervasive use of race in admissions and placement. Whether *Grutter* requires deference to universities in defining a compelling government interest and then further limits narrow tailoring review to "procedural" review of the admissions plan, is a question that demands a national answer. If the panel was correct, equal-protection scrutiny of race-based admissions plans is rational-basis review by another name. If not, the panel has misread *Grutter* to create a special equal protection doctrine for universities that has no constitutional foundation.

II. Review Is Required Because The Fifth Circuit's Analysis Conflicts With This Court's Equal Protection Decisions.

A. The Court Should Correct The Fifth Circuit's Unwarranted Deference To UT.

As the Fifth Circuit's decision demonstrates, claiming to apply strict scrutiny may be very different from actually applying it. The Fifth Circuit effectively abandoned strict scrutiny by holding that "due deference" validated UT's conclusion that racial diversity is "'essential to its educational mission,'" App. 34a (quoting *Grutter*, 539 U.S. at 328), as well as UT's determinations that: (1) the levels of minority enrollment arising from UT's pre-existing race-neutral admission program were insufficient to meet its legitimate diversity goals and (2) its use of racial preferences was narrowly-tailored to pursue that interest, App. 178a. Deference was central to the panel's analysis.

Neither *Grutter* nor any other decision condones such unlimited deference. In an unbroken line of decisions, this Court has held that governmental racial classifications demand "the most exacting judicial examination," a "rule [that] obtains with equal force regardless of the race of those burdened or benefited by a particular classification." *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citations and quotations omitted). As this Court has explained, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" and by guaranteeing "that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493. "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." *Adarand*, 515 U.S. at 226 (quotation omitted); *see also Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

Thus, for a racial classification to survive strict scrutiny, the state must first demonstrate that it is pursuing a "compelling," not merely legitimate, government interest. *See Adarand*, 515 U.S. at 227 ("[G]overnment may treat people differently because of their race only for the most compelling reasons."). Moreover, not only must the interest be constitutional, but the use of racial preference must be "necessary to further" it for that state's asserted interest to be deemed compelling. *Id.* at 237. Otherwise, "the mere recitation of a benign or compensatory purpose" would become "an automatic shield which protects against any inquiry" into the constitutionality of government action. *Croson*, 488 U.S. at 490, 495 (citations and quotations omitted).

Second, a compelling use of race must be narrowly tailored. *Grutter*, 539 U.S. at 333-43. "[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands." *Id.* at 342; *see also id.* at 333 ("Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still constrained in how it may pursue that end.") (citation and quotations omitted). Narrow tailoring demands that the use of race have more than a "minimal impact" on the compelling interest the government is trying to further, *Parents Involved*, 551 U.S. at 734, and that it not be over-inclusive, under-inclusive, or unduly extended, *see Croson*, 488 U.S. at 506; *Grutter*, 539 U.S. at 342.

Contrary to the panel's reading, *Grutter* clearly adhered to this line of decisions. To be sure, *Grutter* affords a measure of deference in defining a university's *educational* interest in diversity. But *Grutter* excluded racial balancing from that deference. 539 U.S. at 330. And *Grutter* counsels no deference on whether racial preference is necessary to further a diversity goal or on the means by which diversity is pursued. *Id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer"). Indeed, this Court could not have been clearer that its "scrutiny of the interest asserted by the [Michigan] Law School [was] no less strict for taking into account complex education judgments in an area that lies primarily within the expertise of the university." *Id.* As Chief Judge Jones explained, UT is entitled to deference on its "decision that it has a compelling interest in achieving racial and other student diversity. But that is about as far as deference should go." App. 178a.

Adherence to this Court's precedent requires UT to demonstrate that the minority admission levels it is pursuing are necessary to satisfy an educational interest in racial diversity. That showing must rest on a strong basis in evidence. *See Croson*, 488 U.S. at 493; *Wygant*, 476 U.S. at 277. "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493. The panel's reliance on UT's "good faith" as a substitute for a strong basis in evidence has no support in this Court's decisions.

The panel contended that *Croson* and *Wygant* have "little purchase" in this case because they are employment-related cases and because they involved explicit quotas. App. 40a-42a. But *Croson* and *Wygant* cannot be so easily distinguished. This Court has expressly relied on these and other employment-related rulings in articulating the mode of analysis applicable in the educational setting. *See, e.g.*, *Grutter*, 539 U.S. at 326-34; *Parents Involved*, 551 U.S. at 729-32; *Gratz*, 539 U.S. at 270. And while the particular attributes of any race-based program may impact the inquiry into narrow tailoring, *Grutter*, 539 U.S. at 336-37, they do not bear on the antecedent question whether it was "necessary" to invoke racial preferences in the first place. As Chief Judge Jones explained, the panel simply "fail[ed] to apply the avowed continuity in principle of the Court's decisions." App. 180a.

Indeed, under *Grutter*, the "serious, good faith consideration" standard applies only to how race-neutral alternatives should be considered in the narrow-tailoring component of strict scrutiny. *See Grutter* 539 U.S. at 339 ("Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives."). And even then, "good faith" is only an acknowledgement that the Court will not force a university to try a race-neutral approach that it has reasonably concluded to be unworkable. The *Grutter* Court's reliance on "good faith" "is not a new standard at all, but rather a way to express the classic requirement that narrow tailoring be more than a rote exercise in dismissing race-neutral alternatives." App. 180a (Jones, C.J.).[14] Universalizing the "good faith" standard improperly expands the deference afforded UT under *Grutter*.

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[14] According to the panel, the invocation of the "'serious, good-faith consideration' standard, rather than the strong-basis-in-evidence standard," in *Parents Involved* shows that the latter is inapplicable in school cases. App. 179a. But nothing in the opinion suggests that the Court was choosing between the two. Rather, the Court deployed the "good faith" concept to demonstrate that the school assignment plans under review were not narrowly tailored

Worse still, the panel "distorts narrow tailoring into a rote exercise in judicial deference." App. 180a (Jones, C.J.). The panel entirely departed constitutional bounds when it required Petitioner to rebut UT's claim that its use of race was in "good faith." App. 36a. If anything is clear, an individual suffering discrimination should not shoulder the heavy burden of proving that the government's use of race is *not* narrowly tailored: "[T]he government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests." *Johnson v. California*, 543 U.S. 499, 505 (2005) (quotation omitted). There is no authority supporting deference to UT's subjective judgment that its race-based admissions program is narrowly tailored. "*Grutter* nowhere countenances this radical dilution of the narrow tailoring standard." App. 180a (Jones, C.J.).

In fact, once deference applies to narrow tailoring, strict scrutiny is transformed into "total deference to University administrators," App. 178a (Jones, C.J.), so long as they have articulated a rational basis for the use of race. Under the Equal Protection Clause, the rational-basis standard "is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental

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for, among other reasons, giving "little or no consideration" to nonracial alternatives before employing racial preferences. *Parents Involved*, 551 U.S. at 735. The compelling-interest prong simply was not at issue.

decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (citations omitted). That test is essentially indistinguishable from the one the panel used to uphold UT's admissions plan.

This Court has never applied the highly deferential rational-basis standard to judicial review of racial classifications. Rather, an animating principle of its equal-protection decisions is that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224; *see also Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring) (same). As shown below, UT's race-based admissions program cannot survive this scrutiny.

B. This Court Should Correct The Fifth Circuit's Abandonment Of Strict Scrutiny.

UT's use of race in admissions cannot survive strict scrutiny under this Court's decisions. First, UT's reliance on Texas's racial demographics to establish a diversity goal that justified the reintroduction of racial preferences is blatant racial balancing. Second, classroom diversity is neither a compelling interest in the abstract nor supported by evidence that it is necessary for academic reasons. In any event, UT's admissions plan is not tailored to achieve classroom diversity. Third, UT did not (nor could it) present evidence that it was necessary to supplement its pre-existing race-neutral admissions plan to achieve the compelling interest in racial diversity deemed constitutional in *Grutter*. Fourth, the negligible gains in minority enrollment that have resulted from UT's pervasive use of race in its admissions process since 2004 confirm the absence of narrow tailoring.

1. UT unconstitutionally relied on "differences between the racial and ethnic makeup of the University's undergraduate population and the state's population" to justify its reintroduction of racial preferences. App. 23a. *Grutter* defined the "compelling state interest that can justify the use of race in university admissions" in terms of "the educational benefits that [student body] diversity is designed to produce." 539 U.S. at 325, 330. Diversity so defined produces educational benefit to all students through the exchange of views reflecting differing racial perspectives. *Id.* at 319. *Grutter* does not support a concept of diversity that relies on broader social goals to justify pursuing a level of minority enrollment that mirrors racial demographics in the general population. Were it otherwise, university administrators would be accorded latitude that this Court has consistently denied to other state officials to remedy perceived societal racial imbalances. *See Croson*, 488 U.S. at 485, 505; *Wygant*, 476 U.S. at 276; *Adarand*, 515 U.S. at 220.

UT's attempt to replicate the racial demographics of Texas high schools amounts to "outright racial-balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 330; *see also Bakke*, 438 U.S. at 307 (Powell, J.). UT does not seek racial diversity to enhance the educational dialogue by keeping minority students from feeling "isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. In fact, when UT labeled Hispanics, but not Asian-Americans "underrepresented" even though "the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT," App. 156a, it conceded that the level of Asian-American minority representation suffices for educational purposes, and thereby fatally undermined any argument that its level of Hispanic enrollment is somehow educationally insufficient. *Grutter*, 539 U.S. at 343; *see also Parents Involved*, 551 U.S. at 726.[15]

The panel attempted to salvage UT's reliance on a demographic goal by suggesting that it merely represented "measured attention to the community [UT] serves" in order to "send[] a message" to that community "that people of all stripes can succeed at UT" and to sustain "an infrastructure of leaders in an increasingly pluralistic society." App. 48a, 50a, 51a. This plainly is using racial preference to advance the welfare of the society in which the university resides. The Court has consistently rejected the need to remedy societal racial imbalances as a compelling government interest. *See Croson*, 488 U.S. at 499-50; *Wygant*, 476 U.S. at 276; *Bakke*, 438 U.S. at 288-89 (Powell, J.).

2. UT's reliance on classroom diversity as a benchmark for critical mass also finds no support in this Court's decisions. The proper base for measuring "critical mass" is the "student body," not the classroom. *Grutter*, 539 U.S. at 318, 325, 328, 329, 343. As noted above, this Court has

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[15] 15. UT's disparate treatment of Hispanics and Asian-Americans also illustrates that UT's use of race is over-inclusive. *See Croson*, 488 U.S. at 506. If Asian-Americans are "over-represented" in the freshman class, App. 155a, then Hispanics, who make up a larger portion of UT's incoming freshman classes, are as well. Employing race in admissions decisions to the benefit of Hispanic applicants and the detriment of Asian-Americans under these circumstances is not narrowly tailored.

found that an educational benefit of student-body diversity is enabling underrepresented minorities "to participate in the classroom and not feel isolated." *Id.* at 318. But identifying increased classroom participation as one of several benefits of overall student-body diversity does not endorse classroom diversity as a legal benchmark for critical mass. *Grutter* recognized that the overall comfort of being in a racially diverse campus environment should encourage minority students to participate in classroom discussions, *id.* at 318-19, not that every classroom must have a minimum number of minority students.

Even if classroom diversity were a compelling interest, and it is not, UT has no plan to achieve it. UT has set the bar for classroom diversity so high that it considers data showing that 63% of classes with 10 to 24 students contained 2 or more Hispanic students insufficient evidence of critical mass in the classroom. App. 22a.[16] To pursue classroom diversity of the levels it seeks, UT would need to take one of three steps: (1) institute a fixed curriculum to ensure that each classroom mirrored the racial makeup of the overall class; (2) require some students to enroll (or prevent others from enrolling) in specific schools or majors; or (3) make race so dominant in admissions decisions that a flood of minority students would solve the problem. UT has not expressed any interest in the first option and the other two options are clearly unconstitutional. Thus, no "means" available to UT can be tailored to the "end" of classroom diversity.

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[16] Further, UT's classroom diversity study is irrevocably flawed and based on cherry-picked statistics. For example, UT considers a classroom of five students sufficiently diverse only if it includes at least two African-American, two Hispanic, and two Asian-American students. It is, therefore, impossible for a five-student class (and practically impossible for many larger classes) to ever satisfy UT's standard of classroom diversity.

UT's pursuit of classroom diversity also lacks a meaningful termination point. "[R]eliance on race at the departmental and classroom levels ... will, in practice, allow for race-based preferences in seeming perpetuity." App. 87a (Garza, J.). As Chief Judge Jones queried, "Will the University accept this 'goal' as carte blanche to add minorities until a 'critical mass' chooses nuclear physics as a major?" App. 183a. "If this is so, a university's asserted interest in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom." App. 87a. (Garza, J.).

3. Stripped of its two unconstitutional ends (racial demographics and classroom diversity), UT has failed to establish under any legitimate standard, let alone a "strong basis in evidence," *Wygant*, 476 U.S. at 277, that its use of race in admissions is "necessary" to enroll the "critical mass" of minority students that the educational benefit of diversity justifies, *Grutter*, 539 U.S. at 327. Indeed, UT has not even attempted to articulate any educational concept of "critical mass." Largely because of the Top Ten Percent Law, UT was one of the most diverse public universities in the nation prior to its 2004 reintroduction of race into admissions.[17] In 2004, UT's freshman class

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[17] *See, e.g., The University of Texas at Austin ranked fifth-best producer of degrees for minority undergraduates* (July 15, 2005), *available at* http://www.utexas.edu/news/2005/07/12/rankings (last visited Sept. 15, 2011).

was 21.4% African-American and Hispanic, and 17.9% Asian-American. App. 62a. UT was not remotely similar to UMLS, where minority enrollment languished at about 4% before consideration of race in admissions decisions. *Grutter*, 539 U.S. at 320.

Given the diversity achieved by the Top Ten Percent Law and its own extensive outreach efforts, UT could not credibly claim that it reintroduced racial preference because of a failure to enroll a student body in which "underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 319. UT's use of race was by no means "necessary" to achieve this "critical mass." *Grutter*, 539 U.S. at 327. Neither *Grutter* nor any other decision authorizes "gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." App. 182a (Jones, C.J.).

4. Moreover, the "minimal effect" of UT's admissions plan is antithetical to narrow tailoring. *Parents Involved*, 551 U.S. at 733. As Judge Garza explained, there is no way to know precisely "how many of these students would not have been admitted but-for the use of race as a plus factor." App. 104a. But even if all were admitted solely because of their race, those African-American and Hispanic "students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman class." *Id.* In other words, UT "was able to obtain approximately 96% of the African-American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means." App. 107a. And unlike at UMLS, the success of a non-racial approach is not a theoretical matter—it is manifest in the record.

Accordingly, the current race-based "plan exacts a cost disproportionate to its benefit and is not narrowly tailored." App. 105a. As this Court has explained, the limited results of UT's racial preferences shows that race-neutral "means would be effective" and thus "casts doubt on the necessity of using racial classifications." *Parents Involved*, 551 U.S. at 733-34; *see also id.* at 790 (Kennedy, J., concurring) ("[T]he small number of assignments affected suggests that the schools could have achieved their stated ends through different means."). That is precisely the case here. UT has subjected tens of thousands of applicants to "disparate treatment based solely upon the color of their skin," *id.*, at 734, even though it "has had an infinitesimal impact on critical mass in the student body as a whole," App. 107a (Garza, J.), and the Top Ten Percent Law alone produces a similar level of minority enrollment. The Fifth Circuit's acceptance of this use of race cannot be left unreviewed.

III. The Court Should Grant Review To Clarify Or Reconsider *Grutter* To The Extent It Can Be Read To Justify UT's Use Of Race In Admissions.

For all the reasons identified above, the decision below conflicts with a long line of this Court's precedent, including *Grutter*. If the panel's reading of *Grutter* is correct, however, *Grutter* should be clarified or reconsidered to restore the integrity of the Fourteenth Amendment's guarantee of equal protection. *See, e.g.*, *Adarand*, 515 U.S. at 231-35.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 15, 2011

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, DATED JANUARY 18, 2011

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

631 F.3d 213, 264 Ed. Law Rep. 564

No. 09–50822.
Jan. 18, 2011.

Abigail Noel FISHER; Rachel Multer Michalewicz,

Plaintiffs–Appellants,

v.

UNIVERSITY OF TEXAS AT AUSTIN; David B. Pryor, Executive Vice Chancellor for Academic Affairs in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; James R. Huffines, as Member of the Board of Regents in His Official Capacity; Janiece Longoria, as Member of the Board of Regents in Her Official Capacity; Colleen McHugh, as Member of the Board of Regents in Her Official Capacity; Robert L. Stillwell, as Member of the Board of Regents in His Official Capacity; James D. Dannenbaum, as Member of the Board of Regents in His Official Capacity; Paul Foster, as Member of the Board of Regents in His Official Capacity; Printice L. Gary, as Member of the Board of Regents in His Official Capacity; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; Francisco G. Cigarroa, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants–Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before *KING*, *HIGGINBOTHAM* and GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We consider a challenge to the use of race in undergraduate admissions at the University of Texas at Austin. While the University has confined its explicit use of race to the elements of a program approved by the Supreme Court in *Grutter v. Bollinger*,[1] UT's program acts upon a university applicant pool shaped by a legislatively-mandated parallel diversity initiative that guarantees admission to Texas students in the top ten percent of their high school class. The ever-increasing number of minorities gaining admission under this Top Ten Percent Law casts a shadow on the horizon to the otherwise-plain legality of the *Grutter*-like admissions program, the Law's own legal footing aside. While the Law's ultimate fate is not the fare of this suit, the challenge to the *Grutter* plan here rests upon the intimate ties and ultimate confluence of the two initiatives. Today we affirm the constitutionality of the University's program as it existed when Appellants applied and were denied admission.

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[1] 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

Abigail Fisher and Rachel Michalewicz, both Texas residents, were denied undergraduate admission to the University of Texas at Austin for the class entering in Fall 2008. They filed this suit alleging that UT's admissions policies discriminated against them on the basis of race in violation of their right to equal protection under the Fourteenth Amendment and federal civil rights statutes.[2] They sought damages as well as injunctive and declaratory relief. Proceeding with separate phases of liability and remedy, the district court, in a thoughtful opinion, found no liability and granted summary judgment to the University.

The procedural posture of this case defines the scope of our review. There are no class claims and both students deny intention to reapply to UT.[3] It follows that Fisher and Michalewicz lack standing to seek injunctive or forward-looking declaratory relief.[4] This principle is rote. To obtain forward-looking equitable remedies, a plaintiff must show she faces imminent threat of future injury.[5] Without that threat, these two applicants only have standing to challenge their rejection and to seek money damages for their injury.[6]

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[2] *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587, 590 (W.D.Tex.2009) (citing U.S. CONST. amend. XIV, § 1, and 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*).

[3] Like all Texas residents, Appellants could attend UT Austin as transfer students if they first enrolled in a participating UT system school and met the standards required by the Coordinated Admissions Program, discussed in greater detail below. Instead, Appellants permanently enrolled at other institutions.

Our focus will be upon the process employed by UT to admit freshmen when Fisher and Michalewicz applied for the class entering Fall 2008, looking to earlier and later years only as they illuminate the rejection of these two applicants.[7] Our task is burdened by the reality that we are examining a dynamic program administered by a large university subject to government oversight. Indeed, the first of UT's periodic five-year reviews was to begin in the fall of 2009, a review that must engage an array of variables, including an ever-present question of whether to adjust the percentage of students admitted under the two diversity initiatives.

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[4] *See DeFunis v. Odegaard,* 416 U.S. 312, 319, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (per curiam) (dismissing for lack of standing a suit that challenged a law school admissions policy because the plaintiff would "never again be required to run the gantlet of the Law School's admissions process").

[5] *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 201–11, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *City of L.A. v. Lyons,* 461 U.S. 95, 105–10, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

[6] *See Lyons,* 461 U.S. at 105–07, 103 S.Ct. 1660.

[7] *Cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 711 n. 1, 127 S.Ct. 2738, 168 L.Ed.2d 508 (relying on data from before the district court record closed, even after newer data had become available).

I. *GRUTTER V. BOLLINGER*

We begin with *Grutter v. Bollinger* because UT's race-conscious admissions procedures were modeled after the program it approved. In rejecting constitutional challenges to the University of Michigan Law School's admissions program, *Grutter* held that the Equal Protection Clause did not prohibit a university's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[8] Mapping on *Grutter*, UT evaluates each application using a holistic, multi-factor approach, in which race is but one of many considerations. In granting summary judgment to UT, the district court found that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*," and "as long as *Grutter* remains good law, UT's current admissions program remains constitutional."[9] Laying aside the Top Ten Percent Law, that observation is indisputably sound.[10]

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[8] *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325.

[9] *Fisher*, 645 F.Supp.2d at 612–13; *see also id.* at 613 ("If the Plaintiffs are right, *Grutter* is wrong." (internal quotation marks omitted)).

[10] In practice, the admissions systems of Michigan Law School and UT differ because UT's automatic admission of the top ten percent of Texas high school seniors "largely dominates [its] admissions process." *Fisher*, 645 F.Supp.2d at 595. We discuss the impact of the Top Ten Percent Law in greater detail below.

A

Grutter embraced the diversity interest articulated twenty-five years earlier by Justice Powell, who wrote separately in *Regents of the University of California v. Bakke.*[11] This vision of diversity encompassed a broad array of qualifications and characteristics where race was a single but important element.[12] The Michigan Law School designed its admissions program to achieve this broad diversity, selecting students with varied backgrounds and experiences—including varied racial backgrounds—who would respect and learn from one another.[13] The Court explained:

> [The Law School's] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.[14]

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[11] 438 U.S. 265, 269, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.).

[12] *See Grutter*, 539 U.S. at 325, 123 S.Ct. 2325 (citing *Bakke*, 438 U.S. at 315, 98 S.Ct. 2733 (opinion of Powell, J.)).

[13] *Id.* at 314, 123 S.Ct. 2325.

[14] *Id.* at 338, 123 S.Ct. 2325 (brackets and internal quotation marks omitted).

The Law School's policy also reaffirmed its "longstanding commitment" to "one particular type of diversity, that is, racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the] student body in meaningful numbers."[15]

In an effort to ensure representation of minorities, the Law School sought to enroll a "critical mass" of minority students, which would result in increased minority engagement in the classroom and enhanced minority contributions to the character of the School. The *Grutter* Court endorsed this goal, holding that diversity, including seeking a critical mass of minority students, is "a compelling state interest that can justify the use of race in university admissions."[16]

That the concept of critical mass bears a simple but deceptive label is evidenced by the division of the Justices over its meaning. In his dissent, Chief Justice Rehnquist saw critical mass as only the minimum level necessary "[t]o ensure that the[ ] minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes."[17] On this view, critical mass is defined only as a proportion of the student body, and the percentage that suffices for one minority group should also suffice for another group.

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[15] *Id.* at 316, 123 S.Ct. 2325 (internal quotation marks omitted).

[16] *Id.* at 325, 123 S.Ct. 2325; *see id.* at 329–30, 123 S.Ct. 2325.

In contrast, Justice O'Connor, writing for the Court, explained that critical mass must be "defined by reference to the educational benefits that diversity is designed to produce."[18] Her opinion recognizes that universities do more than simply impart knowledge to their students. Synthesizing, we find at least three distinct educational objectives served by the diversity she envisioned:

1. **Increased Perspectives.** Justice O'Connor observed that including diverse perspectives improves the quality of the educational process because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[19] In this respect, *Grutter* echoes Justice Powell's recognition in *Bakke* that it is "essential to the quality of higher education" that a university be able to pursue "[t]he atmosphere of speculation, excitement and creation" that is "promoted by a diverse student body."[20] Indeed, diversity often brings not just excitement, but

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[17] *Id.* at 380, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting).

[18] *Id.* at 329–30, 123 S.Ct. 2325 (opinion of the Court).

[19] *Id.* at 330, 123 S.Ct. 2325 (internal quotation marks omitted).

[20] 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.) (internal quotation marks omitted).

valuable knowledge as well. "[A] student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a [university] experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."[21]

2. **Professionalism.** The majority pointed to "numerous studies" showing that "student body diversity ... better prepares [students] as professionals."[22] The Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship,"[23] and today's students must be prepared to work within "an increasingly diverse workforce."[24] Indeed, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[25] A diverse student body serves this end by "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races."[26]

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[21] *Id.* at 314, 123 S.Ct. 2325.

[22] *Grutter,* 539 U.S. at 330, 123 S.Ct. 2325 (internal quotation marks omitted).

[23] *Id.* (internal quotation marks omitted).

[24] *Id.* (internal quotation marks omitted).

[25] *Id.*

[26] *Id.* (internal quotation marks and brackets omitted).

3. Civic Engagement. The Court recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[27] A diverse student body is crucial for fostering this ideal of civic engagement, because "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[28] Maintaining a visibly open path to leadership demands that "[a]ccess to [higher] education ... be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[29] Each member of society "must

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[27] *Id.* at 332, 123 S.Ct. 2325.

[28] *Id.*

[29] *Id.* at 332–33, 123 S.Ct. 2325. The Court further explained:

> [E]ducation [is] pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society .... [T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." And, "[n]owhere is the importance of such

have confidence in the openness and integrity of the educational institutions that provide this training."[30] Further, efforts to educate and to encourage future leaders from previously underrepresented backgrounds will serve not only to inspire, but to actively engage with many woefully underserved communities, helping to draw them back into our national fabric.

B

Recognizing the pursuit of diversity, including racial diversity, to be a compelling interest in higher education, *Grutter* endorsed the right of public universities to increase enrollment of underrepresented minorities. *Grutter* also cautioned that, while it accepted diversity as a compelling interest, any sorting of persons on the basis of race must be by measures narrowly tailored to the interest at stake.

As we read the Court, a university admissions program is narrowly tailored only if it allows for individualized consideration of applicants of all races.[31] Such consideration does not define an applicant by race but instead ensures

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> openness more acute than in the context of higher education."
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> *Id.* at 331–32, 123 S.Ct. 2325 (final two alterations in original; citations and some internal quotation marks omitted).

[30] *Id.* at 332, 123 S.Ct. 2325.

[31] *Id.* at 337, 123 S.Ct. 2325.

that she is valued for all her unique attributes. Rather than applying fixed stereotypes of ways that race affects students' lives, an admissions policy must be " 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.' "[32] As the Supreme Court later summarized, "The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group."[33] Thus, a university admissions policy is more likely to be narrowly tailored if it contemplates that a broad range of qualities and experiences beyond race will be important contributions to diversity and as such are appropriately considered in admissions decisions.[34]

Because a race-conscious admissions program is constitutional only if holistic, flexible, and individualized, a university may not establish a quota for minority applicants, nor may it evaluate minority applications "on separate admissions tracks."[35] The "racial-set-aside program" rejected by Justice Powell in *Bakke* ran afoul of these related prohibitions because it reserved 16 out of 100 seats for members of certain minority groups.[36] A university also may not award a fixed number of bonus points to minority applicants.[37] That was the lesson of *Grutter*'s companion case, *Gratz v. Bollinger*, in which the Court struck down the University of Michigan's undergraduate admissions program because it automatically awarded a fixed number of admissions points to all underrepresented minority applicants, resulting in a group-based admissions boost.[38]

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[32] *Id.* (quoting *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733 (opinion of Powell, J.)).

[33] *Parents Involved*, 551 U.S. at 722, 127 S.Ct. 2738; *see also Grutter*, 539 U.S. at 337, 123 S.Ct. 2325 ("The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.").

[34] *Grutter*, 539 U.S. at 338, 123 S.Ct. 2325.

[35] *Id.* at 334, 123 S.Ct. 2325 (citing *Bakke*, 438 U.S. at 315–16, 98 S.Ct. 2733 (opinion of Powell, J.)).

Both *Bakke* and *Gratz* firmly rejected group treatment, insisting that the focus be upon individuals and that an applicant's achievements be judged in the context of one's personal circumstances, of which race is only a part. So deployed, a white applicant raised by a single parent who did not attend high school and struggled paycheck to paycheck and a minority child of a successful cardiovascular surgeon may both claim adversity, but the personal hurdles each has cleared will not be seen to be of the same height.

C

Finally, *Grutter* requires that any race-conscious measures must have a "logical end point" and be "limited in time."[39] This durational requirement can be satisfied by sunset provisions or by periodic reviews to reconsider whether there are feasible race-neutral alternatives that would achieve diversity interests " 'about as well.'"[40] In this respect, *Grutter* is best seen not as an unqualified endorsement of racial preferences, but as a transient response to anemic academic diversity. As Justice O'Connor observed, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[41]

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[36] *Id.* at 322, 123 S.Ct. 2325; *see Bakke*, 438 U.S. at 289, 98 S.Ct. 2733 (opinion of Powell, J.).

[37] *Gratz v. Bollinger*, 539 U.S. 244, 271–72, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).

[38] *Id.*

II. HISTORY OF THE UNIVERSITY'S ADMISSIONS POLICIES

Justice O'Connor's vision may prove to be more aspirational than predictive. Regardless, universities will construct admissions programs wedded to their missions, which include bringing both meritorious and diverse students to campus. Each year, UT receives applications from approximately four times more students than it can enroll.[42] Over the past two decades, UT has repeatedly revised its admissions procedures to reflect its calculus of educational values while navigating judicial decisions and legislative mandates.

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[39] *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

[40] *Id.* at 339, 123 S.Ct. 2325 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986)).

[41] *Id.* at 343, 123 S.Ct. 2325.

[42] *Fisher*, 645 F.Supp.2d at 590.

A

Until 1996, UT selected students using two metrics. The first measure, still employed today, is the Academic Index ("AI"), a computation based on the student's high school class rank, standardized test scores, and the extent to which the applicant exceeded UT's required high school curriculum.[43] Perceiving that AI alone would produce a class with unacceptably low diversity levels, UT considered a second element for admissions—race. These measures combined resulted in UT admitting more than 90% of applicants who were ranked in the top ten percent of their high school class.[44]

There were then no clear legal limits on a university's use of race in admissions. The Supreme Court decided *Bakke* in 1978 but its guidance came in a fractured decision, leaving a quarter century of uncertainty.[45] The record does not detail precisely how race factored in admissions decisions during this time, but it is undisputed that race was considered directly and was often a controlling factor in admission.[46] Under this race-conscious admissions policy, the freshman class entering in Fall 1993 included 5,329 students, of whom 238 were African-American (4.5% of the overall class) and 832 were Hispanic (15.6%).[47]

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[43] *Id.* at 596.

[44] Marta Tienda et al., *Closing the Gap?: Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action* 52 tbl.5 (Tex. Higher Educ. Opportunity Project Working Paper), *available at* http:// theop. princeton. edu/ workingpapers. html. Unlike the current Top Ten Percent Law, UT's earlier policies did not *mandate* the admission of all top ten percent students. Thus, even though a top ranking at a predominantly minority high school would contribute to a higher AI score, the AI alone could not effectively serve as a proxy for race because, on average, minorities received lower standardized test scores.

[45] *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Four Justices would have held that

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universities have broad authority to consider race in admissions in order to "remedy disadvantage cast on minorities by past racial prejudice." *Id.* at 325, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Four other Justices would have held that Title VI of the Civil Rights Act of 1964 bars federally funded universities from making any admissions decisions on the basis of race. *Id.* at 417–18, 98 S.Ct. 2733 (opinion of Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ.). Justice Powell cast the decisive vote in a separate opinion—not joined in full by any other Justice—that invalidated the racial set-aside in the admissions program then before the Court, but reasoned that it would be constitutional for a university to consider race as one facet of diversity in a flexible review that treated each applicant as an individual. *Id.* at 316–19, 98 S.Ct. 2733 (opinion of Powell, J.). Because none of these positions carried the support of a majority of the Court, it was not completely clear which (if any) of these rationales was controlling. *See Grutter,* 539 U.S. at 322–25, 123 S.Ct. 2325 (2003) (recounting this history and the subsequent confusion among lower courts).

[46] Records do reflect that at UT's law school during this time, minority and nonminority applicants were reviewed by separate admissions committees and were subject to different grade and test-score cutoffs. *See Hopwood v. Texas,* 78 F.3d 932, 935–38 (5th Cir.1996).

[47] Univ. of Tex. at Austin, *1998–1999 Statistical Handbook.* Minority enrollment was fairly consistent from 1989 until 1993,

B

Race-conscious admissions ended in 1996 with *Hopwood v. Texas*, when a panel of this court struck down the use of race-based criteria in admissions decisions at UT's law school.[48] A majority of that panel held that diversity in education was not a compelling government interest,[49] a conclusion the Texas Attorney General interpreted as prohibiting the use of race as a factor in admissions by any undergraduate or graduate program at Texas state universities.[50]

Beginning with the 1997 admissions cycle, UT deployed a Personal Achievement Index ("PAI") to be used with the Academic Index. In contrast to the mechanical formulas used to calculate the AI, the PAI was meant "to

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with some slight decreases in 1994 and 1995. UT publishes its *Statistical Handbook* annually, and these handbooks are cited throughout the district court record. *See* Univ. of Tex. at Austin Office of Admissions, *Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996–2002* (2003) (Dist. Ct. Dkt. No. 96, Tab 8, Ex. B), at 5, 6; Univ. of Tex. at Austin, *Proposal to Consider Race and Ethnicity in Admissions* (2004) (Dist. Ct. Dkt. No. 96, Tab 11, Ex. A), at 30; Univ. of Tex. at Austin Office of Admissions, *2008 Top Ten Percent Report* (Dist. Ct. Dkt. No. 94, Ex. 9), at 4 [hereinafter *2008 Top Ten Percent Report*]. Handbooks dating back to 1998 are available online at http:// www. utexas. edu/ academic/ ima/ stat_ handbook/.

[48] 78 F.3d 932 (1996).

[49] *Id.* at 944–48.

[50] *See* Tex. Att'y Gen. Letter Op. No. 97–001 (1997).

identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores."[51] Although facially race-neutral, the PAI was in part designed to increase minority enrollment; many of the PAI factors disproportionately affected minority applicants.[52]

UT also implemented other facially "race-neutral" policies that, together with the AI and PAI, remain in use today. It created targeted scholarship programs to increase its yield among minority students, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools.[53]

Despite these efforts, minority presence at UT decreased immediately. Although the 1996 admissions decisions were not affected by *Hopwood,* the publicity from the case impacted the number of admitted minorities who chose to enroll. In 1997, fewer minorities applied to UT than in years past. The number of African–American and Hispanic applicants dropped by nearly a quarter, while the total number of University applicants decreased by only 13%.[54] This decrease in minority applicants had a corresponding effect on enrollment. Compared to 1995, African–American enrollment for 1997 dropped almost 40% (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen). In contrast, Caucasian enrollment increased by 14%, and Asian–American enrollment increased by 20%.[55]

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[51] *Fisher,* 645 F.Supp.2d at 591.

[52] *Id.* at 591–92.

[53] *Id.* at 592.

[54] *Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996–2002* (2003) (Dist. Ct. Dkt. No. 96, Tab 8, Ex. B), at 6.

C

In 1997, the Texas legislature responded to the *Hopwood* decision by enacting the Top Ten Percent Law, still in effect.[56] The law altered UT's preexisting policy and mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university.

In its first year, the Top Ten Percent Law succeeded in increasing minority percentages at UT. African–American enrollment rose from 2.7% to 3.0% and Hispanic enrollment rose from 12.6% to 13.2%. However, the absolute number of minorities remained stable as a result of a smaller freshman class. Over time, both the number and percentage of enrolled Hispanics and African–Americans increased. The entering freshman class of 2004, the last admitted without the *Grutter*-like plan, was 4.5% African–American (309 students), 16.9% Hispanic (1,149 students), and 17.9% Asian–American (1,218 students) in a class of 6,796 students.[57]

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[55] *1998–1999 Statistical Handbook.*

[56] TEX. EDUC.CODE § 51.803 (1997). The Top Ten Percent Law was amended, during the course of this litigation, to cap the number of students guaranteed admission at UT Austin to 75% of the seats available to Texas residents. *Id.* § 51.803(a–1) (2010). The cap is effective starting with admissions to the Fall 2011 entering class and is currently scheduled to end with admissions to the Fall 2015 entering class.

The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose. In 2004, among freshmen who were Texas residents, 77% of the enrolled African–American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students.[58] These numbers highlight the contribution of the Top Ten Percent Law to increasing minority enrollment, but they also reflect a trade-off implicit in the Law: the increase rested heavily on the pass from standardized testing offered by the Top Ten Percent Law. After implementation of the Law, the likelihood of acceptance for African–American and Hispanic students in the second decile of their high school class, who were without the benefits of the pass from standardized testing, declined. Meanwhile, the acceptance probability of similarly situated Caucasian students increased.[59]

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[57] *2008 Top Ten Percent Report* at 6 tbl.1.

[58] *Id.* at 8; *see also Fisher*, 645 F.Supp.2d at 593 (reporting statistics for total admitted applicants, both Texas and non-Texas residents).

[59] Tienda et al., *supra* note 44, at 52 tbl.5.

D

Hopwood's prohibitions ended after the 2004 admissions cycle with the Supreme Court's 2003 decision in *Grutter*.[60] In August 2003, the University of Texas Board of Regents authorized the institutions within the University of Texas system to examine "whether to consider an applicant's race and ethnicity" in admissions "in accordance with the standards enunciated in" *Grutter*.[61]

As part of its examination, UT commissioned two studies to explore whether the University was enrolling a critical mass of underrepresented minorities. The first study examined minority representation in undergraduate classes, focusing on classes of "participatory size," which it defined as between 5 and 24 students. UT analyzed these classes, which included most of the undergraduate courses, because they offered the best opportunity for robust classroom discussion, rich soil for diverse interactions. According to the study, 90% of these smaller classes in Fall 2002 had either one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students.[62]

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[60] 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

[61] Minutes of the Board of Regents of the University of Texas at Austin, Meeting No. 969, Aug. 6–7, 2003 (Dist. Ct. Dkt. No. 94, Ex. 19, Tab A), at 4.

[62] *Fisher*, 645 F.Supp.2d at 593. Classes with only one student of a given minority were thought to be just as troubling as classes with zero students of that minority because a single

A later retabulation, which excluded the very smallest of these classes and considered only classes with 10 to 24 students, found that 89% of those classes had either one or zero African–American students, 41% had one or zero Asian–American students, and 37% had either one or zero Hispanic students.[63] In its second study, UT surveyed undergraduates on their impressions of diversity on campus and in the classroom. Minority students reported feeling isolated, and a majority of all students felt there was "insufficient minority representation" in classrooms for "the full benefits of diversity to occur."[64]

The University incorporated the findings of these two studies in its June 2004 *Proposal to Consider Race and Ethnicity in Admissions.*[65] The *2004 Proposal* concluded that diverse student enrollment "break[s] down stereotypes," "promotes cross-racial understanding," and "prepares students for an increasingly diverse workplace and society."[66] With respect to the undergraduate program in particular, the *2004 Proposal* explained that "[a] comprehensive college education requires a

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minority student is apt to feel isolated or like a spokesperson for his or her race. *Id.* at 602–03; *see also Grutter,* 539 U.S. at 319, 123 S.Ct. 2325.

[63] Lavergne Aff. (Dist. Ct. Dkt. No. 102, Tab B) ¶¶ 4–5.

[64] Walker Aff. (Dist. Ct. Dkt. No. 96, Tab 11) ¶ 12.

[65] Dist. Ct. Dkt. No. 96, Tab 11, Ex. A [hereinafter *2004 Proposal*].

[66] *Id.* at 1 (internal quotation marks omitted); *see also Fisher,* 645 F.Supp.2d at 603.

robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders."[67] With one eye on *Grutter*, it observed that these objectives are especially important at UT because its "mission and ... flagship role" is to "prepare its students to be the leaders of the State of Texas"—a role which, given the state's increasingly diverse profile, will require them "to be able to lead a multicultural workforce and to communicate policy to a diverse electorate."[68]

Citing the classroom diversity study, the *2004 Proposal* explained that UT had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity. Accordingly, the *2004 Proposal* recommended adding the consideration of race as one additional factor within a larger admissions scoring index. This recommendation was presented as "an acknowledgment that the significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission."[69]

After more than a year of study following the *Grutter* decision, UT adopted a policy to include race as one of many factors considered in admissions. UT has no set date by which it will end the use of race in undergraduate admissions. Rather, it formally reviews the need for race-conscious measures every five years and considers whether adequate race-neutral alternatives exist. In addition, the district court found that the University informally reviews its admissions procedures each year.[70]

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[67] *2004 Proposal* at 23 (quoted in *Fisher*, 645 F.Supp.2d at 602).

[68] *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602).

[69] *Id.* (quoted in *Fisher*, 645 F.Supp.2d at 602).

The current policy has produced noticeable results. One magazine dedicated to diversity in higher education ranked UT "sixth in the nation in producing undergraduate degrees for minority groups."[71] In an entering class that was roughly the same size in 1998 as it was in 2008, the enrollment of African–American students doubled from 165 students to 335 students. Hispanic enrollment increased approximately 1.5 times, from 762 students to 1,228 students. Asian–American enrollment also increased nearly 10%, from 1,034 students to 1,126 students.[72] By contrast, in 2004, the last year the Top Ten Percent Law operated without the *Grutter* plan, fall enrollment included only 275 African–Americans and 1,024 Hispanics.

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[70] *Fisher*, 645 F.Supp.2d at 594.

[71] *Id.* This particular ranking is somewhat limited in its significance, however, as the results are based on raw tabulations of the number of degrees conferred upon minority students. Large schools, like UT, are more likely to be ranked higher simply because they graduate a greater number of students (both minorities and non-minorities). *See* Victor M.H. Borden, *Top 100 Undergraduate Degree Producers: Interpreting the Data*, DIVERSE ISSUES IN HIGHER EDUC., June 12, 2008.

[72] *Statistical Handbook 2004–2005*, at 22 tbl.S13A; *Statistical Handbook 2009–2010*, at 16 tbl.S12 (data for fall enrollment only). For fall and summer numbers combined, see *2008 Top Ten Percent Report* at 6.

Because of the myriad programs instituted, it can be difficult to attribute increases in minority enrollment to any one initiative. In addition, demographics have shifted in Texas, so increases in minority enrollment likely in part reflect the increased presence of minorities statewide.

III. THE CHALLENGED POLICY

UT's consideration of race is one part of the complex admissions process operating when Appellants were rejected. Given Appellants' challenge, we must examine the whole of the process.

A

UT is a public institution of higher education, authorized by the Texas Constitution and supported by state and federal funding. Accordingly, it begins its admissions process by dividing applicants into three pools: (1) Texas residents, (2) domestic non-Texas residents, and (3) international students. Students compete for admission only against other students in their respective pool. Texas residents are allotted 90% of all available seats, with admission based on a two-tiered system, beginning with students automatically admitted under the Top Ten Percent Law and then filling the remaining seats on the basis of the Academic and Personal Achievement Indices.[73] Because Appellants are Texas residents, their challenge focuses on the admissions procedures applied to in-state applicants.

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[73] Admission decisions for domestic non-Texas residents and international applicants are made solely on the basis of their Academic and Personal Achievement Indices.

Texas applicants are divided into two subgroups: (1) Texas residents who are in the top ten percent of their high school class and (2) those Texas residents who are not. Top ten percent applicants are guaranteed admission to the University, and the vast majority of freshmen are selected in this way, without a confessed consideration of race. In 2008, for example, 81% of the entering class was admitted under the Top Ten Percent Law, filling 88% of the seats allotted to Texas residents and leaving only 1,216 offers of admission university-wide for non-top ten percent residents.[74] The impact of the Top Ten Percent Law on UT's admissions has increased dramatically since it was first introduced in 1998, when only 41% of the seats for Texas residents were claimed by students with guaranteed admission.[75]

The remaining Texas applicants, who were not within the top ten percent of their high school graduating class, compete for admission based on their Academic and Personal Achievement Indices.[76] The Academic Index is the mechanical formula that predicts freshman GPA using standardized test scores and high school class rank.[77] Some applicants' AI scores are high enough that they receive admission based on that score alone. Others are low enough that their applications are considered presumptively denied. If an application is presumptively denied, senior admission staff review the file and may, on rare occasions, designate the file for full review notwithstanding the AI score.[78]

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[74] *2008 Top Ten Percent Report* at 8 tbl.2, 9 tbl.2b. Table 2 shows 8,984 top ten percent students were admitted in 2008. The UT Associate Director of Admissions reported that 10,200 admissions slots are available for Texas residents, leaving 1,216 slots for non-top ten percent students. Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

[75] *Id.* at 7 tbl.1a. In 1998, out of a class that included 6,110 Texas residents, only 2,513 enrolled freshmen were admitted under the Top Ten Percent Law.

[76] The district court found that, on "relatively rare" occasions, a holistic review of the entire application may result in

The Personal Achievement Index is based on three scores: one score for each of the two required essays and a third score, called the personal achievement score, which represents an evaluation of the applicant's entire file. The essays are each given a score between 1 and 6 through "a holistic evaluation of the essay as a piece of writing based on its complexity of thought, substantiality of development,

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the University admitting an applicant to the fall class even though his or her AI or PAI scores fall just shy of the official cutoff. *See Fisher*, 645 F.Supp.2d at 599.

[77] *Fisher*, 645 F.Supp.2d at 596. The precise formulas used to calculate an applicant's Academic Index are derived by regression analysis and vary by intended major. For instance, the formula for prospective engineering majors gives greater weight to math scores, whereas the formula for prospective liberal arts majors gives somewhat greater weight to verbal scores. *See 2004 Proposal* at 27 & n.5. The differences in these formulas are immaterial to the present case.

[78] In other words, no applicant is denied admission based purely on AI score without having her file reviewed by at least one admissions reader and her individual circumstances considered.

and facility with language."[79] The personal achievement score is also based on a scale of 1 to 6, although it is given slightly greater weight in the final PAI calculation than the mean of the two essay scores.[80]

This personal achievement score is designed to recognize qualified students whose merit as applicants was not adequately reflected by their Academic Index. Admissions staff assign the score by assessing an applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service. In addition, the personal achievement score includes a "special circumstances" element that may reflect the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school, and—beginning in 2004—the applicant's race.[81] To assess these intangible factors, evaluators read the applicant's essays again, but this time with an eye to the information conveyed rather than the quality of the student's writing. Admissions officers undergo annual training by a nationally recognized expert in holistic scoring, and senior staff members perform quality control to verify that awarded scores are appropriate and consistent. The most recent study, in 2005, found that holistic file readers scored within one point of each other 88% of the time.[82]

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[79] *Fisher,* 645 F.Supp.2d at 597.

[80] PAI = [(personal achievement score * 4) + (average essay score * 3)] / 7. *Id.* at 597 n. 7.

[81] *Id.* at 591–92, 597.

None of the elements of the personal achievement score—including race—are considered individually or given separate numerical values to be added together. Rather, the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person and to place his or her achievements in context.[83] As UT's director of admissions explained, "race provides—like [the] language [spoken in the applicant's home], whether or not someone is the first in their family to attend college, and family responsibilities—important context in which to evaluate applicants, and is only one aspect of the diversity that the University seeks to attain."[84] Race is considered as part of the applicant's context whether or not the applicant belongs to a minority group, and so—at least in theory—it "can positively impact applicants of all races, including Caucasian[s], or [it] may have no impact whatsoever."[85] Moreover, given the mechanics of UT's admissions process, race has the potential to influence only a small part of the applicant's overall admissions score. The sole instance when race is considered is as one element of the personal achievement score, which itself is only a part of the total PAI. Without a sufficiently high AI and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.[86]

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[82] *Id.* at 597; *see* Univ. of Tex. at Austin Office of Admissions, *Inter-Rater Reliability of Holistic Measures Used in the Freshman Admission Process of the University of Texas at Austin* (Feb. 22, 2005) (Dist.Ct.Dkt. No. 94, Ex. 10).

[83] *Fisher*, 645 F.Supp.2d at 597.

[84] Walker Aff. (Dist. Ct. Dkt. No. 96, Tab 11) ¶ 15.

[85] *Fisher*, 645 F.Supp.2d at 597.

B

Although the process for calculating AI and PAI scores is common to all parts of the University, each offer of admission to UT is ultimately tied to an individual school or major. Texas residents in the top ten percent of their high school class are guaranteed admission to the University, but they are not assured admission to the individual school or program of their choice.

Most majors and colleges in the University provide automatic admission to Top Ten Percent Law applicants, but certain "impacted majors"—including the School of Business, the College of Communication, and the Schools of Engineering, Kinesiology, and Nursing—are obligated to accept only a certain number of Top Ten Percent Law applicants.[87] These programs are "impacted" because they could fill 80% or more of their available spaces each year solely through operation of the Top Ten Percent Law. To avoid oversubscription and to allow these colleges and majors to admit some non-top ten percent applicants, UT caps the percentage of students automatically admitted to these programs at 75% of the available spaces.[88]

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[86] *See id.* at 608.

[87] In addition, because of special portfolio, audition, and other requirements, the Top Ten Percent Law does not apply to the School of Architecture, the School of Fine Arts, and certain honors programs.

Top Ten Percent Law applicants who do not receive automatic entry to their first choice program compete for admission to the remaining spaces, and if necessary to their second-choice program, on the basis of their AI and PAI scores. The admissions office places students into matrices for each preferred school or major, with students grouped by AI score along one axis and PAI score along the other axis. Liaisons for the majors then establish a cutoff line, which is drawn in a stair-step pattern. Applicants denied admission to their first-choice program are considered for their second choice, with cutoff lines readjusted to reflect the influx of those applicants. Any top ten percent applicants not admitted to either their first– or second-choice program are automatically admitted as Liberal Arts Undeclared majors. All other applicants not yet admitted to UT compete, again according to AI and PAI scores, for any remaining seats in the Liberal Arts Undeclared program.

Although this completes the admissions process for the fall portion of the freshman class, no Texas resident who submits a timely application is denied admission. Instead, those residents not admitted to the entering fall class are offered admission to either the summer program or the Coordinated Admissions Program (CAP). Marginal applicants who missed the cutoff for the fall class are offered admission to the summer program, which permits students to begin their studies at UT during the summer and then join the regularly admitted students in the fall. About 800 students enroll in the summer program each year. All remaining Texas applicants are automatically enrolled in CAP, which guarantees admission as a transfer student if the student enrolls in another UT system campus for her freshman year and meets certain other conditions, including the completion of thirty credit hours with a cumulative grade point average of 3.2 or higher.

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[88] Thus, for example, the School of Business granted automatic admission only to those students who graduated in the top 4% of their high school class and selected a business major as their first choice. Ishop Dep. (Dist. Ct. Dkt. No. 96, Tab 2) at 32.

C

The Academic Index and Personal Achievement Index now employed by UT have been in continuous use since 1997. The lone substantive change came in 2005, following the *Grutter* decision, when the Board of Regents authorized the consideration of race as another "special circumstance" in assessing an applicant's personal achievement score.

Race—like all other elements of UT's holistic review—is not considered alone. Admissions officers reviewing each application are aware of the applicant's race, but UT does not monitor the aggregate racial composition of the admitted applicant pool during the process. The admissions decision for any particular applicant is not affected—positively or negatively—by the number of other students in her racial group who have been admitted during that year.[89] Thus, "it is difficult to evaluate which applicants have been positively or negatively affected by its consideration or which applicants were ultimately offered admission due to their race who would not have otherwise been offered admission."[90] Nevertheless, the district court found that race "is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application."[91]

D

UT undoubtedly has a compelling interest in obtaining the educational benefits of diversity, and its reasons for implementing race-conscious admissions—expressed in the *2004 Proposal*—mirror those approved by the Supreme Court in *Grutter*. The district court found that both the UT and *Grutter* policies "attempt to promote 'cross-racial understanding,' 'break down racial stereotypes,' enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as 'spokespersons' for their race."[92] Like the law school in *Grutter*, UT

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[89] *Fisher*, 645 F.Supp.2d at 598, 609.

[90] *Id.* at 597.

[91] *Id.* at 597–98.

[92] *Id.* at 603 (quoting *Grutter*, 539 U.S. at 319–20, 123 S.Ct. 2325). More specifically, as described in the *2004 Proposal*, one purpose of UT's race-conscious policy is " 'to provide an educational setting that fosters cross-racial understanding,

"has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."[93] UT has made an "educational judgment that such diversity is essential to its educational mission," just as Michigan's Law School did in *Grutter.*[94]

Considering UT's admissions system in its historical context, it is evident that the efforts of the University have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion. That said, the use of race summons close judicial scrutiny, necessary for the nation's slow march toward the ideal

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provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.'" *2004 Proposal* at 25 (quoted in *Fisher,* 645 F.Supp.2d at 603). Another is to produce " 'future educational, cultural, business, and sociopolitical leaders.'" *Id.* at 24 (quoted in *Fisher,* 645 F.Supp.2d at 602). And because Texas's population is uniquely diverse—"[i]n the near future, Texas will have no majority race"—" 'tomorrow's leaders must not only be drawn from a diverse population[,] but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate.'" *Id.* at 24 (quoted in *Fisher,* 645 F.Supp.2d at 602). As the state's flagship public institution, UT determined that it " 'has a compelling educational interest to produce graduates who are capable of fulfilling the future leadership needs of Texas.' " *Id.* at 24 (quoted in *Fisher,* 645 F.Supp.2d at 602).

[93] *Fisher,* 645 F.Supp.2d at 603 (quoting *Grutter,* 539 U.S. at 333, 123 S.Ct. 2325).

[94] *Grutter,* 539 U.S. at 328, 123 S.Ct. 2325.

of a color-blind society, at least as far as the government can see.

IV. STANDARD OF REVIEW

It is a given that as UT's *Grutter*-like admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny with its requirement of narrow tailoring.[95] At the same time, the Supreme Court has held that "[c]ontext matters" when evaluating race-based governmental action, and a university's educational judgment in developing diversity policies is due deference.[96]

A

Judicial deference to a university's academic decisions rests on two independent foundations. First, these decisions are a product of "complex educational judgments in an area that lies primarily within the expertise of the university," far outside the experience of the courts.[97] Second, "universities occupy a special niche in our constitutional tradition," with educational autonomy grounded in the First Amendment.[98] As Justice Powell explained in *Bakke*, "[a]cademic freedom .... includes [a university's] selection of its student body."[99]

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[95] *Id.* at 326, 328, 123 S.Ct. 2325 (citing *Adarand,* 515 U.S. at 227, 115 S.Ct. 2097); *see also Parents Involved,* 551 U.S. at 720, 127 S.Ct. 2738.

[96] *Grutter,* 539 U.S. at 327, 123 S.Ct. 2325; *see also id.* at 328, 123 S.Ct. 2325 ("The Law School's educational judgment ... is one to which we defer .... Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.").

[97] *Id.* at 328, 123 S.Ct. 2325.

Yet the scrutiny triggered by racial classification "is no less strict for taking into account" the special circumstances of higher education.[100] "[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in [a] particular context."[101] Narrow tailoring, a component of strict scrutiny, requires any use of racial classifications to so closely fit a compelling goal as to remove the possibility that the motive for the classification was illegitimate racial stereotype. Rather than second-guess the merits of the University's decision, a task we are ill-equipped to perform, we instead scrutinize the University's decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the University acted in good faith, a presumption Appellants are free to rebut.[102] Relatedly, while we focus on the University's decision to adopt a *Grutter*-like plan, admissions outcomes remain relevant evidence of the plan's necessity—a reality check.

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[98] *Id.* at 329, 123 S.Ct. 2325.

[99] *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.).

[100] *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325.

[101] *Id.* at 327, 123 S.Ct. 2325.

[102] *Id.* at 329, 123 S.Ct. 2325 ("[G]ood faith on the part of a university is presumed absent a showing to the contrary." (internal

B

With a nod to *Grutter*'s command that we generally give a degree of deference to a university's educational judgments, Appellants urge that *Grutter* did not extend such deference to a university's decision to implement a race-conscious admissions policy. Instead, they maintain *Grutter* deferred only to the university's judgment that diversity would have educational benefits, not to the assessment of whether the university has attained critical mass of a racial group or whether race-conscious efforts are necessary to achieve that end.

As an initial matter, this argument in its full flower is contradicted by *Grutter*. The majority held that, like the examination into whether the University has a compelling interest, "the narrow-tailoring inquiry ... must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."[103] That is, the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment.

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quotation marks omitted) (quoting *Bakke*, 438 U.S. at 318–19, 98 S.Ct. 2733 (opinion of Powell, J.))).

[103] *Id.* at 333–34.

Appellants would have us borrow a more restrictive standard of review from a series of public employment and government contracting cases, in which the Supreme Court "held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary."[104] The Court most recently applied this strong-basis-in-evidence standard in *Ricci v. DeStefano.*

In *Ricci,* white firefighters from New Haven, Connecticut sued under Title VII, challenging the city's decision to disregard a promotions test after the results showed that white candidates significantly outperformed minority candidates.[105] New Haven defended this action, arguing that if it had ratified the test results it could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters.[106] The white firefighters, however, argued that ignoring the test results was a violation of Title VII's separate prohibition against intentional race discrimination, or disparate treatment.[107] Responding to this tension, the Supreme Court held that such intentional race-based action is not permitted by Title VII unless the employer can demonstrate with a strong basis in evidence that it would have been liable under the disparate impact provision had it not taken the action.[108] The Court suggested that anything less would risk creating a *de facto* quota system, where an employer could disregard test results to achieve a preferred racial balance, impermissibly shifting the focus from individual discrimination to group bias.[109] Applying the strong-basis-in-evidence standard, the Supreme Court held that New Haven's fear of disparate impact liability was not adequately supported.[110]

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[104] *Ricci v. DeStefano,* ––– U.S. ––––, 129 S.Ct. 2658, 2675, 174 L.Ed.2d 490 (2009) (some internal quotation marks omitted) (quoting *Richmond v. J.A Croson Co.,* 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), in turn quoting *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality)).

[105] *Id.* at 2664.

[106] *Id.*; *see* 42 U.S.C. § 2000e–2(k)(1)(A)(i) (codifying *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

The city had argued it only needed to show a fear of liability based on a good-faith belief—a rough analogy to the university admissions standard. Yet the Court found that an intent-based standard could not be squared with the statutory text. The *Ricci* Court turned to the strong-basis-in-evidence standard "as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII."[111]

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[107] *See* 42 U.S.C. § 2000e–2(a)(1).

[108] *Ricci*, 129 S.Ct. at 2664.

[109] *Id.* at 2676.

[110] *Id.*

[111] *Id.* at 2676. We note that these statutory constraints are not present in the context of university admissions programs.

Although *Ricci* did not address the firefighters' equal protection claim, the Court derived its standard from *Richmond v. J.A. Croson Co.*,[112] a government contracting case, which in turn adopted from a plurality opinion in *Wygant v. Jackson Board of Education*, a public employment case.[113] In *Wygant*, the plurality concluded that defending race-based public employment decisions as responsive to present effects of past discrimination required a strong basis in evidence of the past discrimination.[114] Similarly, *Croson* adopted this standard after observing that "an amorphous claim [of] past discrimination in a particular industry cannot justify the use of an unyielding racial quota."[115]

This recitation of history, quick as it is, makes plain that the cases Appellants cite have little purchase in this challenge to university admissions. The high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration. In doing so, it touches the third rail of racial quotas. *Wygant* and *Croson* both involved explicit quotas; in *Ricci*, the Court was concerned that the city's use of race threatened to devolve into a *de facto* quota.

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[112] 488 U.S. at 500, 109 S.Ct. 706.

[113] 476 U.S. at 277, 106 S.Ct. 1842.

[114] *Id.* at 277–78, 106 S.Ct. 1842.

[115] *Croson*, 488 U.S. at 499, 109 S.Ct. 706.

By contrast, *Grutter* recognized that universities are engaged in a different enterprise. Their holistic approach is part of a forward-looking effort to obtain the educational benefits of diversity. The look to race as but one element of this further goal, coupled with individualized consideration, steers university admissions away from a quota system. *Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.

Parents Involved in Community Schools v. Seattle School District No. 1 further supports this understanding.[116] When scrutinizing two school districts' race-conscious busing plans, the Court invoked *Grutter*'s "serious, good faith consideration" standard, rather than the strong-basis-in-evidence standard that Appellants would have us apply.[117] The *Parents Involved* Court never suggested that the school districts would be required to prove their plans were meticulously supported by some particular quantum of specific evidence. Rather, the Court struck down the school districts' programs because they pursued racial balancing and defined students based on racial group classifications, not on individual circumstances.

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[116] 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

[117] *See id.* at 735, 127 S.Ct. 2738 (quoting *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325).

In short, the Court has not retreated from *Grutter*'s mode of analysis, one tailored to holistic university admissions programs. Thus, we apply strict scrutiny to race-conscious admissions policies in higher education, mindful of a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body.

C

Appellants do not allege that UT's race-conscious admissions policy is functionally different from, or gives greater consideration to race than, the policy upheld in *Grutter*. Rather, Appellants question whether UT *needs* a *Grutter*-like policy. As their argument goes, the University's race-conscious admissions program is unwarranted because (1) UT has gone beyond a mere interest in diversity for education's sake and instead pursues a racial composition that mirrors that of the state of Texas as a whole, amounting to an unconstitutional attempt to achieve "racial balancing"; (2) the University has not given adequate consideration to available "race-neutral" alternatives, particularly percentage plans like the Top Ten Percent Law; and (3) UT's minority enrollment under the Top Ten Percent Law already surpassed critical mass, such that the additional (and allegedly "minimal") increase in diversity achieved through UT's *Grutter*-like policy does not justify its use of race-conscious measures. We will consider each of these arguments in turn.

V. RACIAL BALANCING

Again, diversity is a permissible goal for educational institutions, but "outright racial balancing" is not. Attempting to ensure that the student body contains some specified percentage of a particular racial group is "patently unconstitutional."[118] This concept follows from the Supreme Court's repeated emphasis that, by itself, increasing racial representation is not a sufficiently compelling interest to justify the use of racial preferences. *Grutter* described many important educational interests that may be sought through diversity, but steadfastly maintained that " '[r]acial balance is not to be to be achieved for its own sake.'"[119] Moreover, "[t]he point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance" by creating an unconstitutional quota.[120]

A

Looking to the details of UT's race-conscious admissions policy, it is clear that administrators knew a quota system would not survive judicial review, and they took care to avoid this fatal mistake. UT's system was modeled after the *Grutter* program, which the Supreme Court held was not a quota. UT has never established a specific number, percentage, or range of minority enrollment that would constitute "critical mass," nor does it award any fixed number of points to minority students in a way that impermissibly values race for its own sake.[121]

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[118] *Grutter*, 539 U.S. at 329–30, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.)).

[119] *Id.* at 330, 123 S.Ct. 2325 (quoting *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992)).

[120] *Parents Involved*, 551 U.S. at 723, 127 S.Ct. 2738.

Further, there is no indication that UT's *Grutter*-like plan is a quota by another name. It is true that UT looks in part to the number of minority students when evaluating whether it has yet achieved a critical mass, but "[s]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota."[122] Whereas a quota imposes a fixed percentage standard that cannot be deviated from, a permissible diversity goal " 'require[s] only a good-faith effort ... to come within a range demarcated by the goal itself.'"[123] Indeed, UT's policy improves upon the program approved in *Grutter* because the University does not keep an ongoing tally of the racial composition of the entering class during its admissions process.[124]

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[121] Appellants argue that UT's "head-in-the-sand approach"—refusing to identify any specific number, percentage, or range of minority students that would constitute critical mass—is an improper attempt "to short circuit any inquiry into whether it can justify its policy with evidence by arguing that critical mass is a purely subjective concept that cannot be evaluated in numerical terms." Appellants claim that until UT identifies some "finishing line," the use of race has "no logical stopping point" and is therefore "too amorphous a basis for imposing a racially classified remedy." But in both *Bakke* and *Grutter*, the controlling opinions expressly approved of policies seeking only some undefined "meaningful number" of minorities, *see Grutter*, 539 U.S. at 335, 123 S.Ct. 2325; *Bakke*, 438 U.S. at 323, 98 S.Ct. 2733 (opinion of Powell, J.), and the Court has firmly "rejected" the argument "that diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite" a ground for race-conscious university admissions policies, *Gratz*, 539 U.S. at 268, 123 S.Ct. 2411 (internal quotation marks omitted). On the contrary, if UT were to identify some numerical target for minority enrollment, that would likely render the policy unconstitutional under *Grutter*.

UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas. Its methods and efforts belie the charge. The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African–Americans at UT is half the percentage of Texas's African–American population, while Asian–American enrollment is more than five times the percentage of Texan Asian–Americans.[125]

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[122] *Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 (citation, internal quotation marks, and brackets omitted).

[123] *Id.* at 335, 123 S.Ct. 2325 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986)).

[124] *Cf. Grutter*, 539 U.S. at 391–92, 123 S.Ct. 2325 (Kennedy, J., dissenting).

[125] *Fisher*, 645 F.Supp.2d at 607 n. 11.

B

Appellants nevertheless argue that UT's program amounts to racial balancing because it supposedly evinces a special concern for demographically underrepresented groups, while neglecting the diverse contributions of others. These arguments do not account for the operation of UT's admissions system or the scope of the diversity interest approved by the Court in *Grutter*.

1

The district court expressly found that race can enhance the personal achievement score of a student from any racial background, including whites and Asian–Americans.[126] For example, a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same school. This possibility is the point of *Grutter*'s holistic and individualized assessments, which must be " 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.' "[127] Indeed, just as in *Grutter*, UT applicants of every race may submit supplemental information to highlight their potential diversity contributions, which allows students who are diverse in unconventional ways to describe their unique attributes.[128]

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[126] *Id.* at 606.

[127] *Grutter*, 539 U.S. at 337, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733 (opinion of Powell, J.)).

The summary judgment record shows that demographics are not consulted as part of any individual admissions decision, and UT's admissions procedures do not treat certain racial groups or minorities differently than others when reviewing individual applications. Rather, the act of considering minority group demographics (to which Appellants object) took place only when the University first studied whether a race-conscious admissions program was needed to attain critical mass. Appellants' objection therefore must be directed not to the design of the program, but rather to whether UT's decision to reintroduce race as a factor in admissions was made in good faith.

2

Appellants contend that UT revealed its true motive to be outright racial balancing when it referenced state population data to justify the adoption of race-conscious admissions measures. They insist that if UT were truly focused on educational benefits and critical mass, then there should be no reason to consult demographic data when determining whether UT had sufficient minority representation.

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[128] *Id.* at 338, 123 S.Ct. 2325; *see Fisher*, 645 F.Supp.2d at 597.

We disagree. The University's policies and measured attention to the community it serves are consonant with the educational goals outlined in *Grutter* and do not support a finding that the University was engaged in improper racial balancing during our time frame of review. Both *Grutter* and *Bakke* recognized that "there is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body.'"[129] In its policymaking process, UT gave appropriate attention to those educational benefits identified in *Grutter* without overstepping any constitutional bounds.

Grutter recognized that racial and ethnic backgrounds play an influential role in producing the diversity of views and perspectives which are paramount to a university's educational mission. As Justice O'Connor explained, the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters" can have a significant impact on a student's views.[130] The Court acknowledged that "[b]y virtue of our Nation's struggle with racial inequality, [underrepresented minority students] are both likely to have experiences with particular importance to the [University's] mission, and less likely to be admitted in meaningful numbers on criteria that ignore these experiences."[131] UT properly concluded that these individuals from the state's underrepresented minorities would be most likely to add unique perspectives that are otherwise absent from its classrooms. Identifying *which* backgrounds are underrepresented, in turn, presupposes some reference to demographics, and it was therefore appropriate for UT to give limited attention to this data when considering whether its current student body included a critical mass of underrepresented groups.

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[129] *Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 323, 98 S.Ct. 2733 (opinion of Powell, J.)).

[130] *Id.* at 333, 123 S.Ct. 2325.

[131] *Id.* at 338, 123 S.Ct. 2325.

Preparing students to function as professionals in an increasingly diverse workforce likewise calls for some consideration of a university's particular educational mission and the community it serves. For instance, a nationally renowned law school draws upon a nationwide applicant pool and sends its graduates into careers in all states; therefore it is appropriate for such a school to consider national diversity levels when setting goals for its admissions program. In contrast, UT's stated goal is to "produce graduates who are capable of fulfilling the future leadership needs of Texas."[132] This objective calls for a more tailored diversity emphasis. In a state as racially diverse as Texas, ensuring that graduates learn to collaborate with members of racial groups they will encounter in the workforce is especially important. The *2004 Proposal* concluded that a race-conscious admissions program was necessary at UT specifically because "from a racial, ethnic, and cultural standpoint, students at the

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[132] 132. *2004 Proposal* at 23 (quoted in *Fisher*, 645 F.Supp.2d at 602).

University [were] being educated in a less-than-realistic environment that [was] not conducive to training the leaders of tomorrow."[133]

The need for a state's leading educational institution to foster civic engagement and maintain visibly open paths to leadership also requires a degree of attention to the surrounding community. A university presenting itself as open to all may be challenged when the state's minority population grows steadily but minority enrollment does not. Indeed, the *2004 Proposal* expressed concern that UT appeared "largely closed to nonwhite applicants" and did not "provide a welcoming supportive environment" for minority students.[134] UT was keenly aware that by sending a message that people of all stripes can succeed at UT, the University would attract promising applicants from once-insulated communities, over time narrowing the credentials gap between minority and non-minority applicants.[135] After *Hopwood,* such applicants were dissuaded from applying to UT. But through the Top Ten Percent Law and *Grutter*-like plan, UT has increased its minority applicant pool in its effort to ensure that it serves as a flagship university for the entire state, not just Texans of certain backgrounds. Cultivating paths to leadership for underrepresented groups serves both the individual and the public, sustaining an infrastructure of leaders in an increasingly pluralistic society. Although a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account.

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[133] *Id.* at 24–25 (quoted in *Fisher,* 645 F.Supp.2d at 602).

[134] *Id.* at 14.

[135] *See, e.g.,* Mark C. Long et al., *Policy Transparency and College Enrollment: Did the Texas Top Ten Percent Law Broaden Access to the Public Flagships?,* 627 ANNALS AM. ACAD. POL. & SOC. SCI. 82 (2010); Kim M. Lloyd et al., *Minority College Aspirations, Expectations and Applications Under the Texas Top 10% Law,* 86 SOC. FORCES 1105 (2008).

Finally, *Grutter*'s structure accepts that a university's twin objectives of rewarding academic merit and fostering diversity can be complementary rather than competing goals; that students rising to the top of underrepresented groups demonstrate promise as future leaders. These students' relative success in the face of harmful and widespread stereotypes evidences a degree of drive, determination, and merit not captured by test scores alone. Insofar as Appellants complain that the University's limited attention to demographics was inconsistent with the legitimate educational concerns recognized in *Bakke* and *Grutter*, we conclude that their contention cannot be sustained.

3

Appellants argue that a broad approach to educational diversity is improper because "critical mass" must be an "inward-facing concept ... that focuses on the functioning of the student body," encompassing only that level of minority enrollment necessary to ensure that minority students participate in the classroom and do not feel isolated. While Appellants' view may comport with one literal interpretation of the "critical mass" label, it is not the view that prevailed in *Grutter*. The *Grutter* majority defined critical mass "by reference to the educational benefits that diversity is designed to produce,"[136] and the educational benefits recognized in *Grutter* go beyond the narrow "pedagogical concept" urged by Appellants. On this understanding, there is no reason to assume that critical mass will or should be the same for every racial group or every university. We are persuaded, as was the district court, that the University adhered to *Grutter* when it reintroduced race into its admissions process based in part on an analysis that devoted special attention to those minorities which were most significantly underrepresented on its campus.

VI. THE TOP TEN PERCENT LAW

Grutter is best read as a path toward the moment when all race-conscious measures become unnecessary. To that end, *Grutter* requires universities that employ race-conscious admissions to seriously consider race-neutral alternatives. But "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," especially if the proffered alternatives would require the University to sacrifice other important interests, like its academic selectivity and reputation for excellence.[137]

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[136] *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325.

[137] *See id.* at 339–40, 123 S.Ct. 2325.

The parties devote significant attention to the Top Ten Percent Law.[138] Since the Law was first enacted in 1997, UT has seen increases in both African–American and Hispanic enrollment, but again, changing demographics and other minority outreach programs render it difficult to quantify the increases attributable to the Top Ten Percent Law.[139]

Appellants put forward the Top Ten Percent Law as a facially race-neutral alternative that would allow UT to obtain a critical mass of minority enrollment without resorting to race-conscious admissions. As the argument goes, if the Top Ten Percent Law were able to serve the University's interests "about as well" as race-conscious admissions, without differentiating between students on the basis of race, then it would render UT's current admissions program unconstitutional.[140] UT responds that the Top Ten Percent Law does not constitute a workable alternative to a flexible admissions system, and so it is "entirely irrelevant" as a matter of law in determining whether or not a university may adopt the holistic consideration of race to achieve critical mass.

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[138] TEX. EDUC.CODE § 51.803 (1997). The precise impact UT's other race-neutral alternatives (such as scholarship and outreach programs) have had on minority enrollment is not clear, but their effect would not appear to be great enough to bear on the constitutionality of the University's race-conscious admissions policy.

[139] *Fisher*, 645 F.Supp.2d at 594; *see also* Marta Tienda & Teresa A. Sullivan, *The Promise and Peril of the Texas Uniform Admissions Law* 164–65 & tbl.1, *in* THE NEXT TWENTY-FIVE YEARS? AFFIRMATIVE ACTION AND HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA A 155 (David L. Featherman et al. eds., 2010).

[140] *See Grutter*, 539 U.S. at 339, 123 S.Ct. 2325 (quoting *Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct. 1842 (1986)).

UT is correct that so-called "percentage plans" are not a constitutionally mandated replacement for race-conscious admissions programs under *Grutter*, although—as will become apparent—this realization alone does not end our constitutional inquiry. The idea of percentage plans as a viable alternative to race-conscious admissions policies was directly advocated to the *Grutter* Court by the United States, arguing as *amicus curiae*.[141] In response, the Court held that although percentage plans may be a race-neutral means of increasing minority enrollment, they are not a workable alternative—at least in a constitutionally significant sense—because "they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[142] In addition, the Court emphasized existing percentage plans—including UT's—are simply not "capable of producing a critical mass without forcing [universities] to abandon the academic selectivity that is the cornerstone of [their] educational mission."[143]

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[141] The United States has since filed an amicus brief in the present case, urging us to uphold UT's current admissions program.

[142] *Grutter*, 539 U.S. at 340, 123 S.Ct. 2325 (internal citation omitted).

[143] *Id.*

That the Top Ten Percent Law is not a constitutionally-mandated alternative does not make it irrelevant. By now it is clear that the Law is inescapably tied to UT's *Grutter* plan, as *Grutter* does its work with the applicants who remain after the cut of the Top Ten Percent Law. In 2008, top ten percent applicants accounted for 8,984 of the 10,200 Texas admittees.[144] Thus, with the Top Ten Percent Law in effect, UT's *Grutter* plan can only possibly influence the review of approximately 1,200 admitted students' applications.[145] In evaluating the constitutionality of an admissions program, we cannot ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texan freshmen.[146]

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[144] *2008 Top Ten Report* at 8 tbl.2; Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

[145] In reality, the *Grutter* plan operates on even fewer applications, as many non-top ten percent students are admitted based purely on their class rank and standardized test scores, without any reference to their PAI, leaving only 841 seats in 2008 that were evaluated under the *Grutter* plan. *See* Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

[146] *2008 Top Ten Report* at 7 tbl.1a; *see supra* note 74 and accompanying text. We also note that since it began, the Top Ten Percent Law has had an increasing impact on admissions decisions. In 1998, top ten percent candidates comprised just 41% of Texans in the freshman class. In 2004, 66% of Texan freshmen were top ten percent students, and in 2008, top ten percent students made up 81% of the Texas freshmen seats. While the legislative 75% cap on top ten percent enrollment may help alleviate some of the concerns with this plan, the fact remains that the Top Ten Percent Law operates today very differently than it did when first implemented.

The reality is that the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it. While the Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity.[147] For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African–American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African–American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African–American.[148] It is evident that if UT is to have diverse interactions, it needs more minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs. The holistic review endorsed by *Grutter* gives UT that discretion, but the Top Ten Percent Law, which accounts for nearly 90% of all Texas resident admissions, does not.[149]

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[147] *See* Univ. of Tex. at Austin Office of Info. Mgmt., *Statistical Handbook 2009–2010*, at 32 tbl.S27 (2010) (reporting UT enrollment by college, grade level, ethnicity, and gender); Lisa Dickson, *Major Choices: Race and Gender Differences in College Major Choice*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 108 (2010) (analyzing UT data and finding that "significant differences by gender, race, and ethnicity persist in initial college major choice even after controlling for the [SAT] score of the student and the high school class rank of the student").

[148] *Statistical Handbook 2009–2010*, at 31–32 tbl.S27.

Focusing narrowly on geographic diversity, in part as a proxy for race, the Top Ten Percent Law crowds out other types of diversity that would be considered under a *Grutter*-like plan. By ignoring these other diversity contributions, the Top Ten Percent Law restricts the University's ability to achieve the maximum educational benefits of a truly diverse student body.[150] As UT's 2003 classroom study shows, percentage plans bear little promise of producing the meaningful diverse interactions envisioned by *Grutter*, at least not in the classroom. For instance, the study reported that although overall enrollment of minority students at UT rose significantly between 1996 and 2002, the Fall 2002 schedule contained more classes with zero or one African American or Hispanic students than had the Fall 1996 schedule.[151]

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[149] For example, instead of admitting a minority top ten percent student from a low-performing school, UT might admit a minority student with an interest in business who is just as academically qualified (and perhaps more so), but falls outside the top ten percent of his high school class because he attends a more competitive high school. This example also demonstrates how the Top Ten Percent Law hurts academic selectivity: UT must admit a top ten percent student from a low-performing high school before admitting a more qualified minority student who ranks just below the top ten percent at a highly competitive high school. This effect, in turn, further widens the "credentials gap" between minority and non-minority students at the University, which risks driving away matriculating minority students from difficult majors like business or the sciences.

[150] The Top Ten Percent Law may produce diversity beyond varying hometowns, including differences in socioeconomic status and rural/urban/suburban upbringing. However, under the Top Ten Percent Law, the University does not have the opportunity to select for a wide range of diverse experiences (such as travel abroad, extra-curricular involvement, or work experience), so the Top Ten Percent Law bluntly operates as an attempt to create diversity through reliance on perceived group characteristics and segregated communities.

Justice Ginsburg pointed out in *Grutter*'s companion case that percentage plans create damaging incentives to the education system. She observed that "[p]ercentage plans depend for their effectiveness on continued racial segregation at the secondary school level." These measures "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages."[152] Similarly, these plans create a strong incentive to avoid competitive educational institutions like magnet schools.[153]

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[151] *2004 Proposal* at 25 & tbl. 8.

[152] *Gratz*, 539 U.S. at 304 n. 10, 123 S.Ct. 2411 (Ginsburg, J., dissenting).

[153] In an effort to ameliorate this effect, a special provision of the Top Ten Percent Law provides that "a high school magnet program, academy, or other special program" may be considered "an independent high school with its own graduating class separate from the graduating class of other students attending the high school," effectively allowing the school to certify two separate groups of Top Ten Percent Law students. *See* TEX. EDUC.CODE § 51.8045.

Texas applicants falling outside the top ten percent group face extreme competition to gain admittance to the University. There are approximately 16,000 students competing for only 1,216 fall admissions slots. The competition is so great that, on average, students admitted from outside the top ten percent of their high school class, regardless of race, have even higher SAT scores than those granted automatic admission under the Top Ten Percent Law.[154] Perversely, this system negatively impacts minority students (who nationally have lower standardized test scores) in the second decile of their classes at competitive high schools. *Grutter*'s holistic look at race may soften this unreasonable exclusion of those second-decile minorities better qualified than many of the non-minorities bluntly swept in under the Top Ten Percent Law. But not much. It requires no empirical study to observe that those excluded under this Law have been a rich source of Texas leaders over its history and that for some applicants, admission to the flagship school of Texas is little more possible than admission to Harvard.[155]

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[154] *See 2008 Top Ten Percent Report* at 12 tbl.6 (showing the average SAT range for top ten percent and non-top ten percent students); *id.* at 13–15 tbls.6a–6d (displaying SAT ranges based on race and top ten percent status).

[155] To reach its target class size, UT offers fall admission to 10,200 Texas applicants. Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12. For the class entering Fall 2008, after UT offered admission to top ten percent students, there were 1,216 admissions spots remaining. (The district court noted there were 841 places, but that number included the admission of so-called "Group A" applicants who have extremely high AI scores but are not in the top ten percent of their class. *See id.*) There were a total of

That all of these weaknesses are apparent in the Top Ten Percent Law only make its focus upon race the plainer.[156]

The Top Ten Percent Law was adopted to increase minority enrollment. That it has done, but its sweep of admissions is a polar opposite of the holistic focus upon individuals. Its internal proxies for race end-run

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27,712 applicants for the fall class of 2008. *Statistical Handbook 2009–2010,* at 25 tbl.S21. Neither the record nor any public information released by the University disclose what portion of that total applicant pool were Texas residents, but if we assume that proportion of applicants from Texas matches the 90% of admissions slots reserved for Texas applicants, one can estimate that there were 24,940 Texas applicants. Subtracting the 8,984 students admitted under the Top Ten Percent Law yields an estimate of 15,956 applicants for 1,216 seats, or an acceptance rate of approximately 7.6%. By comparison, the overall acceptance rate at Ivy League schools for the class entering Fall 2008 ranged from 8% (Harvard) to 21% (Cornell). *See The Rankings: Best National Universities,* U.S. NEWS & WORLD REP., Sept. 2009, at 84–85.

[156] Appellants here do not challenge the constitutionality of the Top Ten Percent Law. In fact, they endorse it as a race-neutral alternative to the *Grutter* plan. A court considering the constitutionality of the Law would examine whether Texas enacted the Law (and corresponding admissions policies) because of its effects on identifiable racial groups or in spite of those effects. *See Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *cf.* Brief of Social Scientists Glenn C. Loury et al. as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), *available at* 2003 WL 402129, at *2, *9–*10 (noting that "it is not clear that [percentage] plans are actually race-neutral" and that some *amici* counsel in *Grutter* "have signaled interest in moving on after this case to challenge these aspects of the Texas program").

the Supreme Court's studied structure for the use of race in university admissions decisions. It casts aside testing historically relied upon, admitting many top ten percent minorities with significantly lower scores than rejected minorities and non-minorities alike. That these admitted minorities are academically able to remain in the University does not respond to the reality that the Top Ten Percent Law eliminated the consideration of test scores, and correspondingly reduced academic selectivity, to produce increased enrollment of minorities. Such costs may be intrinsic to affirmative action plans. If so, *Grutter* at least sought to minimize those costs through narrow tailoring. The Top Ten Percent Law is anything but narrow.

In short, while the Top Ten Percent Law appears to succeed in its central purpose of increasing minority enrollment, it comes at a high cost and is at best a blunt tool for securing the educational benefits that diversity is intended to achieve. We cannot fault UT's contention that the Top Ten Percent Law is plainly not the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies. We are keenly aware that the University turned to the Top Ten Percent Law in response to a judicial ruling. Yet we cannot agree that it is irrelevant. To the contrary, that the Top Ten Percent Law, accounting for the vast majority of in-state admissions, threatens to erode the foundations UT relies on to justify implementing *Grutter* policies is a contention not lacking in force. "Facially neutral" has a talismanic ring in the law, but it can be misleading. It is here.

VII. CRITICAL MASS

Appellants contend that UT's decision to reintroduce race-conscious admissions was unconstitutional because minority enrollment already met or exceeded "critical mass" when this decision was made, and thus any further facial consideration of race was neither warranted nor constitutional. Appellants claim the best measure of whether UT had attained the benefits of diversity is the raw percentage of minorities enrolled. As a result of the combined effects of changing demographics, targeted high school programs, and the Top Ten Percent Law, total minority enrollment had increased over the years. When the decision was made to reintroduce race-conscious admissions in 2004, underrepresented minorities made up 21.4% of the incoming class (4.5% African–American and 16.9% Hispanic).[157]

Although Texas was not constitutionally required to enact the Top Ten Percent Law, Appellants are correct that the decision to do so—and the substantial effect on aggregate minority enrollment at the University—places at risk UT's race-conscious admissions policies. We are confident, and hold, that a *Grutter*-style admissions system standing alone is constitutional. That said, whether to overlay such a plan with the Top Ten Percent Law and how to calibrate its flow presents a Hobson's choice between the minority students it contributes and the test of constitutional bounds it courts. True enough, the Top Ten Percent Law is in a sense, perhaps a controlling sense, a "facially" race-neutral plan. But it was animated by efforts to increase minority enrollment, and to the extent it succeeds it is because at key points it proxies for race.

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[157] *Fisher*, 645 F.Supp.2d at 593.

A

Appellants propose various baseline levels of diversity which, they suggest, would fully satisfy the University's interest in attaining critical mass. They first argue that if "from 13.5 to 20.1 percent" minority enrollment was adjudged to be great enough diversity each year by Michigan's Law School in *Grutter*, then the 21.4% minority enrollment that UT had achieved prior to reintroducing race-conscious admissions must already have achieved critical mass. We find this comparison inapt for numerous reasons.

Appellants' comparison presumes that critical mass must have some fixed upper bound that applies across different schools, different degrees, different states, different years, different class sizes, and different racial and ethnic subcomposition. It is based on Appellants' continued insistence that the concept of critical mass is defined by the minimum threshold for minority students to have their ideas represented in class discussions and not to feel isolated or like spokespersons for their race. As we have discussed, *Grutter* firmly rejects that premise and defines critical mass by reference to a broader view of diversity.

At oral argument, Appellants qualified this insistence and wisely conceded that what constitutes critical mass in the eyes of one school might not suffice at another. *Grutter* concerned a law school, whereas Appellants challenge UT's undergraduate program. Michigan's Law School operates on a national level, while UT focuses on recruiting and producing future leaders for Texas. The law school enrolled approximately 350 students in its first-year class, few enough students that diversity in the student body readily approximates diversity in the classroom. In contrast, UT enrolls approximately 7,000 undergraduates in its first-year class and has data showing diversity rates vary widely across individual classrooms. African–Americans and Hispanics never represented more than a combined 14.8% of the Michigan Law School's applicant pool during the examined time period,[158] while those same underrepresented minorities were 28% of UT's freshman applicant pool for Fall 2008.[159]

Appellants point to the Supreme Court's observation in *United States v. Virginia* that the Virginia Military Institute "could achieve at least 10% female enrollment—a sufficient critical mass to provide the female cadets with a positive educational experience."[160] But this figure, even if accurate, covers only one component of the multi-faceted concept of diversity elaborated in *Grutter.* In any event, the claim that 10% minority enrollment is a ceiling to critical mass is confounded by *Grutter.*

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[158] *Grutter,* 539 U.S. at 384, 123 S.Ct. 2325 tbls.1–2 (Rehnquist, C.J., dissenting).

[159] *2008 Top Ten Percent Report* at 6 tbl.1.

[160] 518 U.S. 515, 523, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (internal quotation marks omitted).

Appellants lastly note that minority enrollment at UT now exceeds the level it had reached in the mid–1990s, pre- *Hopwood,* when the University was free to obtain any critical mass it wanted through overtly race-based decisions. UT responds that it has consistently maintained, both in the *2004 Proposal* and before this Court, that even before *Hopwood* it had never reached critical mass.[161] While UT was making a greater use of race in that era, its pursuit of diversity was constrained by other interests, such as admitting only well-qualified students. We cannot assume that diversity levels immediately before *Hopwood* were indicative of critical mass. Moreover, minority enrollment in 1996 is not indicative of UT's true pre- *Hopwood* diversity. While admissions decisions in 1996 were not controlled by *Hopwood,* the case impacted enrollment, resulting in fewer minority students. If one instead compares minority enrollment from 1989 to 2004, a different picture emerges. In 2004, UT enrolled significantly fewer African–Americans than it had in 1989 (309 compared to 380). In addition, the 2004 entering class consisted of only 100 more Hispanics than the 1989 class, a low number considering the vast increases in the Hispanic population of Texas. Further, the *2004 Proposal* demonstrated that the percentage of diverse classrooms had declined since 1996.[162] The decrease in classroom diversity will only continue if additional minority representation is not achieved, as the University plans to increase its number of course offerings in future years. Finally, whatever levels of minority enrollment sufficed more than a decade ago may no longer constitute critical mass today, given the social changes Texas has undergone during the intervening years. Appellants' proposed baselines are insufficient reason to doubt UT's considered, good faith conclusion that "the University still has not reached a critical mass at the classroom level."[163]

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[161] *See, e.g., 2004 Proposal* at 24 ("[R]estoration to pre-*Hopwood* levels is not sufficient.").

[162] *Id.* at 25 & tbl.8.

Grutter pointedly refused to tie the concept of "critical mass" to any fixed number. The *Grutter* Court approved of the University of Michigan Law School's goal of attaining critical mass even though the school had specifically abjured any numerical target.[164] The Court recounted how school officials had described "critical mass" only through abstract concepts such as "meaningful numbers," "meaningful representation," and "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."[165] The type of broad diversity *Grutter* approved does not lend itself to any fixed numerical guideposts.

None of this is to say that *Grutter* left "critical mass" without objective meaning. Rather, the legally cognizable interest—attaining a critical mass of underrepresented minority students—"is defined by reference to the educational benefits that diversity is designed to produce."[166] If a plaintiff produces evidence that calls into question a university's good faith pursuit of those educational benefits, its race-conscious admissions policies may be found unconstitutional. We are not persuaded, however, that any of the benchmarks suggested by Appellants succeed at calling that judgment into question.

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[163] *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602).

[164] *Grutter*, 539 U.S. at 318, 123 S.Ct. 2325.

[165] *Id.*

B

As we have observed, benchmarks aside, UT's claim that it has not yet achieved critical mass is less convincing when viewed against the backdrop of the Top Ten Percent Law, which had already driven aggregate minority enrollment up to more than one-fifth of the University's incoming freshman class before less subtle race-conscious admissions were reintroduced.

The chief difficulty with looking to aggregate minority enrollment is that it lumps together distinct minority groups from different backgrounds who may bring various unique contributions to the University environment. African–American and Hispanic students, for example, are not properly interchangeable for purposes of determining critical mass, and a university must be sensitive to important distinctions within these broad groups. In *Parents Involved,* the Supreme Court specifically faulted two school districts for employing "only a limited notion of diversity" that lumped together very different racial groups.[167] One school district classified students exclusively as "white" or "nonwhite"; another labeled them as "black" or "other."[168] This "binary conception of race" runs headlong into the central teaching of *Grutter* and other precedents which instruct that a university must give serious and flexible consideration to all aspects of diversity.[169]

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[166] *Id.* at 330, 123 S.Ct. 2325.

[167] *Parents Involved,* 551 U.S. at 723, 127 S.Ct. 2738.

On this record, we must conclude that the University has acted with appropriate sensitivity to these distinctions. Although the aggregate number of underrepresented minorities may be large, the enrollment statistics for individual groups when UT decided to reintroduce race as a factor in admissions decisions does not indicate critical mass was achieved. Further, we recognize that some year-to-year fluctuation in enrollment numbers is inevitable, so statistics from any single year lack probative force; the University needs to maintain critical mass in years when yield is low just as it does when yield is high.

It is also apparent that UT has given appropriate consideration to whether aggregate minority enrollment is translating into adequate diversity in the classroom. Through two separate studies, the *2004 Proposal* reached a serious and good faith determination that the aggregate number overstates the University's true level of diverse interaction. UT sought to obtain the full educational benefits of diversity as approved in *Grutter* and properly concluded that race-conscious admissions measures would help accomplish its goals.

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[168] *Id.* at 712, 716, 127 S.Ct. 2738.

[169] *Id.* at 735, 127 S.Ct. 2738. Even current labels of "Hispanic," "African–American," or "Asian" may lump very different ethnic groups into a single category.

C

Appellants argue that even if UT had not yet achieved critical mass under race-neutral policies, it had come close enough that the reintroduction of race-conscious measures was unwarranted. Pointing to the Supreme Court's recent decision in *Parents Involved,* they argue that the University's use of race is unnecessary, and therefore not narrowly tailored, because it has only a "minimal effect." The district court thought this was an attempt "to force UT into an impossible catch–22: on the one hand, it is well-established that to be narrowly tailored the means 'must be specifically and narrowly framed to accomplish' the compelling interest, but on the other hand, according to [Appellants], the 'narrowly tailored' plan must have more than a minimal effect."[170]

Parents Involved does not support the cost-benefit analysis that Appellants seek to invoke. Rather, *Parents Involved* was primarily a critique of the school districts' "extreme approach" that used binary racial categories to classify schoolchildren.[171] The Court referred to the "minimal effect" sought by this policy as evidence that other, more narrowly tailored means would be effective to serve the school districts' interests.[172] The Court did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small. To the contrary, Justice Kennedy—who provided the fifth vote in *Parents*

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[170] *Fisher,* 645 F.Supp.2d at 609.

[171] *Parents Involved,* 551 U.S. at 735, 127 S.Ct. 2738.

[172] *Id.* at 733, 127 S.Ct. 2738.

Involved—wrote separately to clarify that "a more nuanced, individual evaluation .... informed by *Grutter*" would be permissible, even for the small gains sought by the school districts.[173]

VIII. CONCLUSION

Mindful of the time frame of this case, we cannot say that under the circumstances before us UT breached its obligation to undertake a "serious, good faith consideration" before resorting to race-conscious measures; yet we speak with caution. In this dynamic environment, our conclusions should not be taken to mean that UT is immune from its obligation to recalibrate its dual systems of admissions as needed, and we cannot bless the university's race-conscious admissions program in perpetuity. Rather, much like judicial approval of a state's redistricting of voter districts, it is good only until the next census count—it is more a process than a fixed structure that we review. The University's formal and informal review processes will confront the stark fact that the Top Ten Percent Law, although soon to be restricted to 75% of the incoming class, increasingly places at risk the use of race in admissions. In 1998, those admitted under the Top Ten Percent Law accounted for 41% of the Texas residents in the freshman class, while in 2008, top ten percent students comprised 81% of enrolled Texan freshmen.[174] This trajectory evidences a risk of eroding the necessity of using race to achieve critical mass with accents that may, if persisted in, increasingly present as an effort to meet quantitative goals drawn from the demographics of race and a defiance of the now-demanded focus upon individuals when considering race.

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[173] *Id.* at 790, 127 S.Ct. 2738 (opinion of Kennedy, J.).

[174] *2008 Top Ten Percent Report* at 7 tbl.1a.

A university may decide to pursue the goal of a diverse student body, and it may do so to the extent it ties that goal to the educational benefits that flow from diversity. The admissions procedures that UT adopted, modeled after the plan approved by the Supreme Court in *Grutter*, are narrowly tailored—procedures in some respects superior to the *Grutter* plan because the University does not keep a running tally of underrepresented minority representation during the admissions process. We are satisfied that the University's decision to reintroduce race-conscious admissions was adequately supported by the "serious, good faith consideration" required by *Grutter*. Finally, it is neither our role nor purpose to dance from *Grutter*'s firm holding that diversity is an interest supporting compelling necessity. Nor are we inclined to do so. The role of black athletes in the southern universities forty years ago presents diversity's potential better than can we, although at that early juncture, it was ability overcoming a barrier of race.[175]

The judgment of the district court is AFFIRMED.

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[175] *See* David K. Wiggins & Patrick B. Miller, THE UNLEVEL PLAYING FIELD: A DOCUMENTARY HISTORY OF THE AFRICAN AMERICAN EXPERIENCE IN SPORT 443 (2003) (quoting Roy Wilkins, who wrote in the 1930s that black athletes "carry more interracial education than all the erudite philosophy ever written on race" (internal quotation marks omitted)).

KING, Circuit Judge, specially concurring:

I concur in the judgment and in the analysis and application of *Grutter* in Judge Higginbotham's opinion. No party challenged, in the district court or in this court, the validity or the wisdom of the Top Ten Percent Law. We have no briefing on those subjects, and the district court did not consider them. Accordingly, I decline to join Judge Higginbotham's opinion insofar as it addresses those subjects.

EMILIO M. GARZA, Circuit Judge, specially concurring:

Whenever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed. So it goes in *Grutter*, where a majority of the Court acknowledged strict scrutiny as the appropriate level of review for race-based preferences in university admissions, but applied a level of scrutiny markedly less demanding. To be specific, race now matters in university admissions, where, if strict judicial scrutiny were properly applied, it should not.

Today, we follow *Grutter*'s lead in finding that the University of Texas's race-conscious admissions program satisfies the Court's unique application of strict scrutiny in the university admissions context. I concur in the majority opinion, because, despite my belief that *Grutter* represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. The Supreme Court has chosen this erroneous path and only the Court can rectify the error. In the meantime, I write separately to underscore this detour from constitutional first principles.

I

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. One of the Amendment's "core principles" is to "do away with all governmentally imposed discriminations based on race," *Palmore v. Sidoti,* 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), and to create "a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 505–06, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). This is why "[r]acial and ethnic distinctions of any sort are inherently suspect and ... call for the most exacting judicial examination." *Miller v. Johnson,* 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (quoting *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265, 291, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.)). It matters not whether the racial preference is characterized as invidious or benign: strict scrutiny applies regardless of "the race of those burdened or benefitted by a particular classification." *Shaw v. Reno,* 509 U.S. 630, 650–51, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (quoting *Croson,* 488 U.S. at 494, 109 S.Ct. 706). To survive such exacting scrutiny, laws classifying citizens on the basis of race must be "narrowly tailored to achieving a compelling state interest." *Miller,* 515 U.S. at 904, 115 S.Ct. 2475.

In *Grutter*, the majority acknowledged these fundamental principles, *see Grutter v. Bollinger*, 539 U.S. 306, 326–27, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), but then departed and held, for the first time, that racial preferences in university admissions could be used to serve a compelling state interest. *Id.* at 328, 123 S.Ct. 2325. Though the Court recognized that strict scrutiny should govern the inquiry into the use of race in university admissions, *id.* at 326, 123 S.Ct. 2325, what the Court applied in practice was something else entirely.

A

The *Grutter* majority asserts that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.' " 539 U.S. at 326, 123 S.Ct. 2325 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). But since the Court began applying strict scrutiny to review governmental uses of race in discriminating between citizens, the number of cases in which the Court has permitted such uses can be counted on one hand.[1]

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[1] *See Grutter*, 539 U.S. at 328, 123 S.Ct. 2325 (recognizing racial diversity "in the context of higher education" as compelling); *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992) (remedying the effects of past intentional discrimination a compelling governmental interest); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944) ("[P]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can."). In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld a federal law that set aside public works monies for minority-owned businesses. Although *Fullilove* has not been expressly overruled, it is unlikely that its holding

The Court has rejected numerous intuitively appealing justifications offered for racial discrimination, such as remedying general societal discrimination, *see Croson,* 488 U.S. at 496–98, 109 S.Ct. 706 (plurality opinion); enhancing the number of minority professionals available to work in underserved minority communities, *see Bakke,* 438 U.S. at 310–11, 98 S.Ct. 2733 (opinion of Powell, J.); and providing role models for minority students, *see Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 275–76, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). In all of these cases, the Court found that the policy goals offered were insufficiently compelling to justify discrimination based on race.

In those rare cases where the use of race properly furthered a compelling state interest, the Court has emphasized that the means chosen must "work the least harm possible," *Bakke,* 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.), and be narrowly tailored to fit the interest "with greater precision than any alternative means." *Grutter,* 539 U.S. at 379, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting) (quotation omitted). Moreover, the failure to consider available race-neutral alternatives and employ them if efficacious would cause a program to fail strict scrutiny. *See Wygant,* 476 U.S. at 280 n. 6, 106 S.Ct. 1842 (plurality opinion) (the "term 'narrowly tailored' ... requires consideration of whether lawful alternative and less restrictive means could have

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survives the Court's later Equal Protection decisions. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.3.5, at 738, 742–43 (3d ed.2006). *Korematsu*'s authority is likewise suspect.

been used."); *see also Adarand,* 515 U.S. at 237–38, 115 S.Ct. 2097; *Croson,* 488 U.S. at 507, 109 S.Ct. 706; *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

Beyond the use of race-neutral alternatives, the Court, pre- *Grutter,* had considered several other factors in determining whether race-conscious programs were narrowly tailored. Programs employing a quota system would fail this inquiry, as would programs of unlimited duration. *See Bakke,* 438 U.S. at 315–18, 98 S.Ct. 2733; *Croson,* 488 U.S. at 498, 109 S.Ct. 706. The Court looked to a program's flexibility and its capacity for individualized consideration. *See United States v. Paradise,* 480 U.S. 149, 177, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality opinion); *Croson,* 488 U.S. at 508, 109 S.Ct. 706. The Court also considered the relationship between the numerical goal and the percentage of minority group members in the relevant population, and whether the means chosen were likely to be overinclusive. *See Croson,* 488 U.S. at 506–10, 109 S.Ct. 706. Finally, the Court considered the program's burden on innocent third parties. *See, e.g., Metro Broad., Inc. v. FCC,* 497 U.S. 547, 630, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting) (programs should not "unduly burden individuals who are not members of the favored racial and ethnic groups"); *Bakke,* 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.).

Grutter changed this. After finding that racial diversity at the University of Michigan Law School ("Law

School") was a compelling governmental interest, the Court redefined the meaning of narrow tailoring. *See Grutter*, 539 U.S. at 387, 123 S.Ct. 2325 (Kennedy, J., dissenting) ("The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents."); *see generally* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517 (2007). The Court replaced narrow tailoring's conventional "least restrictive means" requirement with a regime that encourages opacity and is incapable of meaningful judicial review under any level of scrutiny. Courts now simply assume, in the absence of evidence to the contrary, that university administrators have acted in good faith in pursuing racial diversity, and courts are required to defer to their educational judgments on how best to achieve it. *Grutter*, 539 U.S. at 328–29, 123 S.Ct. 2325. What is more, the deference called for in *Grutter* seems to allow universities, rather than the courts, to determine when the use of racial preferences is no longer compelling. *See id.* at 343, 123 S.Ct. 2325 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."). This new species of strict scrutiny ensures that only those admissions programs employing the most heavy-handed racial preferences, and those programs foolish enough to maintain and provide conclusive data, will be subject to "exacting judicial examination." *Miller*, 515 U.S. at 904, 115 S.Ct. 2475. Others, like the University of Michigan in *Grutter*, and the University of Texas here, can get away with something less.

B

Setting aside for a moment *Grutter*'s finding that racial diversity within the Law School was a compelling state interest, *see infra* Sections I.D and III, I find troubling the Court's treatment of whether the Law School's chosen means—using race as a "plus" factor—was narrowly tailored to achieving that end. The Court discussed five hallmarks of a narrowly tailored race-conscious admissions program in answering this question: (1) the absence of quotas; (2) a program that does not unduly harm any racial group; (3) serious, good-faith consideration of race-neutral alternatives; (4) a program that contains a sunset provision or some logical end point; and (5) individualized consideration of all applicants. *See* 539 U.S. at 335–43, 123 S.Ct. 2325. The Court's opinion effectively emptied at least three of these criteria of their probative content, leaving the first and fifth as determinative in any narrow tailoring inquiry. *See* Ayres & Foster, 85 TEX. L. REV. at 543.

First, *Grutter* defined a quota as reserving a fixed number or percentage of opportunities for certain minority groups, and insulating individuals from those groups from competition with all other candidates for available seats. *Id.* at 333–36, 123 S.Ct. 2325. These prohibitions were clear well before *Grutter. See Bakke*, 438 U.S. at 317, 98 S.Ct. 2733; *Croson*, 488 U.S. at 496, 109 S.Ct. 706. Only those programs with overt numerical set-asides or separate minority admissions tracks would fail this requirement.

Next, the Court found that race-conscious admissions programs do not unduly burden innocent third parties so long as they provide individualized consideration. *Grutter*, 539 U.S. at 341, 123 S.Ct. 2325 ("[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."). Here, the Court collapsed the second narrow tailoring criterion into the fifth.

Grutter also held that there were no workable race-neutral alternatives at the Law School, such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." *Id.* at 340, 123 S.Ct. 2325. The Court likewise rejected the United States' argument that the Law School's plan was not narrowly tailored because race-neutral alternatives that had proven effective elsewhere (i.e., the percentage plans utilized in California, Florida, and Texas) were available and would deliver the educational benefits the Law School was seeking. *Id.* The Court held that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative .... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.* at 339, 123 S.Ct. 2325. After *Grutter*, universities are no longer required to use the *most effective* race-neutral means. So long as admissions officials have given "serious, good faith consideration" to such programs, they are free to pursue less effective alternatives that serve the interest "about as well." *Id.* (citing *Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct.

1842 (plurality opinion)). Thus, this third criterion is now essentially without meaning. Given the deference that universities' educational judgments are to be afforded post- *Grutter,* "serious, good faith consideration" is a peculiarly low bar that will be satisfied in most every case. *Compare id.* at 339, 123 S.Ct. 2325 (narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives"), *with id.* at 329, 123 S.Ct. 2325 ("[G]ood faith on the part of a university is 'presumed' absent a showing to the contrary.") (citation and internal quotation marks omitted).

Finally, while the Court acknowledged that race-conscious admissions programs must be limited in time, such as by sunset provisions or periodic reviews to determine whether the preferences remain necessary, the Court suspended application of this criterion for twenty-five years. *Id.* at 343, 123 S.Ct. 2325 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). In doing so, the *Grutter* majority simply accepted the Law School's promise that it would terminate its race-conscious policies as soon as possible. *See id.* at 343, 123 S.Ct. 2325 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."). The Court's approval here is remarkable given the constitutional gravity of this experiment (i.e., the Law School's allocation of preferences along racial lines). This fourth criterion will now be considered satisfied with little or no showing on the part of university administrators, at least until 2028.

And thus, all that truly remains of strict scrutiny's narrow tailoring inquiry post- *Grutter* is the requirement of "individualized consideration." But what does this term mean specifically? *Grutter* never tells us. Moreover, the weight given to race as part of this individualized consideration is purposefully left undefined, making meaningful judicial review all but impossible.

C

In *Grutter,* the University of Michigan Law School sought to achieve a student body that was both academically strong and diverse along several dimensions, including race. There, the Court endorsed the Law School's "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337, 123 S.Ct. 2325. The Court noted approvingly that the Law School had "no policy ... of automatic acceptance or rejection based on any single 'soft' variable." *Id.* The *Grutter* majority permitted the use of race and ethnicity as "plus" factors within the Law School's holistic review, but this simply raises the question: how much of a plus?[2] *Grutter* did not say.

Instead, the Court implicitly forbade universities from quantifying racial preferences in their admissions calculus. Contrasting the admissions system found unconstitutional in *Gratz*, the *Grutter* majority noted that "the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.* (citing *Gratz v. Bollinger*, 539 U.S. 244, 271–72, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003)). On this view, rigid point systems that allocate preference points for racial and ethnic status are unconstitutional because they "preclude[ ] admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter* requires." *Gratz*, 539 U.S. at 277, 123 S.Ct. 2411 (O'Connor, J., concurring) (citation omitted).

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[2] The Court's discussion of race as a "plus" factor takes place in the context of strict scrutiny's narrow tailoring inquiry. Whether race should be considered at all is a separate, more fundamental, matter. *See infra* Section III.

But it is not clear, to me at least, how using race in the holistic scoring system approved in *Grutter* is constitutionally distinct from the point-based system rejected in *Gratz*.[3] If two applicants, one a preferred minority and one nonminority, with application packets *identical* in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz?* Although one system quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.

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[3] Although I do not believe the government's use of race in university admissions can ever serve a compelling interest, assuming that it can, there is no reason why a well-designed point system could not account for an applicant's race, among other variables, and yet still provide meaningful, individualized consideration. *See* Ayres & Foster, 85 TEX. L. REV. at 566–70; *see also Gratz*, 539 U.S. at 295, 123 S.Ct. 2411 (Souter, J., dissenting) ("[I]t is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its 'holistic review'; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration ...." (citation omitted)).

Grutter's new terminology like "individualized consideration" and "holistic review" tends to conceal this result. By obscuring the University of Michigan's use of race in these diffuse tests, the Court allowed the Law School to do covertly what the undergraduate program could not do overtly. *See Gratz*, 539 U.S. at 270–76, 123 S.Ct. 2411. This much is clear and has been discussed elsewhere.[4] I write separately to add my view, confirmed while deciding this appeal, that *Grutter*'s narrow tailoring inquiry—now reduced to testing for individualized consideration—is incapable of meaningful judicial review.

Traditionally, strict scrutiny required that the overall benefits of programs employing racial classifications justified the overall costs.[5] *See* Ayres & Foster, 85 TEX. L. REV. at 526 & n. 38. In *Grutter*, not only did the Court fail to conduct such an analysis, it rejected the only means for measuring the constitutionally relevant costs and benefits. *Id.* Although I disagree with the Court that race-conscious policies can ever serve a compelling interest in university admissions, by prohibiting race and ethnicity from being quantified at all, *Grutter* eliminated any chance for courts to critically evaluate whether race is, in fact, the defining feature of an admissions packet. Post- *Grutter,* there is no way to assess how much of a "plus" race gets as a plus-factor in any admissions system. And without the ability to measure the number of "but-for" admits (i.e., admitted minority students for whom race was the decisive factor), courts cannot meaningfully evaluate whether a university's use of race fits its asserted interest narrowly. *See id.* at 527–41, 575–82.[6] In short, it is impossible to subject such uses of race to strict scrutiny. *Grutter* rewards admissions programs that remain opaque.

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[4] *See, e.g.*, Larry Alexander & Maimon Schwarzschild, Grutter *or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3 (2004); CHEMERINSKY, CONSTITUTIONAL LAW 744.

[5] For example, a race-conscious admissions policy that added just one, three, or five members of a preferred minority group to an enrolling class of 6,700 would fail to be narrowly tailored. Such a program would have an intolerably high cost for little return. *See infra* Section II.

Even assuming the Court's "educational benefits of diversity" justification holds true, *see infra* Section I.D, there are far more effective *race-neutral* means of screening for the educational benefits that states like Michigan and Texas ostensibly seek. To the degree that state universities genuinely desire students with diverse backgrounds and experiences, race-neutral factors like specific hardships overcome, extensive travel, leadership positions held, volunteer and work experience, dedication to particular causes, and extracurricular activities, among many other variables, can be articulated with specificity in the admissions essays.[7] These markers for viewpoint diversity are far more likely to translate into enhanced classroom dialogue than a blanket presumption that race will do the same. Moreover, these markers represent the kind of life experiences that reflect industry. Race cannot. While race inevitably colors an individual's life and views, that facet of race and its impact on the individual can be described with some precision through an admissions essay. We should not presume that race shapes everyone's experiences in the same ways and award preference (or a bonus, or a "plus") accordingly. Such a policy, however labeled, is not narrowly tailored.

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[6] *See also id.* at 528 n. 42 (citing, *inter alia,* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 31–39 (1998)) (observing that the degree of racial preferences can be measured by examining the number of but-for admits and the qualification differentials between but-for admits and nonpreferred applicants who would have been admitted in the absence of affirmative action).

Finally, the Court's unusual deference to educators' academic judgments that racial diversity is a compelling interest, coupled with the deference allegedly owed to their determination of when the use of race is no longer necessary, *see id.* at 343, 123 S.Ct. 2325, would appear to permit race-based policies indefinitely. For example, notwithstanding that a university's race-conscious policies had achieved 25% African–American and 25% Hispanic enrollment in the student body generally, that university could still justify the use of race in admissions if these minority students were disproportionately bunched in a small number of classes or majors. In fact, the majority's application of *Grutter* today reaches just such a result.

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[7] In addition to the two essays that UT requires as part of each application packet, the University considers several of the factors described above in determining an applicant's personal achievement score. *See Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587, 597 (W.D.Tex.2009) ("The third [Personal Achievement Index] element is the personal achievement score, which is based on an evaluation of the file in its entirety by senior members of the admissions staff. The evaluators conduct a holistic review considering the applicant's demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances.").

Despite Top Ten Percent's demonstrable impact on minority enrollment at the University of Texas, the majority opinion holds that the University's use of race in admissions can be justified by reference to the paucity of minority students in certain majors:

> While the [Top Ten Percent] Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, severely limiting the beneficial effects of educational diversity. For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African–American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African–American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African–American. It is evident that if UT is to have diverse interactions, it needs more

> minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs.

Ante at 240. If this is so, a university's asserted interested in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom.

Given the "large-scale absence of African–American and Hispanic students from thousands of classes" at the University of Texas, *Fisher*, 645 F.Supp.2d at 607, today's decision ratifies the University's reliance on race at the departmental and classroom levels, and will, in practice, allow for race-based preferences in seeming perpetuity. Such a use of race "has no logical stopping point" and is not narrowly tailored. *See Croson*, 488 U.S. at 498, 109 S.Ct. 706 (citing *Wygant*, 476 U.S. at 275, 106 S.Ct. 1842). Allowing race-based social engineering at the university level is one thing, but not nearly as invasive as condoning it at the classroom level. I cannot accept that the Fourteenth Amendment permits this level of granularity to justify dividing students along racial lines.

D

The same imprecision that characterizes *Grutter*'s narrow tailoring analysis casts doubt on its discussion of racial diversity as a compelling state interest. *Grutter* found that the Law School had a compelling interest in "securing the educational benefits of a diverse student body," and that achieving a "critical mass" of racially diverse students was necessary to accomplish that goal. *Id.* at 333, 123 S.Ct. 2325. The Law School defined "critical mass" as "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated ... or like spokespersons for their race." *Id.* at 318–19, 123 S.Ct. 2325. The Court clarified: "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id.* at 330, 123 S.Ct. 2325. Justice O'Connor's majority opinion identified three such constitutionally relevant benefits: (i) increased perspective in the classroom; (ii) improved professional training; and (iii) enhanced civic engagement. *Id.* at 330–33, 123 S.Ct. 2325. The first element is based on Justice Powell's focus in *Bakke* on the campus-level benefits of diversity. The second two are new.[8]

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[8] *See* Robert C. Post, *The Supreme Court, 2002 Term—Forward: Fashioning the Legal Constitution: Culture, Courts, and Law,* 117 HARV. L. REV. . 4, 59–60 (2003) ("Although *Grutter* casts itself as merely endorsing Justice Powell's opinion in Bakke, *Grutter*'s analysis of diversity actually differs quite dramatically from Powell's. Powell conceptualized diversity as a value intrinsic to the educational process itself. He regarded diversity as essential to 'the quality of higher education,' because education was a practice of enlightenment, 'of speculation, experiment, and creation,' that thrived on the 'robust exchange of ideas; characteristically provoked by confrontation between persons of distinct life experiences .... [*Grutter*] instead conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership .... *Grutter*'s justifications for diversity thus potentially reach far more widely than do Powell's."); *see also* Ayres & Foster, 85 TEX. L. REV. at 578 n.215 (citing commentary).

My difficulty with *Grutter*'s "educational benefits of diversity" discussion is that it remains suspended at the highest levels of hypothesis and speculation. And unlike ordinary hypotheses, which must be testable to be valid, *Grutter*'s thesis is incapable of testing. Justice O'Connor's majority opinion rests almost entirely on intuitive appeal rather than concrete evidence.

1

The first constitutionally relevant benefit that makes up *Grutter*'s compelling interest is racial diversity's direct impact in the classroom. Here, the Court concluded that diverse perspectives improve the overall quality of education because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when students have the greatest possible variety of backgrounds." *Id.* at 330, 123 S.Ct. 2325 (internal quotation marks omitted). This rationale conforms to Justice Powell's opinion in *Bakke* that universities should pursue "[t]he atmosphere of speculation, excitement and creation" that is "promoted by a diverse student body." 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.).[9] I question the validity of this surmise.

Nonetheless, assuming a critical mass of minority students could perceptibly improve the quality of classroom learning, how would we measure success? By polling students and professors, as the University of Texas has done?[10] How would we know whether the substantial social harm we are tolerating by dividing students based on race is worth the cost? That classroom discussion is, in fact, being enhanced? How can a party prove that it is? How can an opposing party prove that it is not?

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[9] Justice Powell's opinion in *Bakke* conspicuously avoided claiming a categorical educational benefit of diversity, asserting only the potential for such benefits. *See* 438 U.S. at 314, 98 S.Ct. 2733 (opinion of Powell, J.).

My concern with allowing viewpoint diversity's alleged benefits to justify racial preference is that viewpoint diversity is too theoretical and abstract. It cannot be proved or disproved. Sure, the *Grutter* majority cited to expert reports and amicus briefs from corporate employers as evidence that student body diversity improves educational outcomes and better prepares students for the workforce. *Id.* at 330, 123 S.Ct. 2325. But this support can be easily manipulated.[11] If all a university "need do is find ... report[s]," studies, or surveys to implement a race-conscious admissions policy, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson,* 488 U.S. at 504, 109 S.Ct. 706; *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n. 11, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) ("[C]lassifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalizations."). *Grutter* permits race-based preferences on nothing more than intuition—the type that strict scrutiny is designed to protect against. *See* 539 U.S. at 327, 123 S.Ct. 2325 ("Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.") (citation and internal quotation marks omitted).

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[10] Every measure of social benefit or harm would be subjective and, at worst, capable of manipulation through framing biases.

[11] *See* Alexander & Schwarzschild, 21 CONST. COMMENT. at 5 n.9 (criticizing the Court's undue reliance on amicus briefs from corporate employers).

Grutter and *Bakke* err by simply assuming that racial diversity begets greater viewpoint diversity. This inference is based on the assumption that members of minority groups, *because of* their racial status, are likely to have unique experiences and perspectives incapable of expression by individuals from outside that group. But as the Court has recognized elsewhere, the Constitution prohibits state decisionmakers from presuming that groups of individuals, whether classified by race, ethnicity, or gender, share such a quality collectively. *See Miller,* 515 U.S. at 914, 115 S.Ct. 2475 (the Equal Protection Clause forbids "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens.") (citation omitted). There is no one African–American or Hispanic viewpoint,[12] and, in fact, *Grutter* approved the Law

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[12] For example, life experiences differ significantly if a Hispanic student's ethnicity originates in Mexico as opposed to Spain, or, for that matter, any of various Central and South American countries. Likewise, an African–American student whose roots come from Nigeria would be distinct in culture and ethnicity from a student whose ancestry originated in Egypt or Haiti. This same principle applies for students from non-preferred

School's diversity rationale precisely because of the role that racial diversity can play in dispelling such falsehoods. *See id.* at 320, 123 S.Ct. 2325 (citing expert testimony suggesting that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."); and *id.* at 333, 123 S.Ct. 2325 ("[D]iminishing the force of such stereotypes is a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students.").

Grutter sought to have it both ways. The Court held that racial diversity was necessary to eradicate the notion that minority students think and behave, not as individuals, but as a race. At the same time, the Court approved a policy granting race-based preferences on the assumption that racial status correlates with greater diversity of viewpoints.

2

Grutter's second asserted educational benefit of diversity relates to improved professional training. Here, Justice O'Connor writes that diversity "promotes cross-racial understanding, helps to break down racial

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racial classes. For example, second-generation students from English, Irish, Scottish, or Australian ancestry would come with very different cultural experiences, and yet all of these students would be grouped together as "White" in racial classification systems like the one used at the University of Texas.

stereotypes, and enables students to better understand persons of different races." *Id.* at 330, 123 S.Ct. 2325 (internal quotation marks and brackets omitted). Such training is essential, the argument goes, for future leaders who will eventually work within and supervise a racially diverse workforce. *Id.* at 330–31, 123 S.Ct. 2325.

State universities are free to define their educational goals as broadly as needed to serve the public interest. We defer to educators' professional judgments in setting those goals. *Grutter,* 539 U.S. at 328, 123 S.Ct. 2325 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally proscribed limits."). My concern, discussed throughout this opinion, is not that *Grutter* commands such deference, but that it conflated the deference owed to a university's asserted interest with deference to the means used to attain it. *See id.* at 388, 123 S.Ct. 2325 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal.").

There is, however, one aspect of the Court's "improved professional training" rationale that I find especially troubling. While *Grutter* made much of the role that educational institutions play in providing professional training, *see id.* at 331, 123 S.Ct. 2325 ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship"), the cases the Court relied on involved primary and secondary schools. *See id.* (citing *Plyler v. Doe,* 457 U.S. 202, 221, 102

S.Ct. 2382, 72 L.Ed.2d 786 (1982) (describing education as pivotal to "sustaining our political and cultural heritage") and *ibid.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("education ... is the very foundation of good citizenship.")). I question whether these cases apply with equal force in the context of higher education, where academic goals are vastly different from those pursued in elementary and secondary schools. Moreover, a university's self-styled educational goals, for example, promoting "cross-racial understanding" and enabling students "to better understand persons of different races," could just as easily be facilitated in many other public settings where diverse people assemble regularly: in the workplace, in primary and secondary schools, and in social and community groups. *See Grutter,* 539 U.S. at 347–48, 123 S.Ct. 2325 (Scalia, J., dissenting). I do not believe that the university has a monopoly on furthering these societal goals, or even that the university is in the best position to further such goals. Notwithstanding an institution's decision to expand its educational mission more broadly, the university's core function is to educate students in the physical sciences, engineering, social sciences, business and the humanities, among other academic disciplines.

3

Finally, *Grutter* articulated a third benefit of racial diversity in higher education: enhancing civic engagement. Here, the Court wrote that:

> Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of educational institutions that provide this training .... Access to [higher] education ... must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.
>
> *Id.* at 332–33, 123 S.Ct. 2325.

Unlike the first two "educational benefits of diversity," which focused on improving classroom discussion and professional training, this third claimed benefit plainly has nothing to do with the university's core education and training functions. Instead, *Grutter* is concerned here with role that higher education plays in a democratic society, and the Court suggests that affirmative action at public universities can advance a societal goal of encouraging minority participation in civic life.[13] This proposition lacks foundation.

If a significant portion of a minority community sees our nation's leaders as illegitimate or lacks confidence in the integrity of our educational institutions, as *Grutter* posits in the block quote above, *see id.,* 539 U.S. at 332, 123 S.Ct. 2325, I doubt that suspending the prevalent constitutional rules to allow preferred treatment for as few as 15–40 students, *see infra* Section II, is likely to foster renewed civic participation from among that community as a whole.[14]

Grutter replaced *Bakke's* emphasis on diversity in educational *inputs* with a new emphasis on diversity in educational *outputs*. By expanding Justice Powell's original viewpoint diversity rationale to include diversity's putative benefits in the workforce and beyond (i.e., inspiring a sense of civic belonging in discouraged minority communities), the Court has endorsed a compelling interest without bounds. Post- *Grutter*, it matters little whether racial preferences in university admissions are justified by reference to their potential for improved discussion in individual classrooms, or even at the university generally. Now such preferences can be justified based on their global impact. By removing the focus of attention from diversity's educational value at the campus level, the Court has ensured that the "educational benefits of diversity" will accommodate all university affirmative action plans as compelling.

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[13] *See* Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals,* 117 HARV. L. REV.. 113, 174–76 (2003).

[14] This is not to criticize universities, like the University of Texas, for implementing policies that seek to increase minority representation, not merely for its educational benefits on campus, but also for the secondary benefits that such increases in minority enrollment can have in the workplace and in society generally. A university degree confers professional and leadership opportunities unavailable otherwise, and ensuring that all segments of society have meaningful access to public institutions of higher education "represents a paramount government objective." *Grutter,* 539 U.S. at 331–32, 123 S.Ct. 2325 (citing Brief of United States as Amicus Curiae 13). I do not question this goal, but rather the constitutionality of using race to attain it.

E

Finally, by using metaphors, like "critical mass," and indefinite terms that lack conceptual or analytical precision, but rather sound in abject subjectivity, to dress up constitutional standards, *Grutter* fails to provide any predictive value to courts and university administrators tasked with applying these standards consistently. And notwithstanding the Court's nod to federalism, *Grutter*'s ambiguity discourages States from experimenting or departing from the one accepted norm. *See id.* at 342, 123 S.Ct. 2325 (citing *United States v. Lopez*, 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.")). In the absence of clear guidance, public universities nationwide will simply model their programs after the one approved in *Grutter* rather than struggle with the risks and uncertain benefits of experimentation. That is exactly what has occurred here. With one exception—the Top Ten Percent law—the race-conscious admissions policy that we review today is identical to the program used at the Law School.

II

As mentioned at the outset, I concur in the opinion because I believe today's decision is a faithful application of *Grutter*'s teachings, however flawed I may find those teachings to be. I am compelled to follow the Court's unusual deference towards public university administrators in their assessment that racial diversity is a compelling interest, as well as the Court's refashioned narrow-tailoring inquiry. *See* 28 U.S.C. § 453. My difficulty is not necessarily with today's decision, but with the one that drives it. Nonetheless, there is one aspect of Judge Higginbotham's thoughtful opinion that gives me pause about whether *Grutter* compels the result we reach today. Ultimately, and regrettably, I recognize that the deference called for by *Grutter* may make this concern superfluous.

As today's opinion notes, the University of Texas's race-conscious admissions policy is nearly indistinguishable from the program approved by the Supreme Court in *Grutter*.[15] *Ante* at 216–17, 217–18, 230. As such, the majority opinion summarily finds that, like the Law School in *Grutter*, the University of Texas has a compelling interest in obtaining the educational benefits of diversity in its undergraduate program. *Id.* at 230–31. After affording all deference due, today's decision focuses on the efficacy of the University's race-conscious admissions policy. *Id.* at 232–33 ("[W]hile we focus on the University's decision to adopt a *Grutter*-like plan, admissions outcomes remain relevant evidence of the plan's necessity—a reality check."). In my view, the efficacy of the University's race-based admissions policy is more than merely relevant, it is dispositive.

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[15] As a result, UT's policy suffers from all the same defects as the Law School policy evaluated in *Grutter* and discussed previously in this opinion. *See supra* Section I.

The plaintiffs here argue that the University of Texas's interest in obtaining a racially diverse student body is not compelling because the University has already achieved critical mass by way of Texas's Top Ten Percent law. *See* TEX. EDUC. CODE § 51.803 (1997). The University disagrees. This claim is difficult to evaluate. The University refuses to assign a weight to race or to maintain conclusive data on the degree to which race factors into admissions decisions and enrollment yields. *See Fisher*, 645 F.Supp.2d at 608–09 ("At no point in the process is race considered individually or given a numerical value; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context."). Whether the University of Texas's use of race is narrowly tailored turns on whether its chosen means—using race as a plus factor in the University's holistic scoring system—are effective, not just in theory, but also in practice.

If, apart from the Top Ten Percent law, the University of Texas's race-conscious admissions program added just three-to-five African–American students, or five-to-ten Hispanic students, to an entering freshman class of 6,700, that policy would completely fail to achieve its aims and would not be narrowly tailored. *See* Ayres & Foster, 85 TEX. L. REV. at 523 n. 27 ("At least as a theoretical matter, narrow tailoring requires not only that the preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest."). The marginal benefit of adding just five or ten minority students to a class of this size would be negligible and have no perceptible impact on the "educational benefits that diversity is designed to produce." *Grutter,* 539 U.S. at 330, 123 S.Ct. 2325 ("[C]ritical mass is defined by reference to the educational benefits that diversity is designed to produce.").[16] This is especially so, if, as the district court suggests, "the large-scale absence of African–American and Hispanic students from thousands of classes indicates UT has not reached sufficient critical mass for its students to benefit from diversity and illustrates UT's need to consider race as a factor in admissions in order to achieve those benefits." *Fisher*, 645 F.Supp.2d at 607 (citing statistics showing that in 2002, the University offered over 5,631 classes, 79% of which (4,448) had just one or zero African-American students; 30% of classes (1,689) had zero or one Hispanic students).[17] So, the controlling question is, "Is the University of Texas's race-conscious policy effective?" And by effective, I do not mean that every statistically insignificant gain (i.e., adding one, three, or five students at the margin) qualifies. The constitutional inquiry for me concerns whether the University's program meaningfully furthers its intended goal of increasing racial diversity on the road to critical mass. I find it does not.

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[16] *See Bakke,* 438 U.S. at 316, 98 S.Ct. 2733 (opinion of Powell, J.) (noting the "necessity of including more than a token number of black students"). *See also* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes,* 72 HARV. EDUC. REV.. 330, 360–61 (2002) (enrolling "significant numbers of students of various groups" is necessary to enable students to "perceive differences both within groups and between groups"); Kathryn R.L. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale,* 54 J. LEGAL. EDUC.. 316, 332–34 (2004) (noting that under a cost-benefit analysis it may be more difficult to justify an affirmative action program when a university is unable to enroll a critical mass of minority applicants).

In the 2008 admissions cycle, 29,501 students applied to the University of Texas. *See Fisher*, 645 F.Supp.2d at 590. Less than half, 12,843, were admitted and 6,715 ultimately enrolled.[18] *Id.* Of these enrolled students, 6,322 came from Texas high schools.[19] *See Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin*, October 28, 2008 at 7 ("*2008 Top Ten Percent Report*"). 5,114 (80.9% of enrolled Texas residents) of these students were a product of Top Ten Percent, meaning that, at most, 1,208 (19.1%) enrolled non-Top Ten Percent Texas residents had been evaluated on the basis of their AI/PAI scores. *Id.*

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[17] These statistics represent all classes at UT with five or more students, including large lecture courses. For classes with five to 24 students—the most likely to foster the vibrant discussion described in *Grutter* and *Bakke*—the figures are more revealing. In 2002, UT offered 3,616 classes with five to 24 students. Of these, 90% had one or zero African-American students and 43% had one or zero Hispanic students. *See* Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004 at 26, Table 8.

[18] Today's decision, like the district court's, alternates between using statistics from admitted and enrolled students. If realizing the educational benefits of diversity is the University's asserted interest, only the data for enrolled students is relevant to our review.

Of the 363 African–American freshmen from Texas high schools that were admitted and enrolled (6% of the 6,322–member enrolling class from Texas high schools),

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[19] In the discussion that follows, I use the number of enrolled Texas residents (6,322) as a baseline rather than the aggregate enrollment for first-time freshman (6,715). There are two reasons for this. First, this case asks us to decide the necessity of UT's race-conscious admissions policy in light of Texas's Top Ten Percent law. I find this question is evaluated most effectively by comparing enrollment data for Texas residents, which include precise figures for Top 10% and Non–Top 10% enrollees. Second, as the majority opinion recognizes, *ante* at 241–42 n. 155, the record does not include data showing what portion of the total applicant pool were Texas residents and what portion came from out-of-state. This is problematic. We know, for example, that the 2008 entering freshman class included 375 African–American and 1,338 Hispanic students, and that 363 and 1,322 of these students, respectively, were Texas residents. *See 2008 Top Ten Percent Report* at 6–7. So, although we know that the 2008 enrolling freshman class included 12 African–American and 16 Hispanic students from out-of-state, we cannot intelligently discuss the potential impact of UT's race-conscious policy on this data set without also having total application and admissions information available for non-Texas residents. This does not affect my conclusions—the number of non-Texas African–American and Hispanic students enrolled in the freshman class is statistically insignificant.

305 (4.8%) were a product of Top Ten Percent, while 58 (0.92%) African–American enrollees had been evaluated on the basis of their AI/PAI scores.[20] *See 2008 Top Ten Percent Report* at 7. For the 1,322 (21%) total enrolled in-state Hispanic students, 1,164 (18.4% of enrolled in-state students) were a product of Top Ten Percent, while 158 (2.5%) had been evaluated on the basis of their AI/PAI scores. *Id.* We know that in some cases an applicants' AI score is high enough that the applicant is granted admission based on that score alone. But we do not have data to show how many of these 58 African–American and 158 Hispanic students were admitted automatically based on their AI scores, which are race-neutral, and how many were admitted after factoring in the students' PAI scores, which use the University's *Grutter*-like holistic evaluation plan and include consideration of an applicant's race as one of seven "special circumstances." Nonetheless, assuming that *all* 58 and 158 African–American and Hispanic students, respectively, were admitted on the basis of their combined AI and PAI scores (i.e., that none of these minority students gained admission on the basis of their race-neutral Academic Index score alone), the question is whether the University's use of race, which is a "highly suspect tool," *Croson,* 488 U.S. at 493, 109 S.Ct. 706, as part of the PAI score contributes a statistically significant enough number of minority students to affect critical mass at the University of Texas.

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[20] In this section, I often refer to a raw number followed by a percentage listed in parentheses. *E.g.,* "305 (4.8%)." This percentage figure (__%) is calculated by dividing number of students cited by 6,322, the number of enrolled Texas residents in the 2008 freshman class.

We do not know, because the University does not maintain data, the degree to which race influenced the University's admissions decisions for any of these enrolled students or how many of these students would not have been admitted but-for the use of race as a plus factor. But assuming the University gave race decisive weight in each of these 58 African–American and 158 Hispanic students' admissions decisions, those students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322–person enrolling in-state freshman class. And this is assuming a 100%, unconstitutional use of race, not as a plus factor, but as a categorical condition for guaranteed admission. *See Grutter*, 539 U.S. at 329–30, 123 S.Ct. 2325 (making race an automatic factor in admissions would "amount to outright racial balancing, which is patently unconstitutional.").

Assume further, that such a prohibited use of race was employed in only half of the University's admissions decisions. This would still only yield 29 (0.46%) African–American and 79 (1.25%) Hispanic students.

Now assume that the University's use of race is truly holistic; that given the multitude of other race-neutral variables the University considers and values sincerely, race's significance is limited in any individual application packet. *See Fisher*, 645 F.Supp.2d at 608 ("UT considers race in its admissions process as a factor of a factor of a factor of a factor. As described in exhaustive detail above, race is one of seven 'special circumstances,' which is in turn one of six factors that make up an applicants personal achievement score."). Lastly, assume that in this system, the University's use of race results in a but-for offer of admission in one-quarter of the decisions. A twenty-five percent but-for admissions rate seems highly improbable if race is truly limited in its holistic weighting, but the unlikelihood of the assumption proves my point. Even under such a system, the University's proper use of race holistically would only yield 15 (0.24%) African–American and 40 (0.62%) Hispanic students. African–American students, for example, admitted and enrolled by way of this holistic system would still only constitute *two-tenths of one percent* of the University of Texas's 2008 entering freshman class. Such a use of race could have no discernable impact on the classroom-level "educational benefits diversity is designed to produce" or otherwise influence "critical mass" at the University of Texas generally. Such a plan exacts a cost disproportionate to its benefit and is not narrowly tailored. This is especially so on a university campus with, for example, 4,448 classes (out of 5,631) with zero or one African–American students, and 1,689 classes with zero or one Hispanic students. *Fisher*, 645 F.Supp.2d at 607.

More importantly, if the figures above are reasonably accurate, the University's use of race also fails *Grutter*'s compelling interest test as a factual matter. *See* 539 U.S. at 333, 123 S.Ct. 2325 ("[D]iminishing the force of [racial] stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."). From its inception immediately following *Grutter*, the University's race-conscious admissions policy was described as essential to the University of Texas's educational mission:

> [T]o accomplish [UT's] mission and fulfill its flagship role ... the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds. The proposal to consider race in the admissions process is not an exercise in racial balancing but an acknowledgment that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission.

Fisher, 645 F.Supp.2d at 602 (citing Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004 at 24). If the University's use of race is truly necessary to accomplish its educational function, then as a factual matter, the University of Texas's race-conscious measures have been completely ineffectual in accomplishing its claimed compelling interest.

In contrast, Top Ten Percent was responsible for contributing 305 and 1,164 African-American and Hispanic students, respectively, to the entering 2008 freshman class using entirely race-neutral means. These students represent 4.8% and 18.4% of the entering in-state freshman class. In addition, of the 58 African-American and 158 Hispanic enrolled students evaluated on the basis of their AI and PAI scores, if the University's use of race was truly holistic, the percentage of these students for whom race was a decisive factor (i.e., but-for admits) should be minimal. In other words, the vast majority of these 58 and 158 students were admitted based on objective factors other than race. That is, the University was able to obtain approximately 96% of the African–American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means. And although the University argues that this number still does not qualify as critical mass, one thing is certain: the University of Texas's use of race has had an infinitesimal impact on critical mass in the student body as a whole. As such, the University's use of race can be neither compelling nor narrowly tailored.

I do not envy the admissions officials at the University of Texas. In 1997, in response to our decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.1996), the people of the State of Texas determined, through their elected representatives, that something needed to be done to improve minority enrollment at Texas's public institutions of higher education. Texas's Top Ten Percent law was intended to effectuate that desire. We take no position today on the constitutionality of that law.[21] Instead, we are asked to scrutinize the legality of the University's race-conscious policy designed to complement Top Ten Percent. Even with the limited data available, I cannot find that the University of Texas's use of race is narrowly tailored where the University's highly suspect use of race provides no discernable educational impact. In my view, the University's program fails strict scrutiny before or after *Grutter. See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 790, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (Kennedy, J., concurring) ("[I]ndividual racial classifications employed in this manner may be considered legitimate *only if they are a last resort* to achieve a compelling interest.") (citation omitted) (emphasis added). Before *Grutter,* it is unlikely that the Supreme Court would have found that the University of Texas's means were narrowly tailored to the interest it asserts. Nonetheless, narrow tailoring in the university admissions context is not about balancing constitutional costs and benefits any longer. Post- *Grutter,* universities need not inflict the least harm possible so long as they operate in good faith. And in assessing good faith, institutions like the University of Texas need not even provide the type of metrics that allow courts to review their affirmative action programs. As long as these public institutions remain sufficiently opaque in their use of race, reviewing courts like ours will be hard pressed to find anything short of good faith and narrow tailoring. In the world post- *Grutter,* courts are enjoined to take universities at their word.

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[21] In assessing whether the University's use of race is narrowly tailored, today's majority opinion finds that Top Ten Percent is not a race-neutral alternative that serves the University's asserted interest "about as well" as its *Grutter*-like plan. *See ante* at 238–42. My concurrence should not be read to approve or reject the constitutionality of percentage plans like Top Ten Percent. That issue remains open. I write separately to underscore the minimal effect that the University's use of race has had on critical mass *in light of Top Ten Percent*, and why the University's use of race would not, therefore, be narrowly tailored applying traditional strict scrutiny principles before *Grutter*. I recognize that *Grutter* appears to swallow this concern.

III

The Supreme Court's narrow tailoring jurisprudence has been reliably tethered, at least before 2003, to the principle that whenever the government divides citizens by race, which is itself an evil that can only be justified in the most compelling circumstances, that the means chosen will inflict the least harm possible, *see Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.), and fit the compelling goal "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493, 109 S.Ct. 706; *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) ("[W]hen a State discriminates on the basis of race ..., we require a tighter fit between the discriminatory means and the legitimate ends they serve."). *Grutter* abandoned this principle and substituted in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades.

My disagreement with *Grutter* is more fundamental, however. *Grutter*'s failing, in my view, is not only that it approved an affirmative action plan incapable of strict scrutiny, but more importantly, that it approved the use of race in university admissions as a compelling state interest at all.

The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible biologically into any set number of races.[22] A world war was fought over such principles. Each individual is unique. And yet, in 2010, governmental decisionmakers are still fixated on dividing people into white, black, Hispanic, and other arbitrary subdivisions. The University of Texas, for instance, segregates student admissions data along five racial classes. *See, e.g., 2008 Top Ten Percent Report* at 6 (reporting admissions data for White, Native–American, African–American, Asian–American, and Hispanic students). That is not how society looks any more, if it ever did.

When government divides citizens by race, matters are different.[23] Government-sponsored discrimination is repugnant to the notion of human equality and is more than the Constitution can bear. *See Grutter,* 539 U.S. at 388, 123 S.Ct. 2325 (Kennedy, J., dissenting) ("Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality."). There are no *de minimis* violations of the Equal Protection Clause, and when government undertakes any level of race-based social engineering, the costs are enormous. Not only are race-based policies inherently divisive, they reinforce stereotypes that groups of people, because of their race, gender, or ethnicity, think alike or have common life experiences. The Court has condemned such class-based presumptions repeatedly. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ("Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications."); *Shaw*, 509 U.S. at 647, 113 S.Ct. 2816 (rejecting the notion "that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same ... interests," or have a common viewpoint about significant issues); *Wygant*, 476 U.S. at 316, 106 S.Ct. 1842 (Stevens, J., dissenting) (the "premise that differences in race, or the color of a person's skin, reflect real differences ... is utterly irrational and repugnant to the principles of a free and democratic society"). I do not see how racial discrimination in university admissions is any less repugnant to the Constitution. If anything, government-sponsored discrimination in this context presents an even greater threat of long-term harm.[24]

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[22] *See* Alexander & Schwarzschild, 21 CONST. COMMENT. at 6 & n.10 ("There is broad scholarly support for this proposition. *See, e.g.,* NAOMI ZACK, PHILOSOPHY OF SCIENCE AND RACE 58–62 (2002); JOSEPH L. GRAVES, JR., THE EMPEROR'S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENNIUM (2001); Joshua M. Glasgow, *On the New Biology of Race,* 100 J. PHIL. 456 (2003).").

[23] *See* Alexander & Schwarzschild, 21 CONST. COMMENT. at 6–7 ("[W]hen the government classifies people racially and ethnically, and then makes valuable entitlements such as admission to a university turn on those classifications, ... that very fact encourages people to think that 'races' are real categories, not bogus ones, and that one's race is an exceedingly important rather than a superficial fact about oneself and others. In other words, it encourages people to pay close attention to race and to think in racial terms.").

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[24] Professor Cohen succinctly describes some of the effects of racial and ethnic preferences in higher education:

> 1. preference divides the society in which it is awarded;

For the most part, college admissions is a zero-sum game. Whenever one student wins, another loses. The entire competition, encouraged from age five on, is premised on *individual* achievement and promise.[25] It is no

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> 2. it establishes a precedent in excusing admitted racial discrimination to achieve political objectives;
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> 3. it corrupts the universities in which it is practiced, sacrificing intellectual values and creating pressures to discriminate by race in grading and graduation;
>
> 4. ...
>
> 5. it obscures the real social problem of why so many minority students are not competitive academically;
>
> 6. it obliges a choice of some few ethnic groups, which are to be favored above all others;
>
> 7. ...
>
> 8. it removes incentives for academic excellence and encourages separatism among racial and ethnic minorities;
>
> 9. it mismatches students and institutions, increasing the likelihood of failure for many minority students; and
>
> 10. it injures race relations over the long haul.
>
> CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION & RACIAL PREFERENCE 109 (2003).

[25] For example, in the School of Architecture, the School of Fine Arts, and certain honors programs, where aptitude is essential, the University requires special portfolio, audition, and

exaggeration to say that the college application is 18 years in the making and is an unusually personal experience: the application presents a student's best self in the hopes that her sustained hard work and experience to date will be rewarded with admission. Race-based preferences break faith with this expectation by favoring a handful of students based on a trait beyond the control of all. *See Bakke,* 438 U.S. at 361, 98 S.Ct. 2733 (opinion of Brennan, White, Marshall & Blackmun, JJ.) ("[A]dvancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of the individual ...."). Given the highly personal nature of the college admissions process, this kind of class-based discrimination poses an especially acute threat of resentment and its corollary—entitlement. More fundamentally, it "assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." *Croson,* 488 U.S. at 495, 109 S.Ct. 706 (citation and internal quotation marks omitted).

Yesterday's racial discrimination was based on racial preference; today's racial preference results in racial discrimination. Changing the color of the group discriminated against simply inverts, but does address, the fundamental problem: the Constitution prohibits all

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other requirements. *See ante* at 229 n. 87. In these and other impacted programs where student demand outstrips available space, the University recognizes and uses merit as the decisive consideration in admission. I do not see why excellence and merit warrant less consideration in the University's other disciplines.

forms of government-sponsored racial discrimination. *Grutter* puts the Supreme Court's imprimatur on such ruinous behavior and ensures that race will continue to be a divisive facet of American life for at least the next two generations. Like the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, W.D. TEXAS, AUSTIN DIVISION, DATED AUGUST 17, 2009

United States District Court,
W.D. Texas,
Austin Division.

645 F.Supp.2d 587, 250 Ed. Law Rep. 298

No. A-08-CA-263-SS.
Aug. 17, 2009

Abigail Noel FISHER and
Rachel Multer Michalewicz,

Plaintiffs,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Defendants.

ORDER

SAM SPARKS, District Judge.

BE IT REMEMBERED on June 12, 2009 the Court called the above-styled cause for a hearing on all pending matters, the parties appeared through counsel, and the Court addressed Plaintiffs' Motion for Partial Summary Judgment [# 94], Defendants' Cross-Motion for

Summary Judgment [# 96], Plaintiffs' Combined Reply Memorandum in Support of Motion for Partial Summary Judgment and Memorandum in Opposition to Defendants' Cross-Motion for Partial Summary Judgment ("Plaintiffs' Reply and Resp.") [# 98, 99], Defendants' Reply memorandum in Support of Cross-Motion for Summary Judgment [# 102], *Amicus Curiae* Lawrence Longoria, Jr., Nathan Bunch, and Texas League of United Latin American Citizens' (hereinafter collectively referred to as "LULAC") Motion for Leave to File *Amicus Curiae* Brief In Support of Defendants Out of Time [# 104], and Plaintiffs' Response to LULAC's Motion for Leave [# 107]. Plaintiffs do not object to LULAC's participation as *amici,* thus LULAC's Motion for Leave to File *Amicus Curiae* Brief In Support of Defendants Out of Time [# 104] is GRANTED; however, Plaintiffs' objection to the new evidence submitted in support of LULAC's brief is well taken. The Court will sustain the objection and thus consider only LULAC's legal arguments and arguments based on the properly-submitted evidence in this case, and will not consider the new evidence submitted by LULAC. Also filed in relation to the cross motions for summary judgment and considered by the Court are LULAC's *Amicus Curiae* Brief in Support of Defendants [# 104] and *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc., The Black Student Alliance at the University of Texas at Austin, Chad Stanton, Anthony Williams, Ariel Barrett, C.J. Davis, Devon Robinson, Trenton Stanton, and Eric Stanton's (hereinafter collectively referred to as "NAACP") *Amicus Curiae* Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and In Opposition to Plaintiffs' Motion for Partial Summary

Judgment [# 103]. After considering the motions, the responses, the replies, the *amicus* briefs, the relevant law, and the case file as a whole, the Court enters the following opinion and orders.

BACKGROUND

I. Procedural History

On April 7, 2008, Plaintiff Abigail Fisher filed suit in the Western District of Texas. On April 17, 2008, Ms. Fisher was joined in her suit by Rachel Michalewicz. Plaintiff Fisher is a Caucasian female who attended Stephen F. Austin High School in Sugar Land, Texas. Plaintiff Michalewicz is a Caucasian female who attended Jack C. Hays High School in Buda, Texas. Plaintiffs both applied for admission to the University of Texas at Austin ("UT" or the "University") in the fall of 2008. Both were rejected.[1] Plaintiffs sued multiple defendants: the State of Texas; UT; Mark G. Yudof, Chancellor of the University of Texas System in his official capacity; David B. Pryor, Executive Vice Chancellor for Academic Affairs in his official capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in his official capacity; William Powers, Jr., President of the University of Texas at Austin in his official capacity; the Board of Regents of the Texas State University System; John W. Barnhill, Jr., H. Scott Caven, Jr., James R. Huffines, Janiece Longoria, Colleen

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[1] However, as Texas residents both Plaintiffs were offered the opportunity to participate in UT's Coordinated Admission Program ("CAP"), described more fully below.

McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, and Printice L. Gary, as Members of the Board of Regents in their official capacities; and Bruce Walker, Vice Provost and Director of Undergraduate Admissions in his official capacity (collectively "Defendants").[2] Plaintiffs contend the "admissions policies and procedures currently applied by Defendants discriminate against Plaintiffs on the basis of their race in violation of their right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*" Pls.' Am. Compl. [# 30] ¶ 2. Plaintiffs seek declaratory and injunctive relief, including evaluation of Plaintiffs' applications for admission under race-neutral criteria, and attorneys' fees and costs.

Following the Court's denial of Plaintiffs' motion for preliminary injunction, the parties agreed to a scheduling order bifurcating the trial into two phases: liability and remedy. The Court permitted two groups, LULAC and NAACP, to submit *amici* briefs in lieu of intervention. On June 12, 2009, the Court held a hearing on the parties' motions for summary judgment regarding liability, specifically on the issue of whether UT's admissions policies and practices violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

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[2] Plaintiffs subsequently voluntarily dismissed Defendants the State of Texas and Burgdorf, and substituted Kenneth Shine for Mark Yudof.

II. History of Undergraduate Admissions at the University of Texas at Austin

The University of Texas at Austin ("UT") is a public education institution authorized by Article VII § 10 of the Texas Constitution and funded by the governments of Texas and the United States. Pls.' Second Am. Compl. [# 85] ¶ 18. It is a highly selective university, receiving applications from approximately four times more students each year than it can enroll in its freshman class. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 2. For the entering class of 2008, to which Plaintiffs sought admission, 29,501 students applied to UT. Less than half, 12,843, were admitted and 6,715 ultimately enrolled. Defs.' Cross-Mot. for Summ. J. Tab 8, Aff. of Gary M. Lavergne ("Lavergne Aff.") Ex. C, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin*, October 28, 2008 at 6 (Table 1) ("*2008 Top Ten Report*"). As the flagship university of Texas, UT describes its admissions goal as enrolling a meritorious and diverse student body with the expectation that many of its graduates will become state and national leaders. Defs.' Cross-Mot. for Summ. J. Tab 11, Affidavit of N. Bruce Walker ("Walker Aff.") Ex. A, *Proposal to Consider Race and Ethnicity in Admissions*, June 25, 2004 at 24-25 ("*2004 Proposal*"); Defs.' Cross-Mot. for Summ. J. Tab 5, Dep. of N. Bruce Walker ("Walker Dep.") at 9:10-12. To accomplish this, the University continuously develops internal procedures to supplement the judicial and legislative mandates governing its admissions process. Defs.' Cross-Mot. for Summ. J. Tab 2, Dep. of Kendra Ishop ("Ishop Dep.") at 9:13-18. The complex system currently in use at UT and challenged by the Plaintiffs is the product of these shifting internal and external policies. *Id.* In order to provide context to the current system, the Court will briefly review the changes in UT's admissions process from 1995 to today.

a. UT Admissions Pre- and Post-*Hopwood v. Texas*

Until 1996, UT admitted students based on a two-tiered affirmative action system. Pls.' Mot. for Part. Summ. J. Mem. at 3. The first element, still in use today, is known as a the Academic Index ("AI"), and is a computation of each applicant's predicted freshman grade point average ("PGPA") based on the student's high school class rank and standardized test scores (SAT or ACT). *Id.* The second element considered prior to the Fifth Circuit's decision in *Hopwood v. Texas,* 78 F.3d 932 (5th Cir.1996), was the applicant's race, as UT believed exclusive reliance on PGPA would yield a class with "unacceptably low diversity levels." Lavergne Aff. Ex. A, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin,* December 2006 (revised December 2007) at 2 ("*2006 Top Ten Report*"). As a result of this system, UT's 1996 enrolled freshman class, the last class admitted using this process, included 4.1 percent African-American student enrollment and 14.7 percent Hispanic student enrollment. Pls.' Mot. for Part. Summ. J. Statement of Facts ¶ 13 (citing *2006 Top Ten Report* at 4-5 (Tables 1, 1a)).

The Fifth Circuit terminated this system with its decision in *Hopwood v. Texas,* holding unconstitutional the use of race-based criteria in admissions decisions at The University of Texas School of Law. 78 F.3d at 957. The Court concluded diversity in education does not constitute a compelling governmental interest, a conclusion the Texas Attorney General interpreted as prohibiting the use of race as a factor in admissions by any undergraduate or graduate program at Texas state universities, including UT. *Hopwood* at 944; Tex. Att'y Gen. Ltr. Op. No. 97-001 at 18. Consequently, beginning with the 1997 admissions cycle UT eliminated its affirmative action program. *2008 Top Ten Report* at 4. Although the University retained its use of the AI, it replaced consideration of race with a Personal Achievement Index ("PAI"). Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶¶ 86-87. The PAI was determined by a holistic review of applications intended to identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores. *Id.* at ¶ 86; Walker Dep. at 31:7-9.

Although this AI/PAI system was facially race-neutral in accordance with *Hopwood*, it was also partially designed to increase minority enrollment. Walker Dep. at 31:10-12. Many of the special circumstances considered in computing applicants' PAIs disproportionately affect minority candidates, including the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household. Pls.' Mot. for Part. Summ. J. Mem. at 3. Despite these measures, minority enrollment at the University decreased immediately following *Hopwood.* In 1997, the first year during which admissions were conducted under the post-*Hopwood* system, African-

Americans accounted for 2.7 percent and Hispanics for 12.6 percent of the entering freshman class, compared to 4.1 percent and 14.5 percent respectively the previous year under the pre-*Hopwood* system. Pls.' Mot. for Part. Summ. J. Statement of Facts ¶ 79 (citing *2006 Top 10 Report* at 4-5 (Tables 1, 1a)).

b. Internal Initiatives and the Top Ten Percent Law

In order to counter these decreases in minority enrollment, both UT and the Texas State Legislature adopted additional race-neutral[3] initiatives that, along with the AI/PAI system, are still in use by the University. Defs.' Cross-Mot. for Summ. J. Tab 9, Affidavit of Michael K. Orr ("Orr Aff.") ¶ 3. UT instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools. *Id.* ¶ 4. Although the University believes these initiatives had the residual effect of improving diversity, no specific increases can be directly attributed to them and the University does not keep track of their effects on minority representation. Defs.' Cross-Mot. for Summ. J. Tab 4, Dep. of Michael K. Orr ("Orr Dep.") at 20:3-12.

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[3] "Race-neutral" may be a misnomer. As the parties appear to agree, many of these initiatives as well as HB 588 are intended to increase minority enrollment and thus, in reality, are "race-conscious." But *facially* these policies are race-neutral, and thus the Court will continue to use that phrase to describe policies which do not explicitly favor one racial group over another.

The Texas State Legislature responded to *Hopwood* by passing House Bill 588, codified as TEX. EDUC. CODE § 51.803 (1997) and also known as HB 588 or the "Top Ten Percent law," a year after the Fifth Circuit issued its decision. Pls.' Mot. For Part. Summ. J. at 3-4. HB 588, which is still in effect, granted automatic admission to any public state university, including UT, for all public high school seniors in the top ten percent of their class at the time of their application, as well as the top ten percent of high school seniors attending private schools that make their student rankings available to university admissions officers.[4] TEX. EDUC. CODE § 51.803(a); Pls.' Mot. for Part. Summ. J. Statement of Facts ¶¶ 59-60.

The purpose of the Top Ten Percent law was to "ensure a highly qualified pool of students each year in the state's higher educational system" while promoting diversity among the applicant pool so "that a large well qualified pool of minority students [is] admitted to Texas universities." HB 588, House Research Organization Digest (1997) at 4-5. Though facially neutral, one of the purposes of HB 588 was to increase minority representation at UT. Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 19-20. Under HB 588, and in conjunction with the AI/PAI system and other facially race neutral initiatives instituted by UT, post-*Hopwood* minority enrollment levels have improved. *2006 Top 10 Report* at 4-5 (Tables

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[4] HB 588 has recently been amended, limiting the number of freshmen UT must admit under the Top Ten Percent law to 75 percent of its overall freshman class. But this change was not in effect during the relevant time period in which the Plaintiffs applied to UT.

1, 1a). The entering freshman class of 2004, the last admitted under this race-neutral system, was 4.5 percent African-American and 16.9 percent Hispanic, compared to 2.7 percent and 12.6 percent respectively seven years earlier when *Hopwood* first went into effect. Pls.' Mot. for Part. Summ. J. Statement of Facts ¶ 79 (citing *2006 Top Ten Report* at 4-5 (Tables 1, 1a)). Seventy-five percent of all admitted African-American students and seventy-six percent of all admitted Hispanic students in 2004 qualified under the Top Ten Percent law, compared to fifty-six percent of all admitted Caucasian students. *2008 Top Ten Report* at Table 2.

c. UT Admissions *Post-Grutter v. Bollinger* (the Current Admissions System)

Hopwood's prohibition on the consideration of race in admissions ended after the 2004 admissions cycle as a result of the United States Supreme Court's landmark decision in *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). The Supreme Court held that universities have a compelling governmental interest "in obtaining the educational benefits that flow from a diverse student body." *Grutter,* 539 U.S. at 343, 123 S.Ct. 2325. In order to improve classroom discussion, develop the next generation of leaders, and break down racial stereotypes, the Supreme Court decided universities may consider race as a "plus" in evaluating an applicant's file in order to enroll a "critical mass" of minority students, described as "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated ... or like spokespersons for their race." *Id.* at 318-19, 330-34, 123 S.Ct. 2325.

To conform with the *Grutter* decision, UT again modified its admissions policies. On August 6, 2003, the University of Texas Board of Regents passed a resolution authorizing each UT System school to decide "whether to consider an applicant's race and ethnicity as part of the [institution's] admission" policies, which must include "individualized and holistic review of applicant files in which race and ethnicity are among a broader array of qualifications and characteristics considered," as well as periodic reviews to evaluate the efficacy and necessity of considering applicants' race. Pls.' Mot. for Part. Summ. J. Ex. 19, Aff. of Francie A. Frederick ("Frederick Aff.") Ex. A at 4-5.

To determine whether such consideration of race was warranted, UT conducted a study in November 2003 that concluded there was not a critical mass of underrepresented minority students enrolled at the University, though it did not establish what number or percentage of minority students would meet that standard. Walker Dep. at 18:15-24; Walker Aff. ¶ 10. In their survey responses, minority students reported feeling isolated and a majority of students at the University stated there was insufficient diversity in the classroom. *Id.* ¶ 12; Walker Dep. at 21:6-13. The study also found that in 2002, 90 percent of classes with 5 to 24 students had one or zero African-American students and 43 percent had one or zero Hispanic students. Walker Aff. ¶ 11; Lavergne Aff.

Ex. B, *Diversity Levels of Undergraduate Classes at the University of Texas at Austin, 1996-2002* at 8 (Table 3) ("*Diversity Study*").[5] Thus, in August 2004, after almost a year of deliberations, the UT System approved a revised admissions policy for UT that included an applicant's race as a special circumstance reviewers may consider in evaluating an applicant's PAI. Walker Aff. ¶ 14; Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 5.

UT does not have a projected date by which it intends to cease using race as a factor in undergraduate admission decisions. Pls.' Mot. for Part. Summ. J. Mem. at 6. However, as an informal practice UT reviews its admissions procedures each year. Walker Aff. ¶ 16. Furthermore, every five years the admissions process is evaluated specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body, or whether race-neutral alternatives exist that would achieve the same results. *Id.; 2004 Proposal* at 32. The first formal review of UT's use of race in admissions is scheduled to begin in the fall of 2009. *2004 Proposal* at 32.

As a result of its policies, UT "ranks sixth in the nation in producing undergraduate degrees for minority groups." Walker Dep. at 10:21-24 (quoting *Diverse Issues in Higher Education,* May 31, 2007). From 1998 to 2008, a period during which the Top Ten Percent law, the AI/PAI system, and race-neutral initiatives governed the University's admissions policies and to which consideration of race was added in 2005, the enrollment of African-American students increased from three to six percent of the entering freshman class and the enrollment of Hispanic students increased from 13 to 20 percent. *2008 Top Ten Report* at Table 2. However, the various programs in place make it difficult to attribute increases in minority enrollment to a specific program or programs. Walker Dep. at 13:13-17, 23:20-24. Furthermore, demographics in the state of Texas have changed substantially in recent years, indicating that increases in minority enrollment may be at least partially attributed to population shifts. Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 21-22 n. 8. While African-American students accounted for 12.56 percent of Texas high school graduates in 1997 and Hispanic students accounted for 29.78 percent, their populations had increased to account for 13.33 percent and 35.79 percent, respectively, of Texas high school graduates by 2007. Weirich Aff. ¶ 4. Underrepresented minorities are also somewhat more likely to have been admitted to UT under the Top Ten Percent law than their Caucasian peers; in 2008, 85 percent of all admitted Hispanic students and 80 percent of all admitted African-American students qualified for admission under the Top Ten Percent law, compared to 67 percent of all admitted Caucasian students.[6] *2008 Top Ten Report* at Table 2.

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[5] Forty-six percent of classes with between five and twenty-four students had one or zero Asian-American students in 2002. However, UT does not consider Asian-American students to constitute an underrepresented minority at the University. Walker Aff. ¶ 11; *Diversity Study* at 8 (Table 3).

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[6] Within ethnic groups, enrolling top ten percent students generally report higher PGPAs than non-top ten percent students, though their SAT score averages vary little. Caucasian students in both the top ten percent and the non-top ten percent categories

The system under which Plaintiffs were denied admission to UT is a product of all of the developments discussed above, with its most recent changes based on the affirmative action program used by the University of Michigan School of Law and approved by the United States Supreme Court in *Grutter v. Bollinger*. Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 15-16. As did the University of Michigan School of Law, UT uses "a holistic, multifactor, individualized assessment of each applicant" in which race is but one of many factors. *Id.* at 4. However, the two institutions' admissions policies and procedures differ significantly due to UT's legislatively-mandated admission of Top Ten Percent Texas residents, which largely dominates the admissions process. Pls.' Mot. for Part. Summ. J. Mem. at 12. As a result of HB 588, UT operates a two-tiered system of admissions based on the Top Ten Percent law and the AI/PAI system, under which an applicant's race is taken into consideration. *Id.* at 4.

i. Admissions Under HB 588

Before their candidacies are evaluated, all applicants to UT are divided into three pools: Texas residents,

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also report on average higher PGPAs and SAT scores than African-American or Hispanic students. In the entering class of 2007, Caucasian top-ten percent students had an average PGPA of 3.25 and SAT score of 1275, and non-top ten percent students had an average PGPA of 2.95 and SAT score of 1275. African-American top ten percent students had an average PGPA of 2.65 and SAT score of 1078, and non-top ten percent students had an average PGPA of 2.42 and SAT score of 1073. Hispanic top ten percent students had an average PGPA of 2.70 and SAT score of 1115, and non-top ten percent students had an average PGPA of 2.47 and SAT score of 1155.

domestic non-Texas residents and international students. Defs.' Cross-Mot. for Summ. J. Tab 7, Aff. of Kendra B. Ishop ("Ishop Aff.") ¶ 7. Students compete only against other students in their respective pools for admission. *Id.* Texas residents are allotted 90 percent of all available seats, and their admission is based on the Top Ten Percent law, the AI/PAI system, or a combination of both. Defs.' Cross-Mot. for Summ. J. Tab 2, Dep. of Kendra B. Ishop ("Ishop Dep.") at 14:11-15:5; 39:16-17. The remaining ten percent of seats are awarded to domestic non-Texas residents (approximately seven percent in recent years) and international students (approximately three percent in recent years). *Id.* at 40:22-41:6; Pls.' Mot. for Part. Summ. J. at 4. Admission decisions for non-Texas resident applicants are made solely on the basis of their AI and PAI scores. Ishop Aff. ¶ 12.

Texas residents are divided into Top Ten Percent applicants and non-Top Ten Percent applicants. *2008 Top Ten Report* at 2. A significant majority of admitted students qualify for admission due to HB 588. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 15. In 2008, Top Ten Percent applicants accounted for eighty-one percent of the entering class overall, compared to forty-one percent in 1998, and filled ninety-two percent of the seats allotted to Texas residents, leaving only 841 places university-wide in the Fall 2008 class for non-Top Ten Percent Texas residents. *2008 Top 10 Report* at 9 (Table 2b); Ishop Aff. ¶ 16. However, while Texas residents who graduate in the top ten percent of their high school class are guaranteed admission to the University, they are not guaranteed admission to the program of their choice. Defs.' Cross-Mot. for Summ. J. Tab 3, Dep. of Gary M. Lavergne ("Lavergne Dep.") at 15:20-21.

Admission to UT is granted by individual schools or majors. Ishop Aff. ¶ 7. Each applicant identifies their first and second choice programs at the University and competes for admission against other applicants who have identified the same program. *Id.* ¶¶ 7-10. Many colleges and majors provide automatic admission to Top Ten Percent applicants, but two groups impose additional requirements. First, because of special portfolio, audition and other requirements the Top Ten Percent law does not apply to the School of Architecture, the School of Fine Arts, and certain honors programs. Ishop Dep. at 92:6-22. Second, programs known as "impacted majors," including the School of Business, College of Communication, School of Engineering, Kinesiology, and Nursing, are obligated to accept only a certain number of Top Ten Percent applicants. *Id.* at 32:5-17. These programs are "impacted" because they could fill eighty percent or more of their available spaces each year based solely on the preferences of applicants admitted pursuant to the Top Ten Percent law. *Id.* To prevent over-subscription and allow those colleges to admit non-Top Ten Percent applicants, UT caps the percentage of students automatically admitted to these programs at seventy-five percent of the available spaces. *Id.;* Ishop Aff. ¶ 11. Top Ten Percent students who do not receive automatic entry to their first choice program are grouped with other Texas applicants and compete against them for admission to a specific program based on their AI and PAI scores. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 27.

ii. Admissions Under the Academic Index/ Personal Achievement Indices

The AI/PAI system is used to make admission decisions as to all of the Top Ten Percent applicants who are denied automatic admission to the program of their choice, the non-Top Ten Percent Texas resident applicants, the domestic non-Texas resident applicants, and the international applicants. Ishop Aff. ¶ 12. Throughout the process, they remain separated in three pools: Texas residents, domestic non-Texas residents, and international applicants. Ishop Aff. ¶ 7. The current AI/PAI system has been in continuous use since 1997; its only substantive change was UT's decision after *Grutter* to authorize consideration of race in determining an applicant's PAI. Walker Dep. at 30:23-31:1; *2008 Top Ten Report* at 4. AI/ PAI contains two elements: the Academic Index and the Personal Achievement Index.

First, the Academic Index predicts an applicant's freshman GPA in the program to which she has applied. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 25. The AI is computed using a multiple regression equation that contains four elements: (1) an applicant's high school class rank; (2) completion of UT's required high school curriculum; (3) the extent to which the applicant exceeded the required curriculum; and, (4) SAT (verbal and math) or ACT scores. *2008 Top Ten Report* at 2. The equation varies by school, as different programs accord different relative weight to each variable, such as the applicant's math versus her critical reading standardized test scores. Lavergne Dep. at 18:5-18. The equation generates a number ranging from 0.0 to 4.1, with the additional 0.1 points awarded if the applicant has exceeded the required high school curriculum. *Id.* at 17:13-25. Students who take the SAT or ACT more than once receive the benefit of the higher score. *2008 Top 10 Report* at 5 n. 5. Some applicants' AI scores are high enough that the applicant is granted admission based on that score alone. Ishop Aff. ¶ 12. Others are low enough that their applications are considered presumptively denied. *Id.* Known as group "C", applicants whose applications are presumptively denied based on their AI score have their file reviewed by senior admission staff readers who either award a default PAI score of 3-3-3 to the application or determine the file warrants a full review before any PAI scores are assigned. *Id.*

Second, the Personal Achievement Index accounts for all remaining parts of the applicant's file. Ishop Aff. ¶ 4. The index is based on an equation containing three scores: one score for each of the two required essays and a third score, called the personal achievement score, representing a holistic evaluation of the applicant's entire file. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶¶ 29, 49. Each element receives a score from 1 to 6 and is inserted into the PAI equation, which gives slightly greater weight to the personal achievement score than to the mean of the two essays.[7] Lavergne Dep. at 57:14-17, 21:23.

Each of the two essay scores is the result of a holistic evaluation of the essay as a piece of writing based on its complexity of thought, substantiality of development, and facility with language. Defs.' Cross-Mot. for Summ. J. Tab 1, Dep. of Brian Bremen ("Bremen Dep.") at 10:19-21. The majority of essays are written on the two basic topics provided by the University, though some programs require applicants to base their essays on different, program-specific topics. Ishop Dep. at 12:17-19. The scores are awarded by a member of the UT admissions office staff who relies on annual training, a scoring guide, and a set of samples, all of which are provided each year by a UT faculty member who is a nationally recognized expert in holistic scoring. Bremen Dep. at 10:1-12, 18-21, 31:9; Ishop Aff. ¶ 13. Additionally, senior staff members perform quality control, verifying that awarded scores are in line with those they would give. Bremen Dep. at 13:14-20. The most recent study, conducted in 2005, found that essay readers scored within one point of one another 91 percent of the time and holistic file readers scored within one point of one another 88 percent of the time, reflecting significant consistency. Lavergne Aff. ¶ 8.

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[7] PAI = [(personal achievement score * 4) + (average essay score * 3)] / 7. Lavergne Dep. 57:41-17.

The third PAI element is the personal achievement score, which is based on an evaluation of the file in its entirety by senior members of the admissions staff. Bremen Dep. at 14:10-15:6. The evaluators conduct a holistic review considering the applicant's demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances. *2008 Top Ten Report* at 2. The relevant special circumstances include the applicant's family's socio-economic status, her school's socio-economic status, her family responsibilities, whether she lives in a single-parent home, whether languages other than English are spoken at home, her SAT/ACT score compared to her school's average score and, as of 2005, her race. *Id.* The essays are re-read during this process, but only for consideration of the information they convey, rather than to assess the quality of the student's writing. Bremen Dep. at 17:5-13. Students may also choose to submit a resume, supplemental essays, or any additional information such as artwork and portfolios for consideration during this process. Ishop Dep. at 12:19-13:5. None of the elements are considered individually, or given a numerical value and then added together; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context. Bremen Dep. at 22:8-13; Ishop Dep. at 13:9-14:19.

Because an applicant's race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation. Ishop Dep. at 19:20-24. Race in and of itself does not affect the score but is instead used to place the student's achievements into context and reveal whether she possesses a valuable "sense of cultural awareness." Bremen Dep. at 30:25, 41:5-7. Used in this manner, it can positively impact applicants of all races, including Caucasian, or may have no impact whatsoever. Ishop Dep. at 57:2-58:12. Given these guidelines and the fact race, like all the other elements, is never awarded a numerical value or considered alone, it is difficult to evaluate which applicants have been positively or negatively affected by its consideration or which applicants were ultimately offered admission due to their race who would not have otherwise been offered admission. Ishop Dep. at 19:20-

20:3, 23:10-14. Yet, even though race is not determinative, it is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application. Pls.' Mot. for Part. Summ. J. Mem. at 5; Pls.' Mot. for Part. Summ. J. Ex. 8, Dep. of Bruce Walker ("Walker Dep.") at 45:5-12. Although a candidate's race is known throughout the application process, no admissions office employee or anyone else at UT monitors the racial or ethnic composition of the entire group of admitted students in order to decide whether a particular applicant will be admitted. Ishop Aff. ¶ 17.

Once AI and PAI scores have been awarded, the data is entered in matrices created for each major or school, depending on whether the program to which the student applied admits students to the college or into a specific major. Ishop Aff. ¶ 14. The matrix is set up as a graph, with the vertical left axis representing an applicant's PAI score and the horizontal bottom axis representing an applicant's AI score. *Id.* Applicants are identified only by their AI/PAI numbers, with the upper left corner containing the highest combined scores and the lower right corner containing the lowest combined scores. *2008 Top 10 Report* at 3 (Figure 1). Each cell on the matrix contains a number representing the total number of applicants who share that particular combination of AI and PAI scores. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 66.

Once all applicants have been placed within the appropriate matrix cell, a liaison for the school or major establishes a cut-off line. Ishop Dep. at 38:6-8. The line is drawn in a "stair step" manner and UT offers admission to applicants whose AI and PAI scores place them in cells located to the left of the line. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 70. Placement of the cutoff line depends on the combination of AI/PAI scores desired by the school and the number of available slots. Ishop Dep. at 47:10-24.

Applicants denied admission to their first choice program under this process are then "cascaded" down to the matrix of their second choice. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶¶ 69-70. The influx of new applicants changes the matrices' composition, and the cut-off lines are accordingly re-adjusted to accommodate this shift. Ishop Aff. ¶ 14. After all applicants have been considered for their second choice program, Top Ten Percent applicants who have not been admitted to either their first or second choice programs are automatically admitted as Liberal Arts Undeclared majors. *Id.* All remaining applicants are cascaded into the Liberal Arts Undeclared matrix, where they compete for the remaining seats using the same procedure discussed above. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 75. Any non-Texas residents and international applicants who fail to gain admission into Liberal Arts Undeclared are denied admission to UT. Ishop Dep. at 47:2-5.

iii. The Summer and Coordinated Admission Programs

Texas residents, however, are never denied admission to UT if they submit a complete entering freshman application by the published deadlines. *2008 Top Ten*

Report at 3. If not admitted to the entering fall class, a Texas resident is offered admission to either the summer program or the Coordinated Admission Program ("CAP"). *Id.* The summer program allows students to begin their studies at UT during the summer, joining the regularly admitted students in the fall. Ishop Aff. ¶ 15. Approximately eight hundred students are enrolled in that program each year. Ishop Dep. at 47:10-24. CAP entitles its participants to automatically transfer to UT if they meet certain conditions, including the completion of thirty credit hours with a cumulative GPA of 3.2 or higher at a participating UT System campus during their freshman year. Ishop Aff. ¶ 15.

Applicants located in AI/PAI cells on the Liberal Arts Undeclared matrix near those selected for admission to the fall class are considered for admission to the summer class, while all other applicants are automatically admitted into CAP. Ishop Aff. ¶ 15. The potential summer students' files are re-read in their entirety. *Id.* Although senior staff members conducting the review are aware of the scores originally awarded to each applicant's file, they are not bound by them and do not recalculate a new score, but rather make the summer admissions decision based on the file as a whole. Ishop Dep. at 27:10-22. Admission to the summer program is offered solely based on this individualized, holistic review. *Id.* at 29:10-14. Although it is relatively rare, reviewers may still at this late stage admit an applicant to the entering fall class. *Id.* at 49:5-50:12. Furthermore, although the readers conducting this review, like all admission office staffers, have access to a head count of admitted students by race, they do not take such information into account as part of the review process. Ishop Aff. ¶ 15. All Texas residents not offered admission to the summer class through this process are then accepted to CAP, ending the admissions process at UT for that cycle. *Id.* ¶ 14.

ANALYSIS

I. Standard

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In deciding summary judgment, the Court construes all facts and inferences in the light most favorable to the nonmoving party. *Richter v. Merchs. Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir.1996). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir.1990).

Both parties bear burdens of production in the summary judgment process. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). First, the moving party has the initial burden of showing there is no genuine issue of any material fact and judgment should be entered as a matter of law. FED.R.CIV.P. 56(c); *Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The nonmoving party must then come forward with competent evidentiary materials establishing a genuine fact issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson*, 477 U.S. at 256-257, 106 S.Ct. 2505. However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir.1996).

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2. Consequently, the "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Thus, as the Supreme Court has held, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097). To survive strict scrutiny, the racial classification must be "narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325.

II. *Grutter v. Bollinger*

In 2003, the Supreme Court squarely addressed and decided the question of "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." *Id.* at 322, 123 S.Ct. 2325. The Supreme Court answered the question in the affirmative, finding that the University of Michigan Law School (the "Law School") had "a compelling interest in attaining a diverse student body." *Id.* at 328, 123 S.Ct. 2325. The Supreme Court also found the Law School's admissions program to be narrowly tailored despite the existence of race-neutral alternatives, including "percentage plans" similar to Texas' Top Ten Percent law. *Id.* at 339-40, 123 S.Ct. 2325. As the landmark case regarding the consideration of race as part of college admissions, the facts of Grutter deserve particular attention.

Michigan's Law School is one of the top, and most selective, law schools in the nation, routinely admitting 10% or less of applicants. *Id.* at 312-13, 123 S.Ct. 2325. In addition to selecting a highly qualified and promising group of students, the Law School sought, through its admissions process, to admit "a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Id.* at 314, 123 S.Ct. 2325 (citation omitted). The "hallmark" of the admissions policy was "its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'" *Id.* at 315, 123 S.Ct. 2325 (citation omitted). Importantly, admissions officials evaluated each applicant individually based on all of the information available, which included a personal statement, letters of recommendation, an essay on how the applicant would contribute to the life and diversity of the school, undergraduate grades, and the applicant's score on the Law School Admission Test ("LSAT"). *Id.* The admissions policy specifically reaffirmed the school's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.* at 316, 123 S.Ct. 2325 (citation omitted). Specifically, the Law School sought to enroll a "'critical mass' of [underrepresented] minority students" in order to "ensure[e] their ability to make unique contributions to the character of the Law School." *Id.* (citations omitted).

This policy was challenged by Barbara Grutter, a white Michigan resident who was denied admission to the Law School in 1996, as a violation of the Fourteenth Amendment and federal civil rights laws. *Id.* at 316-17, 123 S.Ct. 2325. After an extensive bench trial, the district court "concluded that the Law School's use of race as a factor in admissions decisions was unlawful." *Id.* at 321, 123 S.Ct. 2325. The Sixth Circuit Court of Appeals, sitting en banc, reversed the district court's judgment and held that under Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), diversity was a compelling state interest and the Law School's use of race was narrowly tailored. *Id.* The Supreme Court affirmed, holding "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Id.* at 343, 98 S.Ct. 2733.

In light of this Supreme Court jurisprudence, the Court now turns to the instant dispute.

III. Compelling Governmental Interest

Grutter clearly establishes that a public university "has a compelling interest in attaining a diverse student body." *Id.* at 328, 123 S.Ct. 2325. "[A]ttaining a diverse student body is at the heart of the Law School's proper institutional mission, and [ ] 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" *Id.* at 329, 123 S.Ct. 2325 (quoting *Bakke,* 438 U.S. at 318-19, 98 S.Ct. 2733). The Supreme Court noted several benefits stemming from a diverse student body:

> These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

Id. at 330, 123 S.Ct. 2325 (citations omitted). Furthermore, student body diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* (citation omitted). "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332, 123 S.Ct. 2325.

Crucial to the Supreme Court's finding of a compelling interest was the fact the Law School did not attempt "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin," but rather sought a "critical mass" of minority students. *Id.* (quoting *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733 (opinion of Powell, J.)). The Supreme Court noted that attempting to assure a specific percentage of a minority group would run afoul of the Supreme Court's prohibition on racial quotas and "outright racial balancing." *Id.* at 330, 123 S.Ct. 2325. Consequently, the definition of "critical mass" put forward by the Law School and approved by the Supreme Court was necessarily less than precise. Critical mass was described by Law School officials as "meaningful numbers," "meaningful representation," "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated," or "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 318-19, 123 S.Ct. 2325.

Following the Supreme Court's decision in *Grutter*, the University of Texas Board of Regents passed a resolution authorizing each UT System school to decide "whether to consider an applicant's race and ethnicity as part of the [institution's] admission" policies, which must include "individualized and holistic review of applicant files in which race and ethnicity are among a broader array of qualifications and characteristics considered," as well as periodic reviews to evaluate the efficacy and necessity of considering applicants' race. Pls.' Mot. for Part. Summ. J. Ex. 19, Aff. of Francie A. Frederick ("Frederick Aff.") Ex. A at 4-5.

After conducting its review, UT issued its *Proposal to Consider Race and Ethnicity in Admissions. See* Defs.' Cross-Mot. for Summ. J. Tab 11, Affidavit of N. Bruce Walker ("Walker Aff.") Ex. A, *Proposal to Consider Race and Ethnicity in Admissions,* June 25, 2004 at 24-25 ("*2004 Proposal*"). The *2004 Proposal* specifically addresses the rationale behind considering race as a part of the undergraduate admissions process:

> A comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders. This type of academic environment is a goal of the University of Texas at Austin and admission decisions must take into account this goal. The University of Texas at Austin handles a very large number of undergraduate applications and must select from among a highly qualified pool only the number of students in can accommodate. In light of the institutional goal, admission decisions result from both an assessment of the academic strength of each applicant's record and an individualized, holistic review of each applicant,

taking into consideration the many ways in which the academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging education environment of the University ...

Results indicate that, in a large percentage of [undergraduate] courses, some minority groups are represented by only one student or by none at all. The University of Texas at Austin did not have a critical mass of minority students sufficient to provide an optimal educational experience in 1996 (the pre-*Hopwood* period), and after seven years of good faith race-neutral admission policies, the University still has not reached a critical mass at the classroom level.

If The University of Texas at Austin is to accomplish its mission and fulfill its flagship role, it must prepare its students to be the leaders of the State of Texas. In the near future, Texas will have no majority race; tomorrow's leaders must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate. The University has a compelling educational interest to produce graduates who are capable of fulfilling the future leadership needs of Texas.

Because the University's educational mission includes the goal of producing future educational, cultural, business, and sociopolitical leaders, the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds. The proposal to consider race in the admission process is not an exercise in racial balancing but an acknowledgment that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission. In short, from a racial, ethnic, and cultural standpoint, students at the University are currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow. For the University to adequately prepare future leaders, it must include a critical mass of students from traditionally underrepresented backgrounds.

Critical mass, which is an adequate representation of minority students to assure educational benefits deriving from diversity, affects in a positive way all students because they learn that there is not "one" minority or majority view. In addition, the [Supreme] Court recognized that critical mass is essential in order to avoid burdening individuals with the role of "spokespersons" for their race or ethnicity. Thus, there is a compelling educational interest for the University not to

> have large numbers of classes in which there are no students-or only a single student-of a given underrepresented race or ethnicity.
>
> The use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin. While the number of African American and Hispanic students has risen slightly above 1996 levels, these students still represent only 3% and 14%, respectively, of the entering freshman class. The race-neutral efforts have failed to improve racial diversity within the classroom. In fact ... for Fall, 2002, there were *more* classes with no or only one African American or Hispanic student than there had been in Fall, 1996. With so few underrepresented minorities in the classroom, the University is less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.

2004 Proposal at 23-25 (citation and footnote omitted).

As articulated in the *2004 Proposal,* UT's underlying interest in its decision to consider race as one of the factors in its admissions process closely mirrors the justification provided for the Michigan Law School's use of race and approved by the Supreme Court.[8] Both policies attempt to promote "cross-racial understanding," "break down racial stereotypes," enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as "spokespersons" for their race. *Grutter*, 539 U.S. at 319-20, 330-33, 123 S.Ct. 2325; 2004 Proposal at 23-25. Notably, the Supreme Court also recognized in *Grutter* that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." 539 U.S. at 328, 123 S.Ct. 2325. Despite the obvious similarities between the admissions policy approved by the Supreme Court in *Grutter* and UT's policy, the Plaintiffs still contend UT's admissions program does not further a compelling governmental interest for two reasons. Pls.' Mot. for Partial Summ. J. at 12-18.

First, Plaintiffs argue UT's policy is "untethered to the educational benefits" of a diverse student body identified and approved by *Grutter*. *Id.* at 13. Specifically, Plaintiffs argue that because UT's diversity goals are "open-ended"-or, in other words, because UT has made no effort to define a percentage of its student body that must be filled by underrepresented minorities in order to achieve critical mass that therefore UT's use of race is not tied to the educational benefits of a diverse student body. Rather, Plaintiffs argue it "reflects a pursuit of racial balancing that reflects Texas' racial demographics." *Id.* at 14-15. Second, Plaintiffs also argue UT lacks a compelling interest because it has already achieved or exceeded "critical mass" through its race-neutral policies, most notably the Top Ten Percent law. *Id.* at 17. Plaintiffs argue that under Supreme Court precedent, "critical mass can be no greater than 20% minority enrollment." *Id.* at 18.

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[8] UT's policy is explicitly and admittedly based on the Law School's policy and the *Grutter* case.

The Court finds both the Plaintiffs' arguments unpersuasive and finds UT has a compelling interest in student body diversity as articulated in *Grutter.* First and foremost, *nothing* in *Grutter* suggests a university must establish a specific percentage, or range of percentages, the achievement of which would satisfy critical mass. Plaintiffs cite evidence from the district court hearing and opinion in *Grutter* that the school officials considered "critical mass" to be somewhere between 10-20 percent of the student body. *Id.* at 15; *Grutter v. Bollinger,* 137 F.Supp.2d 821, 832 (E.D.Mich.2001). This evidence, however, is completely unpersuasive to prove the contention that a university must establish a specific percentage of minority enrollment for critical mass. To begin with, the district court that cited this evidence reached the opposite conclusion of the Supreme Court, and was reversed on appeal. Secondly, the actual policy adopted by the Law School *omitted* any reference to a specific figure or inclusion of a percentage "ceiling" because it "could be misconstrued as a quota." *Grutter,* 137 F.Supp.2d at 835. Finally, the *Grutter* decision clearly lacks any suggestion that there exists a specific percentage of minority enrollment that satisfies "critical mass" and above which a school lacks a compelling interest justifying the use of race in admissions. Instead, the Supreme Court implicitly endorses the Law School's general definition of "critical mass" as "meaningful numbers," "meaningful representation," "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated," or "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race" by citing these definitions in its decision. Furthermore, the Law School's policy, which was found to be constitutional, did not have a specific percentage of minority enrollment cited as its goal. *Grutter,* 539 U.S. at 318-19, 123 S.Ct. 2325.

In fact, *Grutter* stands for the opposite proposition-a school which articulates a specific percentage of its student body that must be filled by minority students would violate the constitutional prohibition of racial balancing or racial quotas. *Id.* at 329-30, 334, 123 S.Ct. 2325. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.' " *Id.* at 335, 123 S.Ct. 2325 (quoting *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 496, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion)). "Quotas 'impose a fixed number or percentage which must be attained, or which cannot be exceeded.'" *Id.* (quoting *Sheet Metal Workers' v. EEOC,* 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (O'Connor, J., concurring in part and dissenting in part)). Establishing a specific percentage of minority student enrollment would violate the "paramount" characteristic of a constitutional race-conscious admissions program, namely a flexible and individual evaluation of each applicant. *Id.* at 336-37, 123 S.Ct. 2325. Thus, under *Grutter* the establishment of a specific percentage for critical mass would be a strong indicator of an impermissible racial quota or racial balancing, and consequently critical mass must be defined based on the educational benefits provided by the admission of the individual students rather than on the satisfaction of a numerical percentage. As was the policy of the Michigan Law School, UT has not established a specific percentage of minority enrollment that must be met, but rather considers race as simply one factor in its admissions decisions.

The Plaintiffs' argument that "critical mass" of minority enrollment cannot exceed twenty percent of total enrollment, in light of the foregoing law, is similarly without merit. As explained above, *Grutter* does not require an articulation of a specific percentage of minority enrollment for the achievement of critical mass. Nor does the case indicate, in any way, shape, or form, that "critical mass" is limited to, at most, twenty percent minority enrollment. The Court disagrees with Plaintiffs' claim that "Supreme Court precedent demonstrates that critical mass can be no greater than 20% minority enrollment." Pls.' Mot. for Partial Summ. J. at 18. The first case Plaintiffs cite is the district court's decision in *Grutter*, which was reversed on appeal and in which the Supreme Court found the Law School's admissions policy to be constitutional despite the lack of any upper limit or cap on its minority enrollment. The second case cited, *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), did not even involve the use of race as a factor in admissions. Instead, the case involved the

Virginia Military Institution's ("VMI") unconstitutional exclusion of women from admission. *Virginia*, 518 U.S. at 519, 116 S.Ct. 2264. The Supreme Court noted, "with recruitment, VMI could 'achieve at least 10% female enrollment'-'a sufficient "critical mass" to provide the female cadets with a positive educational experience."' *Id.* at 523, 116 S.Ct. 2264 (citation omitted). Plaintiffs cite this statement, taken out of context, as support for its argument that public universities do not have a compelling interest that would justify the consideration of race as part of its admissions process once it has achieved 20 percent minority enrollment. This statement does not support the Plaintiffs' position. In context, the statement is made to support the claim that there was sufficient female interest in attending VMI such that, if admission was open to women, women would not be so isolated they would be unable to have a positive educational experience. *See Id.* The case in no way relates to the extent to which universities may consider an applicant's race, or for that matter her gender, in making admissions decisions. The last case Plaintiffs cite, *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F.Supp.2d 328, 357 (D.Mass.2003), also fails to establish a 20 percent ceiling for critical mass. In fact, reading beyond the cherry-picked sentences cited by Plaintiffs, *Comfort* recognizes the benefits derived from a diverse student body extend well beyond the 20% number:

> ... 20% is not a magical shut-off point for gains from intergroup contact. The gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is reduced and racial harmony and understanding increases.

Id. Furthermore, the 20 percent number cited in *Comfort* is the "figure below which members of a racial minority in a given setting feel isolated or stigmatized." *Id.* Thus, according to that logic, the *minimum* percentage of minority enrollment that must be achieved to avoid isolation or stigmatization is 20 percent, not the maximum, and that number applies to "a minority group," rather than to minority students as a whole. *Comfort* also recognizes there is no "magic number" for critical mass. *Id. Comfort* in no way establishes, or even endorses, a maximum of 20 percent minority enrollment for the achievement of critical mass-if anything, it endorses 20 percent enrollment per minority group as a *minimum.* As a result, the Court finds the fact the combined minority enrollment at UT exceeds 20 percent of the freshman class does not mean UT lacks a compelling state interest that justifies its continued consideration of race as part of its admissions process.

Plaintiffs also argue UT's use of race in admissions "is divorced from the educational benefits attained by the achievement of critical mass" because the policy primarily benefits African-American and Hispanic students and does not benefit other minority groups, specifically Asian-Americans. Pls.' Mot. for Part. Summ. J. at 16. However, Plaintiffs cite no evidence to show racial groups other than African-Americans and Hispanics are *excluded* from benefitting from UT's consideration of race in admissions. As the Defendants point out, "the consideration of race, within the full context of the entire application, may be beneficial to *any* UT Austin applicant-including whites and Asian-Americans." Defs.' Cross-Mot. for Summ. J. at 12; Ishop Dep. at 56:21-57:25.

Moreover, nothing in *Grutter* requires a university to give equal preference to every minority group. As the Supreme Court recognized, the Michigan Law School's policy did not mention Asians or Jews "because members of those groups were already being admitted to the Law School in significant numbers." *Grutter*, 539 U.S. at 319, 123 S.Ct. 2325. Throughout the opinion, the Supreme Court recognizes the Law School's interest in ensuring the admission of "underrepresented" minority students. *Id.* at 316, 318-20, 335-363, 338, 341, 123 S.Ct. 2325. It is undisputed that UT considers African-Americans and Hispanics to be underrepresented but does not consider Asian-Americans to be underrepresented. *See* Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 92. However, the Court fails to see how UT's determination is improper or renders its consideration of race unconstitutional. As mentioned above, *Grutter* explicitly authorizes universities to exercise its discretion in determining which minority groups should benefit from the consideration of race and emphasizes the importance of including "underrepresented" minority groups.

The mere fact that the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT does not mean Hispanics are not an "underrepresented" minority group. Hispanic students remain underrepresented at UT when their student population as a percentage of the entire UT population is compared to Texas' Hispanic and Latino population. According to the latest statistics from the United States Census Bureau, Texas' population is 36 percent Hispanic or Latino.[9] In contrast, in 2008 only 20 percent of admitted and/or enrolled UT students were Hispanic. *2008 Report* at Table 1.[10] Thus, compared to their percentage of Texas' population as a whole, Hispanics remain underrepresented. Asian-Americans, on the other hand, are largely *overrepresented* compared to their percentage of Texas' population. Plaintiffs suggest that any reference to demographic information in connection with the consideration of race in admissions constitutes an "attempt at engineering the racial demographics of UT Austin to correspond to the racial demographics of the State" and amounts to unconstitutional racial balancing. Pls.' Mot. for Part. Summ. J. at 16 n. 3. Plaintiffs are wrong. The mere concept of an "underrepresented" minority group, adopted and endorsed by the Supreme Court in *Grutter* and various other cases, necessarily involves the comparison of a minority group's representation at a university to its representation in society; otherwise, there would be no way to determine which minority groups qualify as underrepresented and which ones do not. The constitutional prohibition on racial balancing and racial quotas does not require universities to completely ignore societal demographics, but rather prohibits universities from insulating minority applicants from competition with all other applicants or reserving a fixed number of positions for minority students. *Grutter*, 539 U.S. at 334-35, 123 S.Ct. 2325. There is no evidence even suggesting UT insulates minority students from competition or reserves a fixed number of positions for minority students.[11] In fact, Plaintiffs themselves allege UT does not have a specific number or percentage of minority student enrollment that must be achieved in order to create a "critical mass." Thus, the Court finds the mere fact UT considers some minority groups "underrepresented" but not others does not indicate as a matter of law that UT's consideration of race in admissions is "divorced from the educational benefits attained by the achievement of critical mass." Pls.' Mot. for Part. Summ. J. at 16.

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[9] The Court takes judicial notice of the population estimates promulgated by the United States Census Bureau at http://quickfacts. census.gov/qfd/states/48000.html.

[10] For comparison purposes, the Court notes the following statistics: African Americans-12 percent of the Texas population, 6 percent of UT's 2008 freshman class; Caucasians (non-Hispanic)-47.9 percent of the Texas population, 52 percent of UT's 2008 freshman class; and Asian-Americans-3.4 percent of the Texas population, 19 percent of UT's 2008 freshman class.

Plaintiffs also criticize UT's reliance on diversity statistics at the classroom level. Pls.' Resp. & Reply at 18-20. In 2002, as the undisputed evidence shows, 79 percent of UT classes had zero or one African-American students.[12] *2004 Proposal* at Table 8. UT offered over

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[11] If Defendants are in fact attempting to match minority enrollment to state demographics, they are doing a particularly bad job of it, since Hispanic enrollment is less than two-thirds of the Hispanic percentage of Texas' population and African-American enrollment is only half of the African-American percentage of Texas' population, whereas Asian-American enrollment is more than five times the Asian-American percentage of Texas' population.

[12] The Court refers to classes with five or more students. For classes with five to 24 students (a smaller sampling of classes, since it excludes classes with more than 24 students), 90 percent had one or zero African-American students.

5,631 classes that year, meaning approximately 4,448 classes had one or zero African-American students. *Id.* Similarly, 30 percent of these classes had zero or one Hispanic students; in other words, 1,689 classes had zero or one Hispanic students. Plaintiffs argue there has been no recognition of "individual classroom diversity" as a compelling state interest. *Id.* at 18. But Plaintiffs misconstrue the importance of the classroom diversity numbers. Defendants have not asserted a compelling interest in obtaining diversity in every single class-as the Plaintiffs argue, such an attempt would be largely unworkable without unreasonable and unheard of control over each student's schedule. Rather, the large-scale absence of African-American and Hispanic students from thousands of classes indicates UT has not reached sufficient critical mass for its students to benefit from diversity and illustrates UT's need to consider race as a factor in admissions in order to achieve those benefits. The benefits *Grutter* recognizes occur largely within the classroom; thus, the absence of minority students from a large number of classes demonstrates UT's ongoing need to improve diversity campus-wide.

In short, here is no "magic number" for the achievement of critical mass. The Michigan Law School policy, approved by the Supreme Court, did not include any specific percentage, or range of percentages, of minority enrollment that would automatically satisfy "critical mass." Instead, as articulated in *Grutter,* critical mass is defined by the educational benefits diversity provides, both to underrepresented minorities and to the student body at large. 539 U.S. at 318-20, 324-25, 328-33, 123 S.Ct. 2325 ("the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce."). Despite the Plaintiffs' assertions to the contrary, 20 percent minority enrollment is no universal "ceiling" over which additional diversity ceases to be a compelling state interest. After conducting a comprehensive study, UT concluded it had not achieved critical mass and was not adequately providing the benefits from diversity to its students. *See 2004 Proposal.* Thus, like the Michigan Law School, UT decided to consider race as one of several factors in its admissions process in order to increase diversity. Based on the clear holding of the Supreme Court in *Grutter* and the undisputed facts of this case, the Court finds UT "has a compelling interest in attaining a diverse student body" sufficient to justify its consideration of race as a part of its admissions process. *Grutter,* 539 U.S. at 328, 123 S.Ct. 2325.

IV. Narrowly Tailored

Having found UT has a compelling interest in attaining a diverse student body, the Court must next determine whether UT's use of race in admissions is narrowly tailored to further that interest. *Grutter,* 539 U.S. at 326, 123 S.Ct. 2325. *Grutter* specifically addresses what it means for a race-conscious admissions program to be narrowly tailored:

> To be narrowly tailored, a race-conscious admissions program cannot use a quota system-it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants."

> *Bakke,* 438 U.S., at 315, 98 S.Ct. 2733 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." *Id.*, at 317, 98 S.Ct. 2733.

> 539 U.S. at 334, 123 S.Ct. 2325. Furthermore: Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups ... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.

> *Id.* at 339, 123 S.Ct. 2325.

UT considers race in its admissions process as a factor of a factor of a factor of a factor. As described in exhaustive detail above, race is one of seven "special circumstances,"[13] which is in turn one of six factors that make up an applicants personal achievement score. *2008 Top Ten Report* at 2. The personal achievement score is one of three factors, along with two essays, that together make up the Personal Achievement Index ("PAI"). Lavergne Dep. at 57:14-17, 21:23. Finally, the PAI score is one of two elements that make up an applicant's ultimate AI/PAI score, which determines whether a non-Top Ten Percent applicant will receive admission. Ishop Aff. ¶ 12. At no point in the process is race considered individually or given a numerical value; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context. Bremen Dep. at 22:8-13; Ishop Dep. at 13:9-14:19. Although an applicant's race is available throughout the application process, no admissions office employee or anyone else at UT monitors the racial or ethnic composition of the group of admitted students in order to decide whether an applicant will be admitted. Ishop Aff. ¶ 17.

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[13] The other special circumstances factors are the applicant's family's socio-economic status, her school's socio-economic status, her family responsibilities, whether she lives in a single-parent home, whether languages other than English are spoken at home, her SAT/ACT score compared to her school's average score. *2008 Top Ten Report* at 2.

UT's admissions policy shares many of the same features as the Law School's policy in *Grutter,* which is not surprising considering the parties agree UT's policy was based on the Law School's policy. The Supreme Court described the important features of the Law School's policy as follows:

> [T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to

> applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger* [539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003)] ... the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity ... Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."

Grutter, 539 U.S. at 337, 123 S.Ct. 2325 (citations omitted). Furthermore:

> "The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race."

Id. at 340, 123 S.Ct. 2325. Similarly, UT's admissions policy provides a "highly individualized, holistic review" of every applicant, regardless of race or ethnicity, and considers multiple factors that contribute to "diversity" aside from race or ethnicity. UT does not accept any applicant based solely on her race or ethnicity, nor does UT assign any predetermined or numerical value to a person based on those characteristics. At UT, race is "one factor among many," which the University uses to assemble a diverse student body. Thus, based on the obvious similarities between UT's program and the Supreme Court-approved program in *Grutter*, UT's admissions policy on its face appears to be narrowly tailored.

Despite these similarities, Plaintiffs argue UT's use of race in admissions decisions is not narrowly tailored because: 1) "it produces only minimal gains in the enrollment of under-represented minorities;" 2) UT failed to consider race-neutral alternatives that would achieve UT's diversity goals; 3) UT's consideration of race is over-inclusive because it benefits Hispanic students, who are not underrepresented; and 4) UT's consideration of race has no logical end point. Pls.' Mot. for Part. Summ. J. at 19-30; Pls.' Resp. & Reply at 22-29.

Plaintiffs' first argument attempts to force UT into an impossible catch-22: on the one hand, it is well-established that to be narrowly tailored the means "must be specifically and narrowly framed to accomplish" the compelling state interest, *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), but on the other hand, according to the Plaintiffs, the "narrowly tailored" plan must have more than a minimal effect. In support of their argument, Plaintiffs cite *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Plaintiffs are correct that Parents Involved criticizes the "minimal effect" the school's racial classification had on the assignments of students. 127 S.Ct. at 2759-61. However, read in context, this criticism is not meant to establish a new element to the strict scrutiny analysis, but rather is offered as evidence that the school districts had failed to "consider[ ] methods other than explicit racial classifications to achieve their stated goals." *Id.* at 2760. *Parents Involved* reaffirms *Grutter's* standard that "[n]arrow tailoring requires 'serious good faith consideration of workable race-neutral alternatives,'" and criticizes the school districts for rejecting race-neutral alternatives "with little or no consideration." *Id.* (quoting *Grutter,* 539 U.S. at 339, 123 S.Ct. 2325). Thus, as described by the Supreme Court in *Parents Involved,* the question is not whether the means adopted by UT exceeds some undefined "minimal effect" on diversity, but rather whether UT has demonstrated "serious, good faith consideration of workable race-neutral alternatives."[14] *Id.* The undisputed evidence establishes that UT has done more than merely consider race neutral alternatives. The vast majority of UT students are admitted under the Top Ten Percent law, which Plaintiffs agree is a race-neutral policy, and the undisputed evidence establishes UT has instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools. Orr Aff. ¶ 4. Despite these race-neutral efforts to expand diversity at UT, in 2004 the University determined it still lacked a diverse student body, as evidenced by the absence of African-American and Hispanic students in thousands of its classes. *2004 Proposal* at Table 8. To argue UT has failed to give serious, good faith consideration to race-neutral alternatives is to ignore the facts of this case-namely, that UT has used and continues to use race-neutral alternatives in addition to its limited consideration of race as part of its admissions process.

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[14] It should also be noted it is undisputed in the record before the Court that the consideration of race in admissions does increase the level of minority enrollment. The undisputed evidence establishes that even though it is not determinative, race is a meaningful factor and can make a difference in the evaluation of a student's application. Pls.' Mot. for Part. Summ. J. Mem. at 5; Pls.' Mot. for Part. Summ. J. Ex. 8, Dep. of Bruce Walker ("Walker Dep.") at 45:5-12. However, because race is not assigned any numerical value but rather considered as part of an individualized, holistic review of each applicant, the University does not have a specific number of admitted students who were admitted because of their race.

As the Supreme Court in *Parents Involved* recognized, "The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional."" 127 S.Ct. at 2753 (quoting *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325). The facts of *Parents Involved*, as set forth in that case, are clearly distinguishable from this case:

> In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints"; race, for some students, is determinative standing alone ... It is not simply one factor weighed with others in

> reaching a decision, as in *Grutter*, it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz*, the plans here "do not provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way.

Id. at 2753-54 (citations omitted). UT's admissions policy does not make race "*the* " factor nor rely on racial classifications in a "nonindividualized mechanical" way. UT has not only considered but continues to use race-neutral alternatives in addition to its consideration of race. Thus, the mere fact that UT's consideration of race does not have a large effect on diversity, due largely to the overwhelming presence of the Top Ten Percent law, does not mean the policy fails to further UT's compelling interest or is in some way not narrowly tailored for that goal.

These facts also address Plaintiffs' second argument, that "UT Austin failed to undertake 'serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.'" Pls.' Mot. for Part. Summ. J. at 22 (quoting *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325). As described above, UT not only considered but in fact adopted race-neutral alternatives. However despite these efforts, UT concluded the diversity of its student body was lacking based, at least in part, on the absence of underrepresented minority students in thousands of classes. *2004 Proposal* at Table 8. UT thus determined it was necessary to consider race in admissions in addition to continuing to use those race-neutral alternatives. As *Grutter* indicates, courts should provide some level of deference to a university in determining whether additional diversity is needed. *Grutter,* 539 U.S. at 328, 123 S.Ct. 2325 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."). Furthermore, the Supreme Court recognized that the mere existence of race-neutral alternatives, like percentage plans, that could improve diversity does not preclude universities from considering race in admissions, as long as the university has given those alternatives "serious, good faith consideration." *Id.* at 339-40, 123 S.Ct. 2325. "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Id.* at 339, 123 S.Ct. 2325. The Plaintiffs essentially argue UT must exhaust every conceivable race-neutral alternative before it could consider race, a proposition specifically rejected by the Supreme Court. The Court thus explicitly finds the undisputed record and evidence establishes that UT has given serious, good faith consideration to workable race-neutral alternatives as required by *Grutter.*

Next, Plaintiffs argue UT's consideration of race is not narrowly tailored because it is over-inclusive in that it benefits Hispanic students, who are not underrepresented when compared to Asian-American students. This argument closely resembles the Plaintiffs' argument regarding whether UT has stated a compelling state interest, and fails for the same reason. The undisputed evidence establishes that the percentage of UT students who are Hispanic is less than two-thirds the percentage of Texas' population that is Hispanic. Thus, in that sense, Hispanics are clearly an underrepresented minority group. The Constitution does not prohibit the government from considering demographic information in order to decide which groups are underrepresented. Instead, as *Grutter* indicates, the Constitution prohibits racial balancing and racial quotas, but there is no indication in *Grutter* or any other case cited by the Plaintiffs that universities are constitutionally required to ignore societal demographics. *Grutter*, 539 U.S. at 334-35, 123 S.Ct. 2325. The Court thus finds UT's intent to increase the enrollment of Hispanic students does not render their consideration of race in admissions unconstitutionally over-inclusive.

Finally, Plaintiffs argue UT's consideration of race in admissions is not narrowly tailored because it has "no logical end point." Pls.' Mot. for Part. Summ. J. at 30. The Plaintiffs are correct that in order to be narrowly tailored, the *Grutter* Court required that "race-conscious admissions policies must be limited in time." 539 U.S. at 342, 123 S.Ct. 2325. However, the Supreme Court also recognized that "[i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* The undisputed evidence establishes that every five years UT's admissions process is evaluated specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body, or whether race-neutral alternatives exist that would achieve the same results. Walker Aff. ¶ 16; *2004 Proposal* at 32. The first formal review of UT's use of race in admissions is scheduled to begin in the fall of 2009. *2004 Proposal* at 32. Thus, UT's admissions policy explicitly includes a periodic review to determine whether its consideration of race remains necessary to achieve a diverse student body, as required by *Grutter.*[15]

Accordingly, the Court finds UT's consideration of race in admissions is narrowly tailored. In fact, it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter.* Nothing in *Grutter* prohibits a university from using both race-neutral alternatives and race itself, provided such an effort is necessary to achieve the educational benefits that stem from sufficient student body diversity. Such efforts should in fact be encouraged as the next logical step toward the day when consideration of a person's race becomes completely unnecessary. But, until that day, universities are not required to exhaust every possible race-neutral alternative as long as they consider those alternatives seriously and in good faith. UT not only considered several race-neutral alternatives, it implemented them and continues to use them to this day. But, despite those efforts, UT still found diversity lacking in its student body and thus decided to consider race as part of its admissions process. Under *Grutter* and *Parents Involved,* UT's decision and the ensuing admissions policy is narrowly tailored to further a compelling governmental interest.

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[15] The Court further notes that the Supreme Court "[took] the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." *Grutter,* 539 U.S. at 343, 123 S.Ct. 2325 (citation omitted).

CONCLUSION

The Texas Solicitor General summarized this case best when he stated, "If the Plaintiffs are right, *Grutter* is wrong." Absent Texas' Top Ten Percent law and the effect it has on UT admissions, the Court has difficulty imagining an admissions policy that could more closely resemble the Michigan Law School's admissions policy upheld and approved by the Supreme Court in *Grutter*. But if the Plaintiffs are right, and if the Top Ten Percent law somehow acts to make UT's consideration of race in admissions unconstitutional, then every public university in the United States would be prohibited from considering race in their admissions process because the same type of "percentage plan" which the Top Ten Percent law embodies could be established at any state university, and thus their failure to implement such a plan would constitute a failure to consider race-neutral alternatives. *Grutter* stands for exactly the opposite, as the decision explicitly permitted the consideration of race despite the existence and availability of race-neutral alternatives like percentage plans or lotteries. 539 U.S. at 340, 123 S.Ct. 2325. Consequently, as long as *Grutter* remains good law, UT's current admissions program remains constitutional.

In accordance with the foregoing:

IT IS ORDERED that LULAC's Motion for Leave to File *Amicus Curiae* Brief In Support of Defendants Out of Time [# 104] is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment [# 94] is DENIED.

IT IS FURTHER ORDERED that Defendants' Cross-Motion for Summary Judgment [# 96] is GRANTED and the Court GRANTS summary judgment in favor of all Defendants on all claims.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Withdraw Suzzette Rodriguez Hurley as Attorney [# 115] is GRANTED as unopposed.

IT IS FINALLY ORDERED that all pending motions are DISMISSED AS MOOT.

JUDGMENT

BE IT REMEMBERED on the *17th* day of August 2009 the Court entered its order granting summary judgment on behalf of the Defendants, the Court enters the following:

> IT IS ORDERED, ADJUDGED, and DECREED that the Court finds the University of Texas at Austin's admissions policy, and specifically its consideration of race as part of the admissions process, to be narrowly tailored to further a compelling government interest and thus constitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and the federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Plaintiffs Abigail Fisher and Rachel Michalewicz TAKE NOTHING in this cause against the Defendants the State of Texas; the University of Texas at Austin; Kenneth Shine, Chancellor of the University of Texas System in his official capacity; David B. Pryor, Executive Vice Chancellor for Academic Affairs in his official capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in his official capacity; William Powers, Jr., President of the University of Texas at Austin in his official capacity; the Board of Regents of the Texas State University System; John W. Barnhill, Jr., H. Scott Caven, Jr., James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, and Printice L. Gary, as Members of the Board of Regents in their official capacities; and Bruce Walker, Vice Provost and Director of Undergraduate Admissions in his official capacity,[1] and that all costs of suit are taxed against the Plaintiffs, for which let execution issue.

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[1] Plaintiffs previously voluntarily dismissed Defendants the State of Texas and Burgdorf, and substituted Kenneth Shine for Mark Yudof. To any extent necessary, this judgment shall also apply to the previously dismissed or substituted defendants.

APPENDIX C — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, DATED JUNE 17, 2011

United States Court of Appeals,
Fifth Circuit.

644 F.3d 301

No. 09–50822.
June 17, 2011.

Abigail Noel FISHER; Rachel Multer Michalewicz,

Plaintiffs–Appellants,

v.

UNIVERSITY OF TEXAS AT AUSTIN; David B. Pryor, Executive Vice Chancellor for Academic Affairs in His Official Capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; James R. Huffines, as Member of the Board of Regents in His Official Capacity; Janiece Longoria, as Member of the Board of Regents in Her Official Capacity; Colleen McHugh, as Chair of the Board of Regents in Her Official Capacity; Robert L. Stillwell,

as Member of the Board of Regents in His Official
Capacity; James D. Dannenbaum, as Member of the
Board of Regents in His Official Capacity; Paul Foster,
as Member of the Board of Regents in His Official
Capacity; Printice L. Gary, as Member of the Board
of Regents in His Official Capacity; Kedra Ishop, Vice
Provost and Director of Undergraduate Admissions
in Her Official Capacity; Francisco G. Cigarroa, M.D.,
Interim Chancellor of the University of Texas System
in His Official Capacity,

Defendants–Appellees.

Before *KING*, *HIGGINBOTHAM* and GARZA, Circuit Judges.

PER CURIAM:

The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Voting for en banc rehearing were: Chief Judge Edith H. Jones, Judge E. Grady Jolly, Judge Jerry E. Smith, Judge Edith B. Clement, Judge Priscilla R. Owen, Judge Jennifer Walker Elrod, and Judge Catharina Haynes.

Voting against en banc rehearing were: Judge Carolyn Dineen King, Judge W. Eugene Davis, Judge Emilio M. Garza, Judge Fortunato P. Benavides, Judge Carl E.

Stewart, Judge James L. Dennis, Judge Edward C. Prado, Judge Leslie H. Southwick, and Judge James E. Graves.*

Upon the filing of this order, the clerk shall issue the mandate forthwith. *See* FED. R.APP. P. 41(b).

EDITH H. JONES, Chief Judge, with whom *E. GRADY JOLLY, JERRY E. SMITH, EDITH BROWN CLEMENT* and *OWEN*, Circuit Judges, join, dissenting:

By a narrow margin, this court has voted not to rehear this case en banc. I respectfully dissent. This panel decision essentially abdicates judicial review of a race-conscious admissions program for undergraduate University of Texas students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States. The panel purports to apply the Supreme Court's decision in *Grutter v. Bollinger*,[1] which authorized some race conscious admissions to Michigan Law School to foster educational "diversity." The panel's opinion, however, extends *Grutter* in three ways. First, it adopts a new "serious good faith consideration" standard of review, watering down *Grutter*'s reliance on strict narrow tailoring. Second, it authorizes the University's race-conscious admissions program although a race-neutral state law (the Top Ten Percent Law) had already fostered increased campus racial diversity. Finally, the panel appears to countenance an unachievable and unrealistic goal of racial diversity at the classroom level to support the University's race-conscious policy. This decision in effect gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires.

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* In 2009, the court decided to begin identifying the judges voting for or against en banc rehearing where a poll is taken and the request for en banc rehearing is denied.

[1] 539 U.S. 306, 123 S.Ct. 2325 (2003).

Texas today is increasingly diverse in ways that transcend the crude White/Black/Hispanic calculus that is the measure of the University's race conscious admissions program. The state's Hispanic population is predominately Mexican–American, including not only families whose Texas roots stretch back for generations but also recent immigrants. Many other Texas Hispanics are from Central America, Latin America and Cuba. To call these groups a "community" is a misnomer; all will acknowledge that social and cultural differences among them are significant. Whether the University also misleadingly aggregates Indians, Pakistanis and Middle Easterners with East "Asians" is unclear, but Houston alone is home to hundreds of thousands of people from East Asia, South Asia and the Middle East. In Texas's major cities, dozens of other immigrant groups reside whose families have overcome oppression and intolerance of many kinds and whose children are often immensely talented. Privileging the admission of certain minorities in this true melting-pot environment seems inapt. But University administrators cherish the power to dispense admissions as they see fit, which might be reasonable except for two things: the Texas legislature has already spoken to diversity, and the U.S. Constitution abhors racial preferences. Because even University administrators can lose sight of the constitutional forest for the academic trees, it is the duty of the courts to scrutinize closely their "benign" use of race in admissions.

1. That *Fisher* deviates from *Grutter*'s legal analysis is evident from a brief comparison of the cases. In *Grutter*, the Court approved the Michigan Law School's holistic, individual consideration of applications that included a student's race as a factor in addition to many other non-academic factors when the school pursued the "compelling interest" of having a "diverse" student body. The result of the policy was consequential, a tripling of the number of African-American and Hispanic law students, from 4% to 14.5% of the student body. *Grutter*, 539 U.S. at 320, 123 S.Ct. at 2334. Unlike the *Fisher* panel, however, the Supreme Court mentioned deference to university administrators' decisions at only two points in its opinion. *Grutter* expressly followed the narrow tailoring inquiry used in other cases assessing race-conscious governmental policies.

First, recognizing the unique constitutional interests of the academy, the Court "presume[d]" the good faith of the university within its discussion leading to the "conclusion that the Law School has a compelling interest in a diverse student body ...." *Grutter*, 539 U.S. at 328–29, 123 S.Ct. at 2338–39. But even for this purpose, the Court awarded only "a degree of deference" to administrators' academic decisions. *Id.* at 2339.

Second, the Court stated that narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." 539 U.S. at 339, 123 S.Ct. at 2345. This discussion of university decisionmaking was meant to *challenge the university,* not to bless whatever rationale it advances for racially preferential admissions. *Grutter* emphasized, by repeated references to prior decisions concerning racial preferences, that the government "is still 'constrained in how it may pursue [a compelling interest]: [T]he means chosen to accomplish the ... asserted purpose must be specifically and narrowly framed to accomplish that purpose.' " 539 U.S. at 333, 123 S.Ct. at 2341 (citing *Shaw v. Hunt,* 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), a redistricting decision). Further, it held, narrow tailoring "must be calibrated to fit the distinct issues raised" by promoting racial diversity in higher education. *Grutter,* 539 U.S. at 334, 123 S.Ct. at 2341. Far from diluting narrow tailoring in order to defer to university administrators, the *Grutter* Court cited *Adarand*[2]—an employment case—to demonstrate consistency with prior equal protection jurisprudence. The Court explained in detail how the racial "plus factor" in *Grutter* still required minority applicants to compete with nonminority applicants; why this program was not an impermissible quota system; how nonminority candidates with lower academic scores were often admitted over minority candidates; why race-neutral alternative admission programs would not serve the university's particular interests; why nonminority students were not

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[2] *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

"unduly burdened" by the racial factor in the admissions process; and finally, why an end point or periodic review of the process was necessary to comply with the Constitution.

Certainly, *Grutter* authorizes university officials, in certain circumstances, to pursue campus "diversity" using race as one factor in their decisionmaking. But on its face, *Grutter* does not countenance "deference" to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications.

The *Fisher* panel opinion, although occasionally difficult to understand, supplants strict scrutiny with total deference to University administrators.[3] First, the opinion's Standard of Review section mentions strict scrutiny in the first sentence, but goes on for several paragraphs counseling deference to universities. The panel, contrary to the Supreme Court's requirement that every race-conscious governmental decision bears a heavy burden of proof, issues this blanket approval:

> *Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious

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[3] I do not disagree with the panel's conclusion that following *Grutter*, we may presume a university's good faith in the decision that it has a compelling interest in achieving racial and other student diversity. But that is as about as far as deference should go.

> measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.
>
> *Fisher*, 631 F.3d 213, 233 (5th Cir.2011). This statement apparently conflates the University's compelling interest with narrow tailoring, or at least it misleads as to the importance of each prong of strict scrutiny analysis.

Second, immediately following this summary, the panel seeks support from the *Parents Involved* case, which followed *Grutter* and reiterated the Supreme Court's disapproval of "benign" race-based student assignment decisions in public schools. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). But *Fisher* misquotes *Parents Involved* in saying that "[*Parents Involved*] invoked *Grutter's* 'serious, good faith consideration' standard, *rather than* the strong-basis-in-evidence standard that Appellants would have us apply [to the narrow tailoring inquiry]." *Fisher,* 631 F.3d at 234 (emphasis added). There is no support in *Parents Involved* for this artificial dichotomy, nor for *Fisher* 's later assertion that *Parents Involved* might have turned out differently—*i.e.*, racially discriminatory assignments might have been allowed—had there been no "other, more narrowly tailored means" to serve the school districts' purposes. *Id.* On the contrary, *Parents Involved* juxtaposed the narrow tailoring inquiries of *Grutter* and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (Kennedy, J., concurring), an employment decision. *Parents Involved*, 551 U.S. at 735, 127 S.Ct. at 2760. This parallelism illustrated that *Grutter*'s "serious, good faith consideration" statement is not a new standard at all, but rather a way to express the classic requirement that narrow tailoring be more than a rote exercise in dismissing race-neutral alternatives.[4] With due respect to the panel, *Fisher* fails to apply the avowed continuity in principle of the Court's decisions. The panel's "serious, good faith consideration" standard distorts narrow tailoring into a rote exercise in judicial deference.

Third, the panel disturbingly implies that only procedural, not substantive, consideration of a university's race-conscious admissions program is necessary. *Fisher*, 631 F.3d at 231 ("Rather than second-guess the merits of the University's decision, ... we instead scrutinize the University's decisionmaking process ...."). *Grutter* nowhere countenances this radical dilution of the narrow tailoring standard.

Finally, the panel reinforces its overbroad approval or, more precisely, judicial abdication, in its Conclusion, which mentions a "serious, good faith consideration" standard twice and opines that the University's plan "is more a process than a fixed structure that we review." *Id.* at 246–47.

2. The effect of the panel's wholesale deference becomes clear when one considers the important factual distinction

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[4] The *Fisher* panel is simply wrong in attempting to divorce *Grutter*'s standards from those of employment discrimination cases. *Fisher*, 631 F.3d at 233 (holding that employment cases "have little purchase in this challenge to university admissions."). Both *Grutter* and *Parents Involved* routinely invoke those cases.

between this case and *Grutter*. In *Fisher*, the plaintiffs challenged a post- *Grutter* University plan whereby 19% of the entering freshman class were subject to a race-conscious admissions process to increase diversity.[5] As Judge Garza's concurrence demonstrates, the number of students actually admitted under this racial preference policy is unclear, but it amounted to no more than a couple hundred out of more than six thousand new students. 631 F.3d at 260–61 (Garza, J., specially concurring).

The panel opinion asserts that the University's admission process is constitutionally acceptable because it is modeled closely after *Grutter*. Yet the difference is obvious. The Texas legislature statutorily mandated increased diversity in admissions by means of the Top Ten Percent Law. Under that race-neutral law, covering 80% of University admissions, the top ten percent of graduates from every Texas high school were automatically admitted, and many African–American and Hispanic students matriculated to the University. The challenged preferential policy was adopted on top of the unprecedentedly high numbers (compared to many other universities) of preferred minorities entering under the Top Ten Percent Law.[6]

---

[5] I follow Judge Garza's convention of using figures for enrolled Texas students for the same reasons identified in his concurrence. *See* 631 F.3d at 260 n. 19. If we were to expand consideration to out-of-state students, then 23.8% of enrollees would not have gained admission through the Top Ten Percent Law.

[6] In dicta, the author of *Fisher* questions the efficacy, indeed the constitutionality of the Top Ten Percent Law, but no such issue was before the panel.

The pertinent question is thus whether a race-conscious admissions policy adopted *in this context* is narrowly tailored to achieve the University's goal of increasing "diversity" on the campus. Contrary to the panel's exercise of deference, the Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment. *Parents Involved*, 551 U.S. at 734–35, 127 S.Ct. at 2760. As the *Parents Involved* Court explained, "In *Grutter*, the consideration of race was viewed as indispensable in more than tripling minority representation at the [Michigan] law school—from 4 to 14.5 percent." *Id.* Despite the *Fisher* panel's artful use of statistics to describe the effect of the University of Texas's race-conscious plan, the contrast with *Grutter* is stark. As noted by the panel, more than 20% of the entering freshmen are already African–American and Hispanic, resulting in real diversity even absent a *Grutter* plan. The additional diversity contribution of the University's race-conscious admissions program is tiny, and far from "indispensable." It is one thing for the panel to accept "diversity" and achieving a "critical mass" of preferred minority students as acceptable University goals. It is quite another to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African–American or Hispanic.

3. Finally, in an entirely novel embroidering on *Grutter*, the panel repeatedly implies that an interest in "diversity" *at the classroom level*—in a university that offers thousands of courses in multiple undergraduate schools and majors—justifies enhanced race-conscious

admissions. *Fisher*, 631 F.3d at 225 (citing studies that motivated the University's race-conscious plan based on classroom-level diversity); 237 (discussing the state's interest in classroom-level diversity as a constitutional matter); *see also* 240, 241, 243, 244, 245. Although the opinion may not expressly render a "holding" on the permissibility of fostering diversity at the classroom level, it conveys a clear message. The message is reinforced in Judge Garza's concurrence, which rejects the panel majority's implication that ("a university's asserted interest in racial diversity could justify race-conscious policies ... not merely in the student body generally, but major-by-major and classroom-by-classroom.") 631 F.3d at 253–54. (Garza, J., specially concurring).

The pernicious impact of aspiring to or measuring "diversity" at the classroom level seems obvious upon reflection. Will the University accept this "goal" as carte blanche to add minorities until a "critical mass" chooses nuclear physics as a major? Will classroom diversity "suffer" in areas like applied math, kinesiology, chemistry, Farsi, or hundreds of other subjects if, by chance, few or no students of a certain race are enrolled? The panel opinion opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be "underrepresented." It offers no stopping point for racial preferences despite the logical absurdity of touting "diversity" as relevant to every subject taught at the University of Texas. In another extension of *Grutter*, the panel opinion's approval of classroom "diversity" offers no ground for serious judicial review of a terminus of the racial preference policy. *Cf. Grutter*, 539 U.S. at 343, 123

S.Ct. at 2347 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.")

In the end, this case may determine the admissions policies of institutions of higher learning throughout the Fifth Circuit, or beyond, for many years. Reasonable minds may indeed differ on the extent of deference owed to universities in the wake of *Grutter*, but the panel's effective abandonment of judicial strict scrutiny in favor of "deference" at every step of strict scrutiny review contradicts *Grutter* and *Parents Involved*. The panel approves race conscious admissions whose utility is highly dubious in comparison with the effect of the Top Ten Percent Law. And the opinion's hints supporting "classroom diversity" are without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs. I respectfully dissent from the denial of en banc rehearing.

OPPOSITION BRIEF

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In The
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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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No. 11-345

In The Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF IN OPPOSITION

The petition for certiorari should be denied for four reasons.

First, Fisher's petition is shot through with vehicle problems—all caused by her own decisions to sue as an individual plaintiff, and to demand relief that cannot redress the past injuries of which she complains. Fisher is scheduled to graduate from Louisiana State University in May 2012; at this point she cannot possibly assert an intent to apply to UT-Austin as a freshman or transfer student. She therefore lacks the personal stake needed to pursue an injunctive remedy, and her failure to sue as a class representative means that she cannot maintain an Article III case or controversy over her claims for prospective relief. *See Fisher v. Univ. of Tex.*, 631 F.3d 213, 217 (5th Cir. 2011) ("*Fisher II*"); Pet. App. 3a-4a. Only a claim for retrospective relief could preserve a case or controversy in this Court.

Yet Fisher's complaint does not request nominal damages, nor does it seek any damages that could be traced to UT-Austin's rejection of her application, such as lost earning potential or higher tuition expenses. Fisher's sole demand for retrospective relief is for a refund of her $50 application fee and a $50 housing deposit that she paid the University—that is *all* that is at stake in her petition. But neither the application fee nor the housing deposit represents an "injury" caused by UT-Austin's admissions policies. Nor could refunding those fees possibly redress the denial-of-equal-treatment injury that Fisher alleges. Even if Fisher had been accepted (or rejected) by UT-Austin under race-neutral admissions, she *still* would be out-of-pocket for the nonrefundable application fee and housing deposit. And even if this Court were to think that Fisher could salvage an Article III case or controversy out of this situation, UT-Austin could moot these proceedings beyond any doubt simply by tendering $100 to Fisher. It would not be prudent to grant certiorari to resolve a $100 dispute, when a litigant in UT-Austin's position could settle and moot the case rather than incur the massive expenses of litigating this case to conclusion in this Court.

Second, even if Fisher could somehow overcome these daunting and inescapable jurisdictional problems, her petition remains uncertworthy because it alleges no circuit splits and asks this Court to review a fact-bound application of *Grutter v. Bollinger,* 539 U.S. 306 (2003), to the unique circumstances of UT-Austin. Fisher argues that UT-Austin's race-conscious admissions policies are unconstitutional because they are unnecessary—because UT-Austin can (in her view) attain a "critical mass" of underrepresented minority students through the "Top Ten Percent Law." Pet. at 21-22, 34-35. But the Top Ten Percent Law exists only in Texas, and the two other States with similar "percentage plan" admission laws prohibit race-conscious admissions. Fisher therefore is seeking not merely error correction, but a Texas-specific form of error correction.

Third, Fisher's factual concessions below foreclose many arguments that appear in her petition. *See Christian Legal Soc'y v. Martinez,* 130 S. Ct. 2971, 2982-84 (2010). The parties moved for summary judgment on an undisputed factual record, and Fisher's own "Statement of Facts" admits that "UT Austin *has not established a goal, target, or other quantitative objective* for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008," Pls.' SOF at 16 ¶ 98 (emphasis added), and further admits that "[u]sing race in admissions helps UT achieve racial diversity," *id.* at 15 ¶ 93. These factual stipulations leave Fisher no room to argue that UT-Austin engages in "blatant racial balancing," Pet. 29, or that UT-Austin's race-conscious admissions policies have no measurable impact on minority enrollment, *id.* at 23.

Finally, this Court should not grant certiorari to reconsider *Grutter*, as some of Fisher's amici curiae urge, because the question presented assumes *Grutter*'s correctness and asks only "[w]hether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger,* 539 U.S. 306 (2003), permit [UT-Austin's] use of race in undergraduate admissions decisions." Pet. at i. *See* SUP. CT. R. 14.1(a). Even if members of this Court are inclined to reconsider *Grutter*, this is a demonstrably improper vehicle, given the limited question presented, the fatal concessions that Fisher made below, and the intractable jurisdictional problems that plague her petition.

STATEMENT

Since 1997, UT-Austin has based admissions decisions on three factors: (1) high-school class rank; (2) the Academic Index ("AI"); and (3) the Personal Achievement Index ("PAI"). The AI predicts freshman-year grade-point average by combining high-school class rank with standardized test scores. The PAI comprises the applicant's average essay score and her "personal achievement score," which considers leadership, extracurricular activities, honors and awards, work experience, community service, and special circumstances. "Special circumstances" include the applicant's socioeconomic background, the socioeconomic status of her high school, and any special family responsibilities.

Since 1998, Texas law has required UT-Austin to admit any applicant who graduates in the top ten percent of a Texas high-school class. TEX. EDUC. CODE § 51.803. Top Ten Percent applicants are guaranteed only admission to the University. Although many are also admitted to their preferred academic program based on Top Ten Percent status, others are admitted to a particular program based on AI/PAI. In addition, many academic programs admit all applicants who have a particularly high AI but graduated outside of the top 10% of their class. Thus, the vast majority of UT-Austin students are admitted solely on numerical academic criteria.

After *Grutter*, UT-Austin launched an extensive review to determine whether its admissions policies adequately served its broad interest in diversity. UT-Austin commissioned a thorough study to evaluate diversity throughout the university, in various departments and colleges, and within individual classrooms. The University consulted with legal scholars to interpret *Grutter* and with students, faculty members, and a leading expert on holistic review to evaluate whether UT-Austin was attaining the educational benefits of diversity.

At the conclusion of this intensive effort, UT-Austin officials determined that the University lacked critical mass and diversity, both across the student body and within the classroom. Consistent with *Grutter*'s framework, UT-Austin proposed to add race to the existing "special circumstances" subfactors that are considered holistically in developing an applicant's PAI. The proposal was adopted in August 2004 and took effect with the fall 2005 entering class.

ARGUMENT

I. FISHER'S PETITION PRESENTS GRAVE VEHICLE PROBLEMS THAT WILL PREVENT THIS COURT FROM RESOLVING THE MERITS OF HER CONSTITUTIONAL CLAIMS.

An Article III case or controversy exists only when a litigant has suffered a concrete and particularized injury, caused by the challenged conduct, and redressable by the relief requested by the litigant. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The case or controversy must persist through *all* stages of litigation. *See Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990).

Fisher claims to have been wrongfully denied admission to UT-Austin, and her complaint demands declaratory and injunctive relief, a "refund of application fees and related expenses," attorneys' fees and costs, and "[a]ll other relief th[e] Court finds appropriate and just." Pls.' 2d Am. Compl. ¶ 165(i) (5.CR.1262). In light of Fisher's impending graduation from college, none of these claims is capable of maintaining a case or controversy between Fisher and UT-Austin at this stage of the litigation.

A. Fisher Can No Longer Maintain an Article III Case or Controversy Based on Her Claims for Declaratory and Injunctive Relief.

Fisher seeks several types of declaratory and injunctive relief, but disappointed university applicants cannot secure standing to seek forward-looking relief by relying on the fact of past injury. *See Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Instead, Fisher must show that UT-Austin's *future* use of race-conscious admissions threatens her with an "actual or imminent" injury. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-11 (1995); *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 493 (10th Cir. 1998) (litigants seeking to enjoin a university's admission policies must make "an adequate showing" that they "will re-apply to" that school "and will thus be evaluated under disputed policy again 'in the relatively near future'"). Fisher cannot make this showing; indeed, she has not even attempted to do so.

Fisher had standing to seek injunctive relief when she filed her lawsuit on April 7, 2008. At that time, Fisher had not yet matriculated at LSU, and she could plausibly claim that she intended to seek admission to UT-Austin as a freshman or transfer. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (holding that a rejected applicant's intent to seek transfer admission confers standing to seek injunctive relief against a university's freshman admissions policies). But Fisher is now nearly halfway through her senior year at LSU.[1] She denies any intent to reapply to UT-Austin as a freshman or transfer, *see Fisher II*, 631 F.3d at 217 (Pet. App. 3a-4a), and she could not possibly do so at this point. Fisher therefore lacks any "actual or imminent" injury caused by UT-Austin's *future* use of race-conscious admissions, and she cannot seek prospective relief.

None of this would matter had Fisher brought this lawsuit as a class action. If Fisher were representing a class of rejected nonminority applicants, then her impending graduation would not preclude her from seeking prospective relief on behalf of that class, provided one of the class members could satisfy the requirements of Article III. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975). That is why Patrick Hamacher had standing in *Gratz* to seek to enjoin the University of Michigan's undergraduate admissions policies even after he had graduated from a different college; he was representing a certified class of rejected nonminority applicants "for all academic years from 1995 forward." *Gratz*, 539 U.S. at 253.

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[1] *See* http://www.lsu.edu/studentorgs/bowlingclub/roster.html (LSU Bowling Club online roster listing "Abby Fisher" from Sugarland, Texas as a "senior") (last visited December 7, 2011).

Unlike Hamacher, Fisher chose to sue as an individual plaintiff rather than as a class representative. She therefore cannot maintain an Article III case or controversy over her claims for prospective relief at this point—just like Marco DeFunis, who challenged a law school's admissions policies as an individual litigant and found his case declared moot when it reached this Court during his final semester of law school. *See DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (per curiam). Fisher does not even challenge the Fifth Circuit's holding that she "lack[ed] standing" to seek prospective relief against UT-Austin. *See Fisher II*, 631 F.3d at 217 (citing *DeFunis*); Pet. App. 3a-4a.

Indeed, Fisher seems determined to sweep this problem under the rug. This litigation began with *two* plaintiffs—Abigail Fisher and Rachel Michalewicz—who appeared together throughout the proceedings in the district court and court of appeals. But on the certiorari petition, Michalewicz's name has vanished from the caption. The petition does not explain why Michalewicz abruptly left Fisher to go it alone in this Court, but it takes little imagination to understand her absence. Because Michalewicz has already graduated from college,[2] including her as a co-petitioner would only highlight the *DeFunis* problem with this petition.[3] But Michalewicz's absence cannot conceal that Fisher will be joining her former co-plaintiff as a college graduate in just a few months—before any ruling from this Court could realistically issue—and that Fisher has forsworn any intention of reapplying to UT's undergraduate program. Fisher's failure to bring a class-action lawsuit is fatal to her claims for prospective relief.

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[2] http://www.facebook.com/people/Rachel-Michalewicz/100002534130562 (last visited December 7, 2011).

B. Fisher's Demand for a Refund of Her Application Fee and Housing Deposit Will Not Enable This Court To Reach the Constitutional Issues in This Petition.

1. Fisher's $100 Refund Demand Does Not Establish an Article III Case or Controversy.

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[3] *See, e.g., Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128 (1975) (per curiam) (plaintiffs' graduation from high school mooted controversy over rules governing student newspaper, where plaintiffs' proposed class had not been certified, plaintiffs did not appeal district court's dismissal of their damages claims, and only their declaratory claims remained on appeal); *Fox v. Board of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 137 (2d Cir. 1994) (plaintiffs' claims for declaratory and injunctive relief, premised on constitutional challenge to university regulation, became moot upon plaintiffs' graduation); *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (graduation of plaintiffs, who had successfully sued university under Title IX, rendered case moot on appeal).

Because Fisher "will never again be required to run the gantlet of [UT's] admission process," these proceedings are moot—unless Fisher's claims for retrospective relief can establish an Article III case or controversy. *DeFunis*, 416 U.S. at 319.[4] Yet Fisher has eschewed many possible grounds for retrospective relief in this case. Her complaint does not request nominal damages, nor does it seek compensation for losses potentially caused by UT's rejection of her application, such as lost future earnings or higher tuition. The only retrospective relief that Fisher seeks is a refund of her $50 application fee and $50 housing deposit. *See* Pls.' 2d Am. Compl. ¶ 165(g) (5.CR.1262) (demanding "[m]onetary damages in the form of refund of application fees and all associated expenses incurred by Plaintiffs in connection with applying for admission to UT"); *id.* ¶ 104 (5.CR.1252) (alleging payment of application fee and housing deposit). That demand is insufficient to maintain an Article III case or controversy at this point in the litigation.[5]

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[4] Fisher's claims do not qualify as "capable of repetition, yet evading review." That exception to mootness can apply only when (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *See, e.g.*, *DeFunis*, 416 U.S. at 319. Neither condition is met here, for the same reasons as in *DeFunis*. Fisher is about to graduate from LSU and will never again seek freshman admission to UT. And a future plaintiff could challenge UT's undergraduate admissions policy by bringing a class action or alleging a viable damages claim. *Cf. Turner v. Rodgers*, 131 S. Ct. 2507, 2515 (2011) ("*DeFunis* was moot . . . because the plaintiff himself was unlikely to again suffer the conduct of which he complained (and others likely to suffer from that conduct could bring their own lawsuits).").

First, Fisher would have incurred those expenses even if UT-Austin had employed the race-neutral admissions process that she demands. The application fee is a condition of applying to UT-Austin and is nonrefundable; accepted applicants do not get their money back. The housing deposit is likewise an expense that Fisher would have paid even if she had been accepted (or rejected) by UT-Austin under a race-neutral admissions system. Fisher therefore cannot establish a causal link between those "injuries" and UT-Austin's alleged wrongdoing—which means she cannot establish Article III standing over this claim. *See Lujan*, 504 U.S. at 560 ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'"). To avoid this result, Fisher would have to demonstrate that UT-Austin's use of race-conscious admission policies *induced her to apply* to UT-Austin and incur the expenses of applying, even though those policies

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[5] Fisher's claim for attorney's fees cannot establish an Article III case or controversy. *See, e.g., Lewis*, 494 U.S. at 480 ("[An] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.").

decreased her odds of gaining admission. Fisher cannot plausibly make that illogical assertion.

In addition, the refund-of-fees remedy that Fisher requests cannot possibly redress the denial-of-equal-treatment injury that she claims to have suffered. The only redress for that *past* injury is damages aimed at restoring Fisher to the position she would have occupied had UT-Austin considered her application under solely race-neutral criteria. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). These damages could include compensation for the higher tuition costs or lost future income incurred by attending another university—all contingent on a judicial finding that Fisher *would have been admitted* to the university under a race-neutral admissions process. *See Texas v. Lesage*, 528 U.S. 18, 21 (1999); *see also Hopwood v. Texas*, 999 F. Supp. 872, 901-10 (W.D. Tex. 1998). Yet Fisher does not seek *any* compensatory damages along these lines—doubtless because she knows she cannot establish that she would have been admitted to UT-Austin under a race-neutral policy.[6]

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[6] Fisher's highest combined SAT score was 1180, Pls.' 2d Am. Compl. ¶12 (5.CR.1234), significantly lower than the 1290 scored by her former co-plaintiff Rachel Michalewicz, and lower than thousands of other unsuccessful applicants to UT-Austin in 2008. Fisher had an AI of 3.1, well below the minimum AI of 3.5 needed for fall admission in 2008. Ishop Aff. ¶ 18

Fisher therefore encounters Article III problems no matter how she characterizes the injury she allegedly suffered at UT-Austin's hands. If her "injury" is the lost $100 spent on her application fee and housing deposit, then she fails the "causation" requirement of *Lujan*. If she instead characterizes her "injury" as a denial of equal treatment, then she cannot establish redressability because her complaint presents no claim for nominal or compensatory damages. *See Vt. Agency of Natural Res.*, 529 U.S. at 771 (holding that to "demonstrate redressability," a plaintiff must show "a substantial likelihood that the *requested relief* will remedy the

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(7.CR.1927). The undisputed evidence demonstrated that Fisher would not have been offered fall admission in 2008 even if she had scored a perfect "6" on her PAI—the portion of the admissions process where race is considered as "a factor of a factor of a factor of a factor." *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009) ("*Fisher I*"), *aff'd*, 631 F.3d 213 (5th Cir. 2011). Although Fisher theoretically could have been admitted through the summer admission process, the reality is that her academic credentials could not overcome the particularly stiff competition among in-state applicants who graduated outside the top 10% of their high-school class. In 2008, 92% of the admissions spaces available for Texas residents were awarded to Top Ten Percent applicants. Ishop Aff. ¶ 16 (7.CR.1926). After subtracting the admission places automatically awarded to Top Ten Percent applicants, Fisher was one of "approximately 16,000 students" competing for the "1,216 fall admissions slots" available to in-state, non-Top Ten Percent applicants for undergraduate admission in fall 2008. *Fisher II*, 631 F.3d at 241 (Pet. App. 59a). The acceptance rate for those applicants was only 7.6%—lower than Harvard's undergraduate acceptance rate for fall 2008. *Id.* at 241 n.155.

alleged injury in fact") (emphasis added) (citation and internal quotation marks omitted); *see also Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004) (abandoned claims cannot be considered in determining "redressability" under Article III). And Fisher herself characterizes the "depriv[ation] of the opportunity to attend . . . UT Austin" as "an injury that cannot be redressed by money damages." Pls.' 2d Am. Compl. ¶ 124 (5.CR.1262).

This Court has also recognized that litigants cannot preserve an Article III case by invoking "insubstantial" claims for retrospective relief after their claims for injunctive relief become moot. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978) ("Although we express no opinion as to the validity of respondents' claim for damages, *that claim is not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed.*") (emphasis added). *Memphis Light* reflects the approach of *Bell v. Hood*, 327 U.S. 678 (1946), which limits federal-question jurisdiction to cases that present *colorable* federal-law claims; both cases preclude litigants from manufacturing Article III jurisdiction by invoking "insubstantial or frivolous" theories of relief. *Id.* at 683.

Courts of appeals have followed *Memphis Light* in refusing to allow legally baseless theories of retrospective relief to stave off mootness after the claims for prospective relief disappear. *See, e.g.*, *Gottfried v. Med. Planning Servs., Inc.*, 280 F.3d 684, 691 (6th Cir. 2002) (citing *Memphis Light* in holding that "[t]he key question therefore is whether Gottfried has a *viable* claim for damages"); *Henschen v. Houston*, 959 F.2d 584, 588 (5th Cir. 1992) (citing *Memphis Light* in holding that litigants "must advance a viable, not insubstantial damage claim" to avoid mootness); *see also Tanner Adver. Group, L.L.C. v. Fayette County*, 451 F.3d 777, 786 (11th Cir. 2006) ("A request for damages that is barred as a matter of law cannot save a case from mootness."); *Sanchez v. Edgar*, 710 F.2d 1292, 1295-96 (7th Cir. 1983) (citing *Memphis Light* for the proposition that "a viable claim for monetary relief, with the possible exception of a claim for only nominal or insubstantial damages, preserves the saliency of an action."). "Insubstantial" is the best face one can put on Fisher's demands for a refund of her application fee and housing deposit—a theory of damages that bears no relation whatsoever to the harms she allegedly suffered because of UT-Austin's race-conscious admissions policies. *See Carey v. Piphus*, 435 U.S. 247, 254 (1978) ("[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights.").

Fisher might respond in one of two ways. First, Fisher may ask that her complaint be construed to preserve claims for nominal and compensatory damages, perhaps relying on her catch-all demand for "[a]ll other relief this Court finds appropriate and just." But federal courts of appeals have rejected attempts to infer claims for nominal or compensatory damages from similar boilerplate. In *Fox v. Board of Trustees of State University of New York*, 42 F.3d 135 (2d Cir. 1994), the plaintiffs tried to stave off mootness by asking the Second Circuit to infer a claim for nominal damages from their request for "such other relief as the Court deems just and proper." *Id.* at 141. But the court declined to "read a damages claim into the Complaint's boilerplate prayer for 'such other relief as the Court deems just and proper,'" in part because the state university defendants would have asserted immunity defenses against those claims. *Id.* at 141-42.

Numerous other courts have similarly refused to allow such boilerplate to establish a claim for nominal or compensatory damages. *See, e.g.*, *Thomas R.W. ex rel. Pamela R. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) ("[A] general prayer for 'such further relief as this court deems just and proper' [does not] operate to preserve a request for damages in order to avoid mootness where there is no specific request and no evidence to sustain a claim for reimbursement."); *Goichman v. City of Aspen*, 590 F. Supp. 1170, 1173 (D. Colo. 1984) (plaintiff unable to avoid mootness by belatedly invoking a claim for nominal damages because "no prayer appears in the Complaint for such nominal damages"); *Daskalea v. Wash. Humane Soc'y*, 710 F. Supp. 2d 32, 42 (D.D.C. 2010) (rejecting plaintiffs' attempt to avoid mootness by belatedly invoking a claim for nominal damages because their complaint "does not include a request for nominal damages," and noting that "it is 'inappropriate' to 'strain[ ] to find inferences that are not available on the face of the complaint' in order to permit an otherwise moot claim to go forward") (quoting *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (rejecting reliance on a "claim for nominal damages, extracted late in the day from [plaintiff's] general prayer for relief and asserted solely to avoid otherwise certain mootness").[7]

Fisher might also try to invoke Federal Rule of Civil Procedure 54(c), which provides that a final judgment should generally "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." But Rule

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[7] These holdings reflect the general principle that a claim for damages not specifically requested in the plaintiff's complaint cannot prevent a case from becoming moot on appeal. *See Lillbask v. Conn. Dep't of Educ.*, 397 F.3d 77, 91 (2d Cir. 2005) ("Lillbask's equitable challenge . . . is moot and . . . she cannot now revive that claim by raising a compensatory education prayer for relief not mentioned in her Fourth Amended Complaint."); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("A request for damages . . . will not avoid mootness if it was inserted after the complaint was filed in an attempt to breathe life into a moribund dispute.") (quotation marks and citation omitted); *Harris v. City of Houston*, 151 F.3d 186, 190 (5th Cir. 1998) (finding "no support for the appellant's notion that we may fashion relief not requested below in order to keep a suit viable").

54(c) comes into play only when a court enters judgment for the prevailing party—and Fisher did not prevail at any stage below. *See Fox*, 42 F.3d at 142. And Rule 54(c) does not authorize courts to allow an unpleaded claim for nominal or compensatory damages to preserve an otherwise moot case. If it did, then this Court could have reached the merits in *DeFunis*; instead, the Court declared that case moot because DeFunis sought only prospective relief—even though a properly pleaded claim for compensatory damages would have kept that case alive. 416 U.S. at 317 ("DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School.").

Second, Fisher might ask for an opportunity to amend her complaint to assert another claim for damages. But Fisher cannot amend her complaint on appeal. *See, e.g., Scott v. Schmidt*, 773 F.2d 160, 163 (7th Cir. 1985); 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1489 (3d ed. 2011). And it is too late for Fisher to amend her complaint in the district court. In 2008, the district court ordered the parties to "file all motions to amend or supplement pleadings or to join additional parties **by July 14, 2008**," and it never modified this deadline. Even if the district court were inclined to indulge pleading amendments three years past the deadline, it cannot do so if the case has become moot in the interim. *See Fox v. Bd. of Trs. of State Univ. of N.Y.*, 148 F.R.D. 474, 487

(N.D.N.Y. 1993) ("Rule 15(a) does not appear to support allowing the original plaintiffs to amend their complaint after a finding of mootness."), *aff'd*, 42 F.3d 135 (2d Cir. 1994); *see also Flynt v. Weinberger*, 762 F.2d 134, 135 (D.C. Cir. 1985) (per curiam) (district court's mootness dismissal before discovery "preclud[ed] [plaintiffs] from amending their complaint to avoid a dismissal for mootness"); *Alvarez*, 130 S. Ct. at 580 (refusing to allow a belated "motion in the District Court seeking damages" to avoid a mootness dismissal when the complaint sought only declaratory and injunctive relief).

Fisher chose to sue as an individual rather than a class representative. Her imminent graduation precludes this Court from considering her claims for declaratory or injunctive relief. And her only pleaded claim for retrospective relief is incapable of satisfying the requirements for an Article III case or controversy. Her case is already moot, and its mootness will only become more pronounced when Fisher graduates from college in May.

2. Even If Fisher Could Maintain an Article III Case or Controversy by Demanding a Refund of Her Application Fee and Housing Deposit, Her Petition Still Presents Grave Vehicle Problems.

Finally, even assuming that Fisher's demand for a refund of her application fee and housing deposit could keep this case alive, UT-Austin could end the controversy simply by tendering Fisher a check for $100. *See, e.g.*, *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011) (agreeing that "the case was moot after [defendant] agreed to pay the benefits [plaintiff] requested in her complaint"); *Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1331 (Fed. Cir. 2005) ("[T]he tender of the entire amount of the damages claimed by a plaintiff moots the damages claim."); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate."); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) ("Since . . . defendants had offered [plaintiff] the full amount of damages . . . to which she claimed individually to be entitled, there was no longer any case or controversy.").

Granting certiorari would force UT-Austin to choose between incurring the trivial expense of tendering $100 to Fisher and incurring the massive expense of litigating the merits of this case. *See, e.g.*, David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5

INT'L REV. L. & ECON. 3 (1985). To grant certiorari, this Court would have to conclude not only that Fisher could somehow cobble together an Article III case or controversy, but also that UT-Austin would decline to maximize its economic interests. *Cf. Piscataway Twp. Bd. of Educ. v. Taxman*, 522 U.S. 1010 (1997).

* * *

Choices have consequences. Fisher chose to litigate this case as an individual rather than as a class representative, a decision that gave her many advantages below. But there are downsides to that decision, and *DeFunis* gave Fisher fair warning that her chosen strategy came with built-in jurisdictional problems that would emerge as her graduation date drew near.

The burden is on Fisher, as the petitioner, to establish a clear pathway for this Court to address her constitutional claims, and she has not even attempted to make this showing in her certiorari petition. Regardless of what Fisher may offer in her reply brief, she cannot escape the fact that a grant of certiorari will drag this Court into a thicket of procedural and jurisdictional disputes. That alone warrants a denial of her petition. Another lawsuit brought by a class representative will raise the constitutional issues in Fisher's petition without compromising the constitutional requirements of Article III. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

II. FISHER ALLEGES NO CIRCUIT SPLITS AND SEEKS ONLY FACT-BOUND, TEXAS-SPECIFIC ERROR CORRECTION.

Fisher does not allege that the Fifth Circuit's ruling conflicts with any decision from another court of appeals. She alleges only that it conflicts with *Grutter*. This Court rarely grants certiorari in response to this type of error-correction request, particularly when a petitioner alleges nothing more than the "the misapplication of a properly stated rule of law." SUP. CT. R. 10.

A writ of certiorari is further inappropriate because Fisher's constitutional arguments are relevant only to the admissions policies used by UT-Austin. Fisher insists that UT-Austin attained sufficient student-body diversity under the race-neutral Top Ten Percent law, and that race-conscious admissions are therefore unnecessary to achieve the State's compelling interest in student-body diversity. *See* Pet. 33-35. But the Top Ten Percent Law is unique to Texas public-university admissions, and a ruling from this Court on that issue will have little effect outside of Texas. Although Florida and California have adopted percentage plans similar to Texas's Top Ten Percent law, those States prohibit consideration of race in public-university admissions. *See* CAL. CONST. art. I, § 31(a); 6 FLA. ADMIN. CODE 6C-6.002(7). Fisher's claim that UT-Austin has engaged in forbidden "outright racial balancing," Pet. 30, and her complaints about UT-Austin's efforts to attain diversity in the classroom, *id.* at 32, likewise seek a Texas-specific form of error correction that does not merit this Court's review.

Gratz and *Grutter* addressed the constitutionality of race-conscious admissions in higher education—a broad legal issue that had produced a circuit split and affected every public university in the nation. Fisher, by contrast, is litigating a narrow and fact-intensive question: whether UT's consideration of race was sufficiently *necessary* in light of the racial diversity produced by the Top Ten Percent law. *See, e.g., Fisher II*, 631 F.3d at 234 ("Appellants do not allege that UT's race-conscious admissions policy is functionally different from, or gives greater consideration to race than, the policy upheld in *Grutter*. Rather, Appellants question whether UT-Austin *needs* a *Grutter*-like policy.") (Pet. App. 42a). This dispute (to the extent one remains) involves only whether UT-Austin's pre-existing level of minority enrollment was below or above the "*Grutter*-approved 'critical mass.'" *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part); *see also id.* ("I do not look forward to any of these cases.").

III. FISHER'S FACTUAL CONCESSIONS BELOW FORECLOSE NUMEROUS ARGUMENTS IN HER CERTIORARI PETITION.

As if the jurisdictional problems discussed in Part I were not enough to sink Fisher's petition, additional vehicle problems arise from Fisher's factual concessions in the district court. The parties moved for summary judgment based on an undisputed factual record, which precludes Fisher from contradicting the facts that she endorsed—or failed to contradict—in the district-court proceedings. *See Christian Legal Soc'y*, 130 S. Ct. at 2982-84.

Fisher has stipulated to several key facts that cannot be reconciled with the arguments in her certiorari petition. In the Statement of Facts she filed in the district court, Fisher acknowledged that:

> UT Austin *has not established a goal, target, or other quantitative objective* for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008.

Pls.' SOF ¶ 98 (6.CR.1378) (emphasis added). Fisher also conceded that "UT Austin added race as a factor in its admissions decisions because it views race as an important credential that helps the University understand the applicant and evaluate his or her circumstances." Pls.' SOF ¶ 85 (6.CR.1376). These concessions directly contradict Fisher's claims that

UT-Austin "pursu[es] demographically proportional African-American and Hispanic admissions." Pet. 12. *See also id.* at 20 (accusing UT-Austin of "aligning racial demographics and the UT student population"); *id.* at 29 (accusing UT-Austin of establishing "diversity goal[s]"); *id.* at 30 (accusing UT-Austin of "attempt[ing] to replicate the racial demographics of Texas high schools"). Efforts to match the racial composition of a student body with state demographics are the very definition of a "goal," "target," or "quantitative objective." Fisher must either withdraw these accusations, or else explain how this Court can entertain them in light of the fatal concessions that she made below. *See Christian Legal Soc'y*, 130 S. Ct. at 2982-84.

Fisher's Statement of Facts also admits that "[u]sing race in admissions helps UT achieve racial diversity." Pls.' SOF ¶ 93 (6.CR.1377). This stipulation precludes Fisher from arguing that UT-Austin's race-conscious admissions program is not "narrowly tailored" because it fails to advance the cause of student-body diversity. Yet Fisher's certiorari petition repeatedly attacks UT-Austin's admissions policies on precisely those grounds. *See* Pet. 23 (asserting that UT-Austin's race-conscious admissions policies fail *Grutter*'s "narrow tailoring" requirement because they produce only a "negligible increase in minority enrollment" and no "impact on classroom diversity"); *id.* at 30 ("[T]he negligible gains in minority enrollment that have resulted from UT's pervasive use of race in its admissions process since 2004 confirm the absence of narrow tailoring."); *id.* at 35 ("[T]he Top Ten Percent Law alone produces a similar level of minority enrollment."). All of these arguments must be pitched out because Fisher has stipulated that the use of race-conscious admissions "helps UT achieve racial diversity."

Worse still, Fisher failed to dispute the Statement of Facts that UT-Austin submitted when it moved for summary judgment, and Fisher remains bound by that undisputed factual record. University officials testified by affidavit that UT-Austin had reinstated race-conscious admissions because (among other reasons) "officials discovered when talking with students that minority students still felt isolated." *See* Defs.' SOF ¶ 92 (7.CR.1815). Fisher did not contest that testimony below, yet she now insists that "UT does not seek racial diversity to enhance the educational dialogue by keeping minority students from feeling 'isolated or like spokespersons for their race.'" Pet. 30 (quoting *Grutter*, 539 U.S. at 319). That line of argument is closed to Fisher, creating yet another vehicle problem for her certiorari petition.

IV. FISHER'S CONTENTION THAT THE FIFTH CIRCUIT'S RULING "CONFLICTS" WITH *GRUTTER* IS BASELESS.

Even if this Court were willing to consider a request for mere error correction—in a petition plagued by insurmountable jurisdictional defects and contradicted by the litigant's earlier factual stipulations—it *still* should deny Fisher's petition. The question presented asks this Court to review only whether the Fifth Circuit's ruling comports with *Grutter*, and there are no conflicts between the Fifth Circuit's ruling and *Grutter*.

A. UT-Austin's Holistic Consideration of Race Is More Narrowly Tailored Than the Admissions Program Approved in *Grutter* Because UT-Austin Does Not Consult Demographics When Making Individual Admissions Decisions.

UT-Austin's holistic consideration of race was not only patterned after the *Grutter*-approved practices, it also avoids a key feature of the University of Michigan Law School program that troubled the *Grutter* dissenters. Unlike in *Grutter*, UT-Austin does not consult demographics when making individual admissions decisions. *See* 631 F.3d at 235 ("UT's policy improves upon the program approved in *Grutter* because [UT] does not keep an ongoing tally of the racial composition of the entering class during its admissions process."); Pet. App. 45a. This distinction avoids the concern that Justice Kennedy raised in his *Grutter* dissent, in which he criticized the University of Michigan Law School for "keep[ing] ongoing tallies of racial or ethnic composition of their entering students," even as he acknowledged that race-conscious admission policies can serve a compelling state interest. *See Grutter*, 539 U.S. at 391-92 (Kennedy, J., dissenting).

Fisher's insistence that UT-Austin pursues "demographically proportional African-American and Hispanic admission" contradicts not only her own factual stipulation in the district court, *see* Part III, *supra*, but also the findings of the district court and the Fifth Circuit panel. *See Fisher I*, 645 F. Supp. 2d at 607 n. 11 (noting that "[i]f Defendants are in fact attempting to match minority enrollment to state demographics, they are doing a particularly bad job of it") (Pet. App. 156a); *Fisher II*, 631 F.3d at 235 ("UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas. Its methods and efforts belie the charge.") (Pet. App. 45a). In *Grutter*, by contrast, the dissenters accused the University of Michigan Law School of consistently admitting twice as many black students as Hispanic students in an apparent effort to mirror the racial and ethnic makeup of its applicant pool. *See Grutter*, 539 U.S. at 383-85 (Rehnquist, C.J., dissenting). Because UT-Austin's admissions data do not reflect the suspicious correlation between application and admissions demographics that so troubled the *Grutter* dissenters, the district court and the Fifth Circuit each concluded that *Grutter*'s holding logically compelled approval of UT-Austin's program. *See Fisher I*, 645 F. Supp. 2d at 612 ("If the plaintiffs are right, *Grutter* is wrong.") (Pet. App. 169a); *Fisher II*, 631 F.3d at 238 (Pet. App. 52a); *id.* at 259 (Garza, J, concurring) ("I concur in the opinion because I believe today's decision is a faithful application of *Grutter*'s teachings . . . .") (Pet. App. 98a).

B. isher's Attacks on the Fifth Circuit's Ruling Are Meritless.

Fisher claims that the Fifth Circuit defied *Grutter* by applying an excessively deferential variant of strict scrutiny, allowing UT-Austin to consider state demographics when defining "underrepresented" minorities, and approving UT-Austin's race-conscious admissions policies as "narrowly tailored." None of this supports Fisher's claim that the Fifth Circuit "'decided an important question in a way that conflicts with relevant decisions of this Court.'" Pet. 19 (quoting SUP. CT. R. 10(c)).

1. Deference to university administrators

Fisher misrepresents *Grutter* by asserting that it allows courts to defer to university administrators only when deciding whether diversity qualifies as a "compelling state interest." Pet. at 26. Instead, *Grutter* makes clear that deference also extends to the *means* by which a university elects to pursue that compelling interest. 539 U.S. at 333-34 (concluding that "the narrow-tailoring inquiry . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education"). *Grutter* invokes a broad "tradition of giving a degree of deference to a university's academic decisions," and recognizes that courts should respect the "educational autonomy" of universities given their unique role in our society. *Id.* at 328-29. And *Grutter* holds that these generalized principles of deference remain applicable when courts review a university's implementation of a race-conscious admissions program. For example, *Grutter* refused to require universities to exhaust "every conceivable race-neutral alternative"; instead, it held that "narrow tailoring" requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339-40. Even Judge Garza, who denounced *Grutter* as a "misstep," described the panel's deference to university administrators as a "faithful" application of *Grutter*. *Fisher II*, 631 F.3d at 247 (Garza, J., concurring) (Pet. App. 72a).

Fisher also faults the Fifth Circuit for requiring her to "rebut UT's claim that its use of race was in good faith." Pet. 28. But *Grutter* makes clear that "[g]ood faith on the part of a university is presumed absent a showing to the contrary." 539 U.S. at 329 (internal quotation marks omitted). Fisher cavalierly accuses the Fifth Circuit of defying *Grutter* without even acknowledging the crucial passage from *Grutter* on which the panel relied.

2. UT-Austin's identification of underrepresented minorities

As noted earlier, UT-Austin does not consider state demographics when deciding whether to admit applicants. And there is nothing objectionable under *Grutter* about UT-Austin's consideration of demographics in determining whether Hispanics qualify as an "underrepresented minority," because the very concept of "underrepresented minority" presupposes some comparative baseline. *See Fisher II*, 631 F.3d at 237 ("Identifying *which* backgrounds are underrepresented . . . presupposes some reference to demographics, and it was therefore appropriate for UT to give limited attention to this data when considering whether its current student body included a critical mass of underrepresented groups.") (Pet. App. 49a). And defining "underrepresented" status with some reference to state demographics as a comparative baseline is particularly appropriate for UT-Austin, which—as Texas's flagship public university—has a unique mission to prepare students to become leaders of this uniquely diverse state. *See Grutter*, 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

Fisher also cannot escape the fact that *Grutter* approved the University of Michigan Law School's admissions program even though it devoted "some attention" to the racial demographics of its applicant pool. 539 U.S. at 336 (majority opinion); *see also id.* at 383-85 (Rehnquist, C. J., dissenting); *id.* at 392 (Kennedy, J., dissenting). Although *Grutter* condemns "outright racial balancing," it does not forbid a university to consider state demographics in its admissions policies, provided it pursues critical mass (and the educational benefits of diversity) through individualized consideration rather than fixed quotas. *See id.* at 329-30, 335. In this case, the undisputed evidence established that UT-Austin has no such rigid set-asides. See *supra* Part IV.A.

3. The Fifth Circuit's analysis of "narrow tailoring"

Fisher also asserts that UT-Austin's admissions program fails *Grutter*'s "narrow tailoring" requirement in several respects. First, she claims that UT-Austin did not adequately consider "workable, race-neutral alternatives" before adopting race-conscious admissions, and specifically touts Texas's Top Ten Percent plan as one such alternative. *See, e.g.*, Pet. 21. But *Grutter* requires only "serious, good faith consideration of workable race-neutral alternatives," and expressly rejects any requirement that universities adopt "percentage plans" in place of holistic race-conscious admissions. *See Grutter*, 539 U.S. at 340. If UT-Austin is permitted to use a race-conscious holistic method for the *entirety* of its admissions process (as *Grutter* endorses), then surely it may employ a holistic method for only a portion of the process. And it is undisputed that UT-Austin added race to its race-neutral holistic admissions process only upon concluding—following a year-long study undertaken in the wake of *Grutter*—that its existing race-neutral admission policies (including the Top Ten Percent law) were insufficient to attain the educational benefits of diversity. *See Fisher II*, 631 F.3d at 225-26 (Pet. App. 21a-23a).[8]

Second, Fisher argues that UT-Austin's admissions policy is not narrowly tailored because she claims that it has had a "negligible increase in minority enrollment" and no "impact on classroom diversity." Pet. 23. But Fisher is bound by her stipulation in the district court that "[u]sing race in admissions helps UT Austin achieve racial diversity." Pls.' SOF ¶ 93 (6.CR.1377). *See* Part III, *supra*; *Christian Legal Soc'y*, 130 S. Ct. at 2982-84. And in all events, the Fifth Circuit recognized that "[t]he current policy has produced noticeable results" in improving student-body diversity. *Fisher II*, 631 F.3d at 226 (Pet. App. 26a). Although the policy has not produced sweeping changes in the admissions or enrollment demographics in any particular year, that is to be expected given (1) the dominant role played by the Top Ten Percent law; and (2) that race is but one of many "special circumstances" subfactors considered holistically in UT-Austin's admissions process. *See id.* at 228-29 (Pet. App. 29a-30a).[9]

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[8] Fisher's claim that "UT did not . . . present evidence that it was necessary to supplement its pre-existing race-neutral admissions plan to achieve the compelling interest in racial diversity," Pet. 29, simply ignores the undisputed summary-judgment evidence. *See* Walker Aff. ¶¶ 11-12 (7.CR.2123); Walker Depo. 18-21 (7.RR.1904); Defs.' SOF ¶ 92 (7.CR.1814).

[9] Fisher asserts (without citation) that in 2008, "race was decisive for only 33 African-American and Hispanic students"

V. THERE IS NO JUSTIFICATION FOR THIS COURT TO GRANT CERTIORARI TO RECONSIDER OR OVERRULE *GRUTTER*.

Several of Fisher's amici are clamoring for this Court to reconsider or overrule *Grutter*. *See* Br. of Amicus Curiae Mountain States Legal Found. ("MSLF") at 12-21; Br. of Amici Curiae Gail Heriot et al. at 4-23; Br. of Amicus Curiae AALF at 20-22; Br.

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who were both admitted to UT-Austin and enrolled there. Pet. 10. Fisher apparently derives this figure by comparing the percentage of blacks and Hispanics among the non-Top Ten Percent Texas enrollees in 2008 against the percentage from 1999-2003. This methodology is flawed and misleading. First, it is undisputed that race—like the other "special circumstances" subfactors—is never decisive for any UT applicant. *See* Defs.' SOF ¶97 (7.CR.1816). In addition, 2008 was an unusual year because the number of non-Top Ten Percent Texas enrollees reached an all-time low, on account of the ever-increasing role of the Top Ten Percent law in UT's admissions. The total number of non-Top Ten Percent Texas enrollees in 2008 (1,208) was only one-third of the 1998 number (3,597), even though the total enrolled class from Texas high schools that year was more than double its 1998 levels (5,114 versus 2,513). A sounder approach might compare the average annual percentage of blacks and Hispanics among the non-Top Ten Percent enrollees for 1998-2003 (15.2%) against the average annual percentage for 2004-2008 (19.2%). But even that comparison would be flawed because it treats blacks and Hispanics as fungible when determining critical mass—a theory that *Grutter* implicitly rejects (and even Fisher denied below). *See Grutter*, 539 U.S. at 319-20; 2.RR.19:18-23 (acknowledging that "the African-American student would have a diverse point of view from the Hispanic student").

of Amici Curiae Richard Sander et al. at 4-23. But the question presented in Fisher's petition for certiorari avoids this request and assumes *Grutter*'s correctness. *See* Pet. at i. And it is highly unusual for this Court to reconsider a precedent when the question presented fails to challenge it. *See Yee v. City of Escondido*, 503 U.S. 519, 535-37 (1992).

It would be particularly ill-advised for the Court to reconsider *Grutter* when Fisher has been unwilling to challenge the core premise of that decision: that state universities have a "compelling interest" in assembling a racially diverse student body. *See* Pls.' 2d Am. Compl. ¶ 145 (5.CR.1258) ("To the extent UT Austin articulates an interest in promoting 'student body diversity,' Plaintiffs do not challenge this interest."); Pls.' Mot. for Prelim. Inj. at 15 (2.CR.194) (recognizing UT-Austin's "legitimate governmental interest" in "boosting [its] minority enrollment"); Pet. 29 (acknowledging UT's "compelling interest in racial diversity"). And it is doubly inappropriate to reconsider *Grutter* when five members of this Court reaffirmed these propositions in *Parents Involved*, declining pleas to overrule *Grutter* from the amici supporting Fisher in this case. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring) (noting that "[d]iversity, depending on its meaning and definition, is a compelling educational goal"); *id.* at 865 (Breyer, J., dissenting). By leaving in place *Grutter*'s framework, and the distinction it draws between holistic and mechanical considerations of race, *Parents Involved* has further induced universities to rely on *Grutter* and order their admissions policies around the guidelines that it established. *See id.* at 722 (majority opinion) ("[W]e have recognized as compelling for purposes of strict scrutiny . . . the interest in diversity in higher education upheld in *Grutter*).

And Fisher's *amici* encounter another serious obstacle in their quest to overrule *Grutter*: Those who drafted and ratified the Fourteenth Amendment did not establish the principle of "colorblind" government that opponents of race-conscious admissions so often invoke. The Equal Protection Clause requires only that States provide "the equal protection of the laws," *not* "the protection of equal laws,"[10] and the 39th Congress considered and rejected a proposed revision to the Fourteenth Amendment that would have required colorblind government. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866) (7-38 Senate vote defeating proposed language providing that "no State . . . shall . . . recognize any distinction between citizens . . . on account of race or color or previous condition of slavery," and that "all citizens, without distinction of race, color, or previous condition of slavery, shall be protected in the full and equal enjoyment and exercise of all their civil and political rights"). *See also* Melissa L. Saunders, *Equal Protection, Class*

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[10] *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1390 (1992).

Legislation, and Colorblindness, 96 MICH. L. REV. 245, 275-81 (1997) (discussing history of Fourteenth Amendment); *cf. Parents Involved*, 551 U.S. at 788 (2007) (Kennedy, J., concurring) ("[A]s an aspiration, Justice Harlan's axiom [that 'our Constitution is color blind'] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.").

What's more, around the time it approved the Fourteenth Amendment, Congress enacted many explicitly race-conscious laws to help black Americans—without regard to the formally race-neutral criterion of previous condition of servitude. *See* Act of Feb. 14, 1863, ch. 33, 12 Stat. 650, 650 (incorporating and appropriating funds for the "'National Association for the Relief of Destitute *Colored Women and Children*,' for the purpose of supporting such aged or indigent and destitute *colored women and children* . . .") (emphasis added); Act of July 28, 1866, ch. 296, 14 Stat. 310, 317 (resolution appropriating additional funds for the "National association for the relief of destitute *colored women and children*," which had been incorporated under a previous Act of Congress.) (emphases added); Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20 (resolution appropriating funds "for the relief of freedmen *or destitute colored people* in the District of Columbia") (emphasis added); Resolution of Mar. 29, 1867, No. 25, 15 Stat. 26 (special rules for handling the compensation claims of black servicemen); *see generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 762-75, 778-82 (1985); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-31 (1997); ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

Fisher insists that judicial nullification of UT-Austin's admissions policies will "restore the integrity of the Fourteenth Amendment's guarantee of equal protection." Pet. 35. But Fisher clearly is not seeking to "restore" the understandings of equal protection that prevailed in 1868, and she therefore cannot overcome the strong presumption of correctness accorded to *Grutter* under the doctrine of stare decisis. In light of this history, it is hardly surprising that scholars from across the political spectrum have offered sophisticated and elegant defenses of the constitutionality of public-university affirmative-action programs. *See, e.g.*, John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense*, 100 MICH. L. REV. 2036 (2002).

When the original meaning of the Fourteenth Amendment *combines with* stare decisis to support the outcome in *Grutter*, it presents an insurmountable one-two punch against the efforts to overrule that decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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REPLY
BRIEF

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No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Respondent ("UT") seeks at all costs to avoid certiorari. Confronted with a meritorious Petition that raises important constitutional questions concerning the use of race in undergraduate admissions, UT disappointingly resorts to stridency over substance in its Brief in Opposition ("BIO"). UT misstates the procedural posture of this litigation, prematurely questions the monetary relief that Petitioner ultimately might recover, attempts to recast pleadings issues as jurisdictional barriers, distorts neutral factual statements into supposed concessions, and threatens to try to buy its way out of this case, but only if this Court grants review. More extremely, UT advances the peculiar proposition that its use of race is constitutional because the Equal Protection Clause prohibits only discriminatory enforcement of laws—not discriminatory laws themselves. As shown below, none of UT's contentions can withstand analysis. If anything, UT's desperate attempt to avoid certiorari underscores this case's importance and the need for the Court's review.

I. UT's Claims Of Actual Or Potential Mootness Are Meritless.

1. As the Fifth Circuit held, and UT did not contest below, Petitioner has "standing to challenge [her] rejection and to seek money damages for [her] injury." App. 4a. She has suffered an injury within the meaning of Article III, *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003), and the Court is *capable* of redressing that injury, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), through monetary relief, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007), including

nominal damages, *Carey v. Piphus*, 435 U.S. 247, 266 (1978), restitution, or recompense for other losses incurred as a consequence of UT's unconstitutional admissions program, Restatement (Second) of Torts § 903. UT does not disagree that such relief would redress Petitioner's claimed injury. BIO 11, 13.

UT questions whether Petitioner is entitled to such relief, but it is premature to debate the type and amount of damages Petitioner ultimately might recover. With UT's concurrence, the district court bifurcated liability and remedies—a fact that UT fails to mention. As the district court explained, "[r]emedy issues are likely to be much more fact intensive than liability issues," so that "[b]ifurcating this case into two phases—liability, followed by remedy should defendants be found liable—will conserve both scarce judicial resources and the parties' resources." Order, *Fisher v. Texas*, No. 08-263, at 2 (W.D. Tex. July 10, 2008) ("Bifurcation Order"). If Petitioner prevails here, remedies will be litigated on remand and then the district court will award appropriate monetary relief.[1] "Choices have consequences." BIO 22. UT agreed to bifurcate liability and remedies and cannot avoid that choice by couching its substantive challenges to remedies as jurisdictional issues.

2. UT nevertheless claims that monetary damages are unavailable because of supposed defects in the Second

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[1] Anticipating the remedies phase, UT claims that Petitioner would not have been admitted under a race-neutral system. BIO 13 n.6. This claim conflicts with the evidence adduced at the preliminary-injunction stage, where the district court found that 64 "underrepresented minority" students were admitted even though their Academic Index scores were lower than Petitioner's. *Fisher v. Texas*, 556 F. Supp. 2d 603, 607 (W.D. Tex. 2008).

Amended Complaint's ("SAC") prayer for relief. BIO 7-10. UT argues that the return of Petitioner's "application fees and all associated expenses incurred ... in connection with applying for admission to UT," SAC ¶ 4, will not redress her injury because UT's use of race did not "induce[] her to apply," BIO 12. But Petitioner is seeking the return of fees and expenses on restitutionary—not inducement—grounds. Restitution is a standard form of compensatory relief that is capable of redressing Petitioner's constitutional injury. Restatement (Third) of Restitution and Unjust Enrichment § 3 ("A person is not permitted to profit by his own wrong."); *id.* §§ 44, 49.

UT also argues that the Complaint fails to plead a claim for nominal or other monetary damages. But "it is not necessary to allege nominal damages." *Mitchell v. Horn*, 318 F.3d 523, 533 n. 8 (3d Cir. 2003). Regardless, Petitioner prayed for "[a]ll other relief this Court finds appropriate and just," SAC ¶ 165, and courts have consistently read residual demands to include nominal damages, *id.*; *Minn. Lawyers Mut. Ins. Co. v. Batzli*, 2011 WL 3347849, at *10 n.19 (4th Cir. Aug. 4, 2011); *Boxer X v. Donald*, 169 F. App'x 555, 559 (11th Cir. 2006), as well as compensatory damages, *Sapp v. Renfroe*, 511 F.2d 172, 176 n.3 (5th Cir. 1975); *Kursar v. TSA*, 751 F. Supp. 2d 154, 161 n.5 (D.D.C. 2010) (discussing *Doe v. U.S. Dept of Justice*, 753 F.2d 1092 (D.C. Cir. 1985)).[2]

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[2] UT's arguments about declaratory relief are "superfluous in light of the damages claim," *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997). However, even if just nominal damages are awarded, the judgment would still have "the effect of a declaration of legal rights and may deter future infringements or may enable the plaintiff to obtain an injunction to restrain a repetition of the wrong." Black's Law Dictionary 418 (8th ed.); 13C FPP § 3533.3.

Even if UT were correct, however, Rule 15 allows a party to amend her complaint to conform to the evidence and instructs the federal courts to "freely permit" such amendment. Fed. R. Civ. P. 15. UT argues that it is "too late for [Ms.] Fisher to amend her complaint in the district court" because the "district court ordered the parties to file all motions to amend or supplement pleadings ... **by July 14, 2008.**" BIO 19. But UT is wrong. The Bifurcation Order, immediately before setting out the schedule on which UT relies, provides: "[T]he parties have agreed to the following schedule for the liability phase of this case. Nothing in this scheduling order will be deemed to waive or otherwise alter the parties' rights in the remedy phase of this case." Bifurcation Order 2. The Bifurcation Order thus preserves Petitioner's ability to amend with respect to remedies on remand; for UT to argue otherwise is disingenuous.

Moreover, Rule 54(c) provides that the "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). The Rule "recognizes that the circumstances bearing on the feasibility of particular forms of relief often change between the initiation of the suit and the rendition of final judgment." 21A Oakes, Federal Procedure, Lawyers Ed. § 21.51. Thus, "the mooting of the complaint's request for injunctive relief does not require dismissal of the suit if monetary relief would be available on the claim, even if the monetary

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UT would be wise to view it in that manner going forward. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010) ("A litigant who tries to evade a federal court's judgment—and a declaratory judgment is a real judgment, not just a bit of friendly advice—will come to regret it.").

relief was not requested." 10 J. Moore, Moore's Federal Practice § 54.70[1]. "Consequently, the prayer for relief does not determine what relief ultimately will be awarded." 10 Wright, Miller & Kane, Federal Practice & Procedure ("FPP") § 2664 (3d ed.). At bottom, "[t]he liberal amendment policy of Rule 15, combined with Rule 54(c) means that a party should experience little difficulty in securing a remedy other than that demanded in the pleadings as long as the party shows he is entitled to it." *Id.* § 2662; 6 FPP § 1474 (explaining that Rule 15 amendments are "appropriate for increasing the amount of damages sought, or for electing a different remedy than the one originally requested").[3]

3. In any event, UT's entire line of argument badly confuses appropriate remedy with jurisdiction. Because "*jurisdiction* is a question of whether a federal court has the power ... to hear a case" whereas "*relief* is a question of the various remedies a federal court may make available," *Davis v. Passman*, 442 U.S. 228, 239-40, n.18 (1979), "it is not the amount claimed or the type of relief requested in the demand that determines whether the court has jurisdiction," 10 FPP § 2664; *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 561 (1968); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 352 (2008) (Ginsburg, J., concurring in part and dissenting in part). Thus, "a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 65 (1978).

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[3] UT claims that Rule 54(c) is inapplicable because Petitioner has not yet obtained a "final judgment." BIO 18-19. The argument is circular. Whether Petitioner will prevail is the very question before this Court.

UT wrongly argues that *DeFunis v. Odegaard*, 416 U.S. 312 (1974), is to the contrary. Unlike here, the trial court in *DeFunis* granted an injunction requiring the University of Washington Law School to admit DeFunis and the injunction remained in place while the case was appealed. *Id.* at 314-16. That case was moot because DeFunis had been awarded all the relief the Court was capable of providing him. He was scheduled to graduate from his chosen law school and thus had no possible financial injury or claims for "compensation for the higher tuition costs or lost future income incurred by attending another university," BIO 13. Because Petitioner was denied the education that she sought by injunction in this lawsuit, UT acknowledges the Court *is* capable of awarding such compensatory relief. Accordingly, there is no jurisdictional barrier here to invoking Rule 54(c).[4]

UT relies on *Fox v. Board of Trustees of the State University of New York*, 42 F.3d 135 (2d Cir. 1994), to argue that Petitioner should not be permitted to obtain the benefit of Rule 54(c). BIO 10 n.3, 19. But *Fox* was premised on the fact that the government defendants, having answered a plea for relief that sought *only* equitable relief, would be prejudiced because they had not had an opportunity to raise an immunity defense to a damages claim. 42 F.3d at 141. At most, *Fox* reflects the exception to Rule 54(c), where a "plaintiff's failure to demand the appropriate relief has prejudiced his adversary." 10 FPP § 2664. Indeed, *Fox* acknowledges that a request for nominal damages should be read into a complaint that, like Petitioner's, includes a request for monetary relief. *Id.* at 142. Petitioner expressly prayed for money damages, App. 4a, and UT answered on the merits, Ans. to Second Am. Compl., *Fisher v. University of Texas*, No. 08-263 (W.D. Tex. Aug. 22, 2008).

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[4] Nominal damages may also be appropriate in this case, unlike in *DeFunis* where injunctive relief fully vindicated DeFunis's rights. *E.g., Cummings v. Connell*, 402 F.3d 936, 945 (9th Cir. 2005) ("Nominal damages exist as a purely symbolic vindication of [a] constitutional right.").

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997), likewise is distinguishable. As in *Fox*, the complaint in that case alleged only equitable claims against government officials. *Id.* at 49-51. Perhaps more importantly, the parties there had colluded in presenting a request for nominal damages in order to keep the case alive. *Id.* at 71. The Court's conclusion that the dispute had become "friendly or feigned," *id.*, has no application to this case.

4. Finally, UT claims that it might moot the case by tendering $100 (to cover Petitioner's application fee and housing deposit) "rather than incur the massive expenses of litigating this case to conclusion in this Court." BIO 3. But only when "an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever" must an appeal be dismissed as moot. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). Indeed, the principal case UT relies on confirms that the "entire claim is not mooted simply because the specific relief it sought has been rendered moot" if "the party seeking relief" can "demonstrate that the court's adjudication would affect it in some way." *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011). Because nominal and other unquantified compensatory damages would remain available to Petitioner, tendering $100 would not moot the case. *Supra* at 2-5.

In any event, the Court should not be deterred by UT's bluster. UT has been litigating this dispute for three-and-half years. If UT believes that tendering $100 would moot this case, it would not have incurred the significant expense of an appeal, opposition to en banc review, and its BIO. UT now merely threatens payment in an attempt to avoid further review, while preserving the decision below as precedent. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (requiring vacatur if case is mooted by prevailing party). UT should not be permitted to benefit from such gamesmanship.

II. UT Cannot Deny The Importance Of The Petition.

1. This case presents fundamental constitutional issues affecting university admissions programs nationwide. Those important issues were squarely presented below and engendered lengthy decisions at every stage of this case. As Chief Judge Jones lamented, the decision below "in effect gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires." App. 175(a).

2. New federal guidelines justify her concerns. The Department of Education echoed the United States' amicus brief below by adopting a similarly permissive interpretation of *Grutter* in its "Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education," *available at* www2.ed.gov/about/offices/ list/ ocr/docs/guidance-pse-201111.html. Revoking guidance that had discouraged using race-based admissions unless absolutely necessary, the agency encourages universities

"to take proactive steps" to incorporate racial preferences in their admissions procedures. *Id.* Like the Fifth Circuit, it disclaims the applicability of *Parents Involved* to higher education. The proper interpretation of *Grutter* and other governing precedent is central to the validity of the Administration's nationwide guidance and confirms the significance of the issues presented here and the need for this Court's review.

3. That UT unabashedly grants "underrepresented" minorities preferences over Asian-Americans based on state demographics further underscores the importance of this case. BIO 31. UT's selective racial preferences give credence to the concerns of Asian-American students nationwide that their race unfairly counts against them in admissions. *Some Asians' college strategy: Don't check "Asian,"* USA Today, Dec. 4, 2011, *available at* www.usatoday.com/news/education/story/2011-1203/asian-students-college applications/51620236/1.

4. UT argues that this case is idiosyncratic because of the Top 10 Percent Law. BIO 23. But the substantial levels of minority enrollment absent preference ensured by the Top 10 Percent Law are not confined to Texas or percentage plans. Moreover, the equal-protection issues at the heart of this case—questions about the level of scrutiny, critical mass, racial-demographic goals, disparate treatment of minority groups, impact on minority enrollment, and classroom diversity—are questions of importance throughout higher education. Their resolution will provide critical guidance nationwide.

5. UT also seeks to diminish this case by noting the absence of a circuit conflict. BIO 23. But Petitioner need

not assert the existence of a circuit split under Rule 10(c). This Court has not hesitated to review important equal-protection cases in the absence of a circuit split. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009); *Parents Involved*, 551 U.S. at 715, 718; *Johnson v. California*, 543 U.S. 499, 505 (2005); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 (1978).

III. UT's Cursory Attempts To Address The Petition's Merits Are Unpersuasive.

1. UT barely addresses the merits of this dispute. It merely reiterates the opinions below without any serious discussion of the Fifth Circuit's reasoning. BIO 30-34. The Petition fully explains why the panel's reasoning is incorrect and Petitioner need not repeat those arguments here. Pet. 23-35.

2. UT disingenuously attempts to narrow this dispute based on supposed "factual concessions in the district court." BIO 25. But these "concessions" are merely uncontroversial facts that lay the foundation for this legal dispute. For example, that "UT Austin added race as a factor in its admissions decisions because it views race as an important credential," *id.*, says nothing about whether that decision was unconstitutional. Similarly, that "[u]sing race in admissions helps UT achieve racial diversity," *id.* 26, reflects solely that UT uses race to increase enrollment of minorities it considers "under-represented"; it does not establish that UT's use of race survives strict scrutiny. Although there is insufficient space to debunk every supposed concession, it is worth noting that neither the

Court of Appeals nor the District Court relied on "factual concessions" even though UT tried this same tactic below.

3. Finally, UT defends *Grutter* by taking the extraordinary position that the Equal Protection Clause bans only discriminatory enforcement of laws—not discriminatory laws themselves. BIO 37-39. UT's theory would uphold a statute denying university admission to all students of a particular race or, as in *Strauder v. West Virginia*, 100 U.S. 303 (1879), prohibiting blacks from serving on a jury, provided the law were enforced evenhandedly. UT's resort to this striking pronouncement without supporting case citation underscores the need for review.

IV. UT Improperly Seeks To Limit The Scope Of This Court's Review.

Contrary to UT's contention, BIO 35-37, Petitioner has preserved the argument that *Grutter* should be reconsidered. By its express terms, the question presented invoked the full range of Fourteenth Amendment precedent, including but not limited to *Grutter*, and thus encompassed the concerns raised by both Chief Judge Jones and Judge Garza. Indeed, the Petition devotes an entire argument to this issue. Pet. 35. And the question whether *Grutter* should be reconsidered was briefed below. The issue is "fairly included" within the question presented, Rule 14.1(a), and preserved for this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE ASIAN AMERICAN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Asian American Legal Foundation ("AALF"), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans.[1] Americans of Asian origin have a particular interest in use of race in public university admissions. They have historically been, and continue to be, denied access to public schools due to overt racial and ethnic prejudice as well as ostensibly well-intentioned "diversity" programs such as the program at issue here. In case after case, only strict application of the Fourteenth Amendment's guaranty of equal protection has allowed Asian American citizens to live free of racial persecution.

As the record below shows, Asian American students suffer discrimination at the hands of the University of Texas at Austin ("UT Austin"), even though, at variance with UT Austin's stated goal of providing a "critical mass," Asian American students, in fact, are present in UT Austin classrooms in fewer numbers than "Hispanics," one of the favored ethnicities.

In the very recent past, AALF's constituents battled against similar racial discrimination by the San Francisco public school system. In *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 864 (9th Cir. 1998), San Francisco's K-12 schoolchildren of Chinese descent sued to end a consent decree that mandated racial and ethnic admissions quotas in the San Francisco public school system. After five years of litigation, and after the district court found the defendants had almost no chance of prevailing under the strict scrutiny standard mandated by this Court's decisions, the San Francisco Unified School District and the San Francisco chapter of the NAACP, on the opening day of trial, agreed to cease their use of race. *See Ho v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999).

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[1] Notice of this brief has been give to all parties. Letters of consent by all parties to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Many of the same issues raised in *Ho* are present in the instant case. As in *Ho*, UT Austin is engaged in racial balancing without any remedial purpose. It is similarly denying applicants access solely because they are of the "wrong" race or ethnicity. And it is proclaiming that its good faith should excuse the fact that it is trammeling on applicants' civil rights. The *Ho* Plaintiffs prevailed because of this Court's rulings that strict scrutiny had to be applied to a school district's conduct. The plaintiff in the instant case failed because the Fifth Circuit Court of Appeals decided that strict scrutiny no longer applies.

Proponents of racial balancing in San Francisco derive comfort from the decision of the Fifth Circuit decision in this case that, under this Court's ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003), UT Austin is subject to a deferential "good faith" standard instead of strict scrutiny, and may continue to classify students by race for purposes of admission. If the Fifth Circuit decision is allowed to stand, school officials in San Francisco and elsewhere are almost certain to resume their racial balancing programs, because all of them understandably believe that they can meet a "good faith" standard of scrutiny.

AALF and its constituents have a keen interest in Fourteenth Amendment jurisprudence as it relates to public education. Even though it is not widely known, Chinese American schoolchildren were some of the earliest victims of "separate but equal" jurisprudence as it related to education. In *Wong Him v. Callahan,* 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the "Chinese" school in Chinatown was "separate but equal." 119 F. at 382. In *Gong Lum v. Rice,* 275 U.S. 78 (1927), this Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson,* 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl residing in Mississippi could be denied entry to a "white" school because she was a member of the "yellow" race. Id. at 87.

Thus, in *Lee v. Johnson,* 404 U.S. 1215 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry . . . was the classic case of *de jure* segregation involved [and struck down] in *Brown v. Board of Education,* 347 U.S. 483 [1954]. . . ." *Id.* at 1216. "*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. *See Yick Wo v. Hopkins,* 118 U.S. 356." *Lee,* 404 U.S. at 1216.

Amicus curiae AALF submits that the long history of discrimination against Chinese Americans in this country, the Chinese American experience in the *Ho* case, and present, ongoing discrimination faced by members of this historically oppressed group, provide this Court with compelling reasons why it should grant Petitioner the requested Writ, and should not allow the equal protection rights of young citizens to be eroded in the name of racial balancing.

Accordingly, AALF and its constituents respectfully ask this Court to hear their arguments in favor of Petitioners.

INTRODUCTION

The Court should grant certiorari in order to clarify Fourteenth Amendment jurisprudence as it relates to use of race in public education. The decision by the court below, in *Fisher v. University of Texas at Austin*, 631 F. 3d 213 (5th Cir. 2011), that in the university context strict scrutiny means nothing more than applying a "good faith" standard to the school's challenged scheme, giving deference to school officials throughout, flies in the face of all this Court's precedents and must be checked, to prevent further erosion. As this Court has long held, government use of race is always "suspect" and viewed with "hostility"; and should be upheld only where, under strict scrutiny, it is shown to be narrowly tailored to a compelling government interest. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). In *Fisher*, the Fifth Circuit disregarded this fundamental principle in deriving a "good faith" test from this Court's ruling in *Grutter*, and essentially used the imprimatur of this Court to establish a deferential rational-basis-like test for use of race in public education.

Unbounded by any remedial purpose, the UT Austin racial balancing scheme will continue in perpetuity based solely upon the subjective "good faith" judgment of the school's administrators. As the Fifth Circuit's decision in *Fisher* is purportedly based on this Court's ruling in *Grutter,* this "good faith" test, unless repudiated, will be applied far outside Texas. The "slippery slope" created by a rule considering only the "good faith" of the school officials and deferring to their judgment will quickly find application in all the nation's public schools, right down to the kindergarten level. The remedy fought for by AALF's Chinese American constituents in *Ho* will be endangered, along with the civil rights of all students attending or seeking to attend a public school.

Respondents' purported noble purpose should be given no weight. State officials have always argued that their classification of individuals by race was justified by an important government purpose; yet, our country's history has consistently shown that the use of race was wrong. The long history of Chinese Americans in this country amply illustrates this phenomenon. Viewed historically as faceless members of a "yellow horde," in years past, individuals of Chinese descent were often the victims of state action directed at "race" that was meant to serve the greater public good. The onus extended to Chinese American children who sought to attend public schools. *See, e.g.,* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools,* 5 Asian L.J. 181, 207-208 (May 1998).

San Francisco and other cities flatly denied "Chinese" children the right to attend public schools. When courts ordered their admission, the State of California established separate "Chinese" schools, to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864. Even in our times, school officials who believed they were acting in good faith have sought to classify Chinese American students by race for unequal treatment. *See* David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 Harv. BlackLetter J. 39, 54 (Spring 2000).

In case after case, the single historical truth that emerges is that the rights of citizens of Chinese descent—and of all Americans—have been vindicated only by strict application of the Fourteenth Amendment's protection of individual rights, applying a "hostile" standard of "strict scrutiny" to the government's challenged use of race. The Fifth Circuit's substitution of a deferential "good faith" standard ignores what history has taught us, flies in the face of both the spirit and letter of this Court's prior rulings on the issue, and, if allowed to stand, will bring tragic consequences.

For these and other reasons set forth herein, the Court should grant the Writ of Certiorari sought by Petitioner and should clarify this important issue.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW AND CLARIFY THAT USE OF RACE IN EDUCATION REMAINS "ODIOUS," REQUIRING THE STRICTEST JUDICIAL SCRUTINY, WITH THE BURDEN OF JUSTIFYING THE CHALLENGED CONDUCT PLACED SQUARELY ON THE STATE.

The Court should grant certiorari so that it can halt the erosion in Fourteenth Amendment jurisprudence threatened by the Fifth Circuit's recent decision in *Fisher*. The Fifth Circuit's expansion of this Court's ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003), threatens decades of settled Fourteenth Amendment jurisprudence and endangers the civil rights of all Americans seeking access to this nation's schools and universities.

This Court has repeatedly stated that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Use of race "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw* at 643. As this Court reemphasized in *Adarand*, rejecting the argument that the "good motives" of a state actor merit more lenient scrutiny, there are no "benign" racial classifications. 515 U.S. at 226. "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224; *see*

Richmond v. J. A. Croson Co., 488 U. S. 469, 493 *(1989)* ("purpose of strict scrutiny is to 'smoke out' illegitimate uses of race"). Further, this Court has repeatedly held that the burden of proving that the challenged program is narrowly tailored to address a compelling government interest rests firmly on the proponent of the race-based program. *See Johnson v. California*, 543 U.S. 499, 505 (2005).

The Fifth Circuit's decision in *Fisher* distorts and turns the precedents set by this Court on their collective head. In *Fisher*, the Fifth Circuit has held that, under *Grutter*, UT Austin may use race in admissions because it "cannot say" UT Austin officials *did not* act in "good faith" in setting up their race-based admission program. *Fisher*, 631 F. 3d at 246. In the name of *Grutter*, the Fifth Circuit not only reduced the strict scrutiny test to a deferential good faith test, with the good faith of the state actor presumed, it placed all the burdens on the party challenging the use of race: "We presume the University acted in good faith, a presumption Appellants are free to rebut." *Fisher*, 631 F. 3d at 231-232. Instead of requiring a "strong basis in evidence" to justify the challenged use of race, *see Wygant v. Jackson Board of Education,*476 U.S. 267, 277 (1986), the court required no more than the "presumed" good faith of the government actors.

The Fifth Circuit's decision in *Fisher* is breathtaking in its audacity, going far beyond the narrow justification for use of race recognized in *Grutter*. *See Grutter*, 539 U.S. at 330 (law school had important government interest in maintaining "critical mass" of minority students). The deferential "good faith" test the *Fisher* opinion purports to derive from *Grutter* will, if not repudiated by this Court, result in a future in which all public school officials have the power to implement racial balancing schemes, free of judicial interference. From university all the way down to kindergarten, the first lesson students learn will be that they are forever stigmatized and limited by their race. Unbounded by any remedial purpose and subject only to the whim of school officials, these programs of racial discrimination will continue in perpetuity, without end. *See Fisher,* 631 F. 3d at 254 (J. Garza, concurring).

II. UNLESS THIS COURT INTERVENES, THE EFFECTS OF THE DECISION IN *FISHER* WILL BE FELT FAR OUTSIDE OF TEXAS.

In a relevant case involving AALF's constituents, the deferential "good faith" standard discovered by the *Fisher* court will inevitably, unless checked, result in San Francisco's schoolchildren of Chinese descent again facing "benign" race-based discrimination in the city's public school system. In *Ho v. San Francisco Unified School District*, filed in 1994, San Francisco's Chinese American schoolchildren were forced to turn to the courts for redress of their Fourteenth Amendment rights, in order to halt the school district's policy of classifying and assigning them to the city's K-12 schools on the basis of their race. *See Ho,* 147 F.3d 854; Ho, 59 F. Supp. 2d 1021 (on remand); *Ho v. San Francisco Unified Sch. Dist.,* 965 F. Supp. 1316 (1997) (decision giving rise to appeal in 147 F.3d 854).

In *Ho,* the plaintiff class challenged a consent-decree-mandated racial balancing scheme imposed in *San Francisco NAACP v. San Francisco Unified Sch. Dist.,* 576 F. Supp. 34 (N.D. Cal. 1983). Without any finding of a constitutional violation to remedy, the consent decree set up a racial balancing scheme with the stated goals of preventing "racial isolation" and providing "academic excellence" in the city's schools. *See Ho,* 965 F. Supp. at 1322; *see also Ho,* 147 F.3d at 859; *San Francisco NAACP,* 576 F. Supp. at 40-42, 58. Filled with zeal for their vision of racial engineering, the proponents ignored that the San Francisco school district was already one of the most ethnically diverse in the nation.

Under San Francisco's admissions program, nine ethnic groups were arbitrarily defined, including "Chinese." Members of at least four of the groups were required to be present at each school; and no one group could represent more than 45 percent of the student body at any regular school or 40 percent at any alternative school. *See id.; see also Ho,* 147 F.3d at 856. By the time of the *Ho* challenge, the school district had enlarged the original nine arbitrary racial categories to thirteen equally arbitrary categories to take into account the growing prominence of additional racial groups in the district. *See Ho,* 147 F.3d at 858. As they were the largest racially identifiable group, the burden of this system of quotas and caps fell heaviest on students identified as "Chinese," who were most likely to be "capped out" at their neighborhood schools or at desirable magnet schools. *See Levine, supra,* at 55-56. Also, even where preferences were not required to maintain the district's racial quotas and caps, the district nevertheless adopted a policy of granting preferences to applicants classified as "Hispanic" or "African American," *See Ho,* 147 F.3d at 858.

The named plaintiffs' stories amply illustrate the discrimination:

- Brian Ho was five years old. He was turned away from his two neighborhood kindergartens because the schools had accepted the maximum allowed percentage of "Chinese" schoolchildren. He was assigned to a school in another neighborhood. *See Levine, supra,* at 61.

- Patrick Wong, then fourteen years old, applied for admission to Lowell High School, a selective magnet school. He was rejected because his index score was below the minimum required for "Chinese" applicants. However, his score was high enough that he would have been admitted to Lowell had he been a member of any other racial or ethnic group. He was then rejected at three other high schools because such schools had already "capped out" for "Chinese" students. *Id.*

- After moving into a San Francisco neighborhood, Hillary Chen, then eight years old, was not allowed to transfer into any of three elementary schools near her new home because all three schools had accepted the maximum number of "Chinese" schoolchildren allowed under the district's scheme. *Id.*

After five years of vigorous litigation, the *Ho* case settled on the first day of trial with the defendants agreeing to (i) cease using race to assign students to the city's schools and (ii) end the mandatory requirement of self-classification by race on student enrollment forms. *See Ho,* 59 F. Supp 2d at 1025 (approving settlement). Settlement in *Ho* would never have been reached if the district court and the Ninth Circuit (on an interlocutory appeal from the district court's denial of plaintiffs' request for dissolution of the consent decree) had not emphasized to defendants that (i) under this Court's decisions in cases such as *Croson* and *Adarand*, the school district's goal of diversity did not justify its use of race, and (ii) at trial the school district would have to prove, under strict scrutiny, a past constitutional violation tied to its present use of race—a burden defendants were extremely unlikely to carry. *See Ho*, 59 F. Supp. 2d at 1024-25 (noting burdens placed by Ninth Circuit's ruling and district court's prior finding that "defendants had shown little likelihood of prevailing at trial").

If the Fifth Circuit's ruling in *Fisher* is allowed to stand, essentially substituting in the pedagogical context a deferential "good faith" standard in place of strict scrutiny—a rule it purportedly derives from this Court's decision in *Grutter*—there is every likelihood that the San Francisco school district will again try to implement a race-based student assignment program, in spite of the *Ho* settlement and in spite of a new state law prohibiting use of race. Indeed, San Francisco school officials who favor use of race debate the issue every time a new case surfaces offering them support. *See e.g.*, Bob Egelko, Heather Knight, *SCHOOLS, Justices Take Cases On Race-Based Enrollment*, San Francisco Chronicle, at B-1 (June 6, 2006) ("If the Supreme Court upholds the Seattle system . . . Prop. 209 is a moot point. . . Federal laws would override a state initiative." (quoting board member Mark Sanchez).)

III. THE EXPERIENCE OF CHINESE AMERICAN STUDENTS IN *HO* DEMONSTRATES THAT ONLY HARM CAN FLOW FROM A RULE ALLOWING PUBLIC SCHOOLS TO IMPLEMENT RACIAL BALANCING POLICIES.

As this Court has explained, "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities." *Rice v. Cayetano,* 528 U.S. 495, 517 (2000).

In *Ho,* as in the instant case, school officials claimed that classifying students by race would bring them educational benefits. After the filing of the *Ho* case, however, even proponents of San Francisco's racial balancing scheme were forced to admit that no discernable benefits had been produced. One of the more telling indictments was issued by a Grand Jury convened to investigate the success of the program. *See Grand Jury Report,* The San Francisco Unified School District (San Francisco Civil Grand Jury Report, 1996-97) *at* http://sfsuperiorcourt.org/index.aspx?page=286 (last checked Oct. 18, 2011). After extensive investigation, the Grand Jury concluded that racial balancing had achieved nothing but racial balancing: "Fourteen years of experience with the Consent Decree have established that while it has met its goal of *de facto* desegregation, it has been a failure at accomplishing its primary purpose of achieving academic excellence for all ethnic groups." *Id.* at VI (Conclusion). The Grand Jury in particular found that racial balancing had not produced benefits for Hispanic and African American students, who were, in San Francisco as with UT Austin, the focus of the racial balancing scheme. *See id.* at IV.

While mandated racial balancing in San Francisco's schools did not produce discernable benefits, it caused visible harm. Validating this Court's warnings in *Croson* and *Rice*, San Francisco schoolchildren were stigmatized by their classification by race. *See Croson*, 488 U.S. at 493. After the *Ho* case was filed, newspapers widely reported the shame and anger felt by children targeted by the racial quotas. As stated by the parent of one "Chinese" youth turned away because of his ethnicity, "He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?" Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, at C-2 (Feb. 14, 1999).

As Lee Cheng, Secretary of AALF, testified in a written statement for hearings held by the U.S. House of Representatives, Sub-Committee on the Constitution: "Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong." Lee Cheng, *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), at http://judiciary.house.gov/legacy/274.htm (last checked Oct. 18, 2011).

Another insidious byproduct of San Francisco's racial balancing plan was "rampant dishonesty," as parents of all races attempted to misreport children's racial identity to gain admission to desired schools. *See* Michael Dorgan, *Desegregation or Racial Bias?*, San Jose Mercury, at 1A

(June 5, 1995). "[S]ome black families in Bayview-Hunter's Point have gone so far as to take Hispanic surnames to protect their children from busing." *Id.* at 10A. "People know if they want to go to a particular school that has a lot of Caucasians, they should put down something other than Caucasian, and they do." *Id.* at 10A (quoting School Board President Dan Kelly).

In Texas, as in California, stigmatization will result from UT Austin's racial balancing program, however well-intentioned. There, as in California, student applicants will feel shame, frustration and anger because they are singled out for unequal treatment on account of their race. Aspiring students will be encouraged to lie about their race, to gain a coveted place at the school. The university may realize its goal of racial balancing; but, otherwise, only harm will result. The same will be true everywhere else that this new rule derived from *Grutter* finds application.

IV. DEMONSTRATING THAT ITS ONLY GOAL IS RACIAL BALANCING, UT AUSTIN DISCRIMINATES AGAINST ASIAN AMERICANS, EVEN THOUGH THEY ARE LESS REPRESENTED IN ITS CLASSROOMS THAN "HISPANICS," A FAVORED RACIAL CATEGORY.

UT Austin's pretense that its racial discrimination is motivated by the desire to achieve a "critical mass" of underrepresented minorities is belied by the fact that it grants no preferences to Asian Americans even though they are less well represented in UT Austin classrooms than Hispanics, a racial category granted preference in the admissions process. Indeed, in earlier statements, the university candidly admitted that its post-*Grutter* "proposal to [reconsider] race in the admission process" reflected nothing more than a desire to mirror state racial demographics: "[S]ignificant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." *Proposal to Consider Race and Ethnicity in Admissions* at 24 (June 25, 2004) at http://www.utexas.edu/student/admissions/about/admission_proposal.pdf (last visited Oct. 18, 2011) (hereinafter "2004 Proposal").

The manner in which UT Austin treats individual Asian applicants for admission vis-a-vis their Hispanic counterparts confirms that the university's true objective bears little resemblance to the interest in diversity the majority in *Grutter* narrowly permitted. It is uncontested that UT Austin gives Hispanic applicants a preference because of their race but does not afford a similar preference to applicants of Asian ancestry; this despite the fact that "the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT." *Fisher v. University of Texas at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009). The disparate treatment of Asian applicants is incompatible with UT Austin's ostensible pursuit of a "critical mass" of minority students and any accompanying educational benefits. *See Grutter*, 539 U.S. at 330.

In reality, UT Austin has no serious interest in obtaining a critical mass of Hispanic or Asian students. True to its word, the university seeks instead to make the racial composition of its student body mirror the racial composition of the state of Texas. *See* 2004 Proposal at 24. That unlawful objective fully explains UT Austin's decision to prefer Hispanics over similarly situated Asian applicants. In 2008, the university's student body was composed of roughly 20% Hispanics and 19% Asians while those groups respectively represented 36% and 3.4% of the Texas population. *Fisher*, 645 F. Supp. 2d at 606 and n. 10. Only if the university's aim is racial balancing are Hispanics underrepresented and Asians overrepresented. By any objective standard, each of those groups has achieved the "meaningful representation" necessary to produce substantial educational benefits. *Grutter*, 539 U.S. at 319. UT Austin's stated mission of pursuing "racial balance for its own sake" does not comport with the Equal Protection Clause. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

V. BECAUSE THE UNIVERSITY ALREADY HAD A PROVEN RACE-NEUTRAL ALTERNATIVE, ITS RACE-BASED ADMISSIONS PROGRAM COULD NOT BE NARROWLY TAILORED EXCEPT UNDER A RADICALLY-DIFFERENT TEST.

That the Fifth Circuit was able to find UT Austin's admissions policy "narrowly tailored" illustrates the radical nature of the new rule it purports to derive from *Grutter*. Even assuming UT Austin had a compelling government interest in diversity, under traditional notions of narrow tailoring, it still could not discriminate on the basis of race because it already possessed a proven equally efficacious, race-neutral program furthering that interest. *See Johnson*, 543 U.S. at 505; *Grutter*, 539 U.S. at 339. Under Texas' race-neutral Top Ten Percent Law, UT Austin had already achieved a critical mass of minority students. *See* Tex. Educ. Code § 51.803 (1997); Petitioner's Appendix ("App.") 123a. For instance, in 2002, without resorting to race-based discrimination, UT Austin enrolled a class that was 38% non-Caucasian, including a 17% combined African-American and Hispanic population. 2004 Proposal at 30. By 2004, the number of African-American and Hispanic students entering the freshman class had swelled to 21.4% (a 26% increase in only two years), and the total non-white population rose to nearly 43% of the incoming freshman class. App. 62a. These substantial and growing levels of minority enrollment show that UT Austin could (and did) use the Top Ten Percent Law to achieved a "critical mass" of minority representation.

In an attempt to justify using racial preferences in conjunction with the Top Ten Percent Law, UT Austin offered evidence that, in 2002, 79% of classes had one or no African-American students while 30% had one or no Hispanics. 2004 Proposal at 26. However, the university's statistics actually demonstrate the presence of "critical mass" as defined by reference to substantial educational benefits that flow from exposure to racially diverse students. *Grutter*, 539 U.S. at 329. UT Austin's statistics confirm that exposure to African-American and Hispanic students is all but guaranteed in university classrooms. Holding the 2002 in-class figures constant, a typical UT Austin student, over the span of a four-course semester, has a 61% probability of enrolling in a class with at least two African-Americans and a 99.2% probability of attending a class with at least two Hispanics. During a typical student's four-year academic career, the odds approach 100% that she will take at least one class with two or more Hispanics and at least one with two or more

African-Americans.[2] If near certain in-class exposure to two or more African-American and Hispanic students is insufficient to promote "cross-racial understanding," break down "racial stereotypes," and enable students to "better understand persons of different races," *id.* at 329, UT Austin failed to explain why that is so.

Indeed, UT Austin's bald assertion that Hispanics are insufficiently represented was rendered all the more incredible in light of the university's treatment of Asians. While 30% of classes in 2002 had fewer than two Hispanic students, 33% had fewer than two Asian Americans. 2004 Proposal at 26. Yet as noted *supra*, it is undisputed that UT Austin does not accord a preference to Asian applicants. Assuming UT Austin is actually pursuing the benefits of diversity recognized in *Grutter*, its program, in light of the statistics, can be explained in only one of two ways: Either UT Austin knows it already has achieved a "critical mass" of both Hispanics and Asians, without the need for use of race, or, it believes that Hispanics are somehow more valuable than Asians in promoting "cross-racial understanding," breaking down "racial stereotypes," and enabling students to "better understand persons of different races." *Grutter*, 539 U.S. at 329. The record below fails to reflect any evidence offered for the latter dubious proposition.

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[2] Out of N classes, the probability of taking at least one class with two or more students of a particular minority group is calculated by taking one minus the probability of a single class not having two or more members of the group raised to the Nth power. Thus, over a four-course semester, the probability of a typical UT Austin student taking at least one class with two or more African-Americans is expressed by 1-(.79^4), or 61.049%, while the probability of the same student taking at least one class with two or more Hispanics is expressed by 1-(.3^4) or 99.19%. Over the span of a typical student's four-year academic career, the 4 in the previous equations is replaced with a 32, yielding results that round to 100% for both minority groups.

In any event, because it is beyond reasonable dispute that the race-neutral Top Ten Percent Law was already furthering any legitimate diversity interest, UT Austin's race-based admissions policy could not be found narrowly tailored under any of this Court's precedents. Only by finding a new rule mandating deference to the university's judgment as to whether its program was narrowly tailored—essentially applying a form of rational basis scrutiny—was the Fifth Circuit able to find the UT Austin admission program "narrowly tailored."

VI. THIS COURT SHOULD REVISIT ITS DECISION IN *GRUTTER*, TO CLARIFY THAT IT HAS NOT FORSAKEN MORE THAN A CENTURY OF ITS PRECEDENTS INTERPRETING THE FOURTEENTH AMENDMENT.

This Court should grant certiorari to revisit its decision in *Grutter*, to resolve ambiguities in the opinion in that case and to clarify that, contrary to the Fifth Circuit's finding in *Fisher*, it does not sanction a deferential "good faith" rational-basis-like test for government use of race in education.

In *Fisher*, the Fifth Circuit found that, under *Grutter*, only the "good faith" of the school officials mattered, both in the initial determination by the university that it had a compelling government interest in the use of race and in the university's crafting of a race-based plan to further that interest: "Rather than second-guess the merits of the University's decision, a task we are ill-equipped to perform, we instead scrutinize the University's decision making process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires." *Fisher*, 631 F. 3d at 231.

The Fifth Circuit expressly rejected Petitioner's argument that the court should, at least, determine for itself whether the policy was narrowly tailored: "[T]his argument in its full flower is contradicted by *Grutter*. The majority held that, like the examination into whether the University has a compelling interest, 'the narrow-tailoring inquiry . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.'" *Fisher*, 631 F. 3d at 232. The Fifth Circuit presumed the good faith of the school officials and placed all the burdens on the person challenging the use of race: "We presume the University acted in good faith, a presumption Appellants are free to rebut." *Id.* Thus, while the Fifth Circuit pretended to be examining the UT Austin program under strict scrutiny, in fact, it applied something far more like the rational basis scrutiny applicable where no suspect category such as race is involved. *See Central State University v. American Assoc. of University Professors*, 526 U.S. 124, 128 (1999).

While one might be tempted to dismiss the Fifth Circuit's misunderstanding of this Court's decision in *Grutter* as an aberration driven by the ideologies of the judges concerned, the concurrence of Justice Garza demonstrates that more is involved. Justice Garza, while making clear he was not in favor of the UT Austin racial balancing program, nonetheless believed that he had no choice but to vote with the majority, given this Court's ruling in *Grutter*. "I concur in the opinion because I believe today's decision is a faithful application of Grutter's teachings, however flawed I may find those teachings to be." *Fisher*, 631 F. 3d at 259. "I am compelled to follow the Court's unusual deference towards public university administrators in their assessment that racial diversity is a compelling interest, as well as the Court's refashioned narrow-tailoring inquiry." *Id.* "Post-Grutter, universities need not inflict the least harm possible so long as they operate in good faith." 631 F. 3d at 263. "And in assessing good faith, institutions like the University of Texas need not even provide the type of metrics that allow courts to review their affirmative action programs. . . . In the world post-*Grutter*, courts are enjoined to take universities at their word. *Id.*

Because the *Fisher* majority, and even concurring Justice Garza, understand this Court's decision in *Grutter* to reverse virtually all of this Court's precedents as they relate to the use of race in the university context, there is clearly a need to revisit *Grutter*.

CONCLUSION

The use of race in public school admissions is a matter of extreme importance to all Americans. The Fifth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* Rule 10(c). Worse, its decision finding that this Court, in *Grutter*, sanctioned a deferential "good faith" test for use of race by state school officials, with all the burdens on the person challenging the use of race, essentially places the imprimatur of this Court on a rule that will, unless repudiated, result in a new regime of racial discrimination in public schools throughout the nation. Accordingly, the Court should issue the Writ of Certiorari sought by Petitioner.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 11-345

In the

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF SCHOLARS AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), require deference to *non-academic* determinations by the University of Texas at Austin to use race in undergraduate admissions decisions in order to achieve classroom-level racial balance.

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INTEREST OF AMICI CURIAE[1]

The California Association of Scholars ("CAS") is an organization devoted to higher education reform. An affiliate of the National Association of Scholars, it is composed of professors, graduate students, college administrators and trustees, and independent scholars committed to rational discourse as the foundation of academic life in a free and democratic society. The CAS believes it is in a special position to inform the Court about the importance of the constitutional issues presented in *Fisher v. University of Texas* on campuses.

The Center for Constitutional Jurisprudence ("CCJ") was founded in 1999 as the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The CCJ advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the core principle of individual equality is at stake. Of direct relevance, the CCJ previously appeared as *amicus cu-*

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

riae before this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

SUMMARY OF ARGUMENT

Since *Grutter v. Bollinger*, 539 U.S. 306 (2003), many colleges and universities have ramped up their race-based admissions policies.[2] Indeed, *Fisher* itself amply illustrates this trend. None of this is remarkable: Most government programs expand over time; they seldom contract unless serious efforts are made to impose limits. This is true even when, as here, voters oppose those programs.[3]

Underlying the expansion of race-based admissions policies is the mistaken belief that *Grutter* requires courts to give broad and all-encompassing deference to the judgments of colleges and universities on all matters relating to admissions. But an expansive interpretation of "*Grutter*-deference" is wholly inappropriate. *Grutter* was intended as a narrow exception to an otherwise robust ban on race discrimination. It should not be allowed to swallow the rule.

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[2] *See* Althea Nagai, *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity (October 17, 2006) (empirical study finding that preferential treatment for minority students increased at the University of Michigan following *Grutter*). *See also* United States Commission on Civil Rights, *Affirmative Action in American Law Schools* 124-37, 174-85 (April 2007) ("USCCR-AAALS Report") (discussing post-*Grutter* expansion of law school diversity accrediting standards by the ABA and describing evidence of several law schools' capitulation to that body's demands for greater racial preferences).

[3] *See infra* at n. 7.

Grutter permits deference in only one narrow situation—when an individual college or university has made a good faith *academic* judgment that the need to secure the educational benefits of a *student body* with "critical-mass" diversity is compelling. *Grutter* does not give a college or university the right to insist upon critical-mass diversity in each of its classrooms. Neither does it give a college or university the authority to judge whether its own racially discriminatory admissions policies are narrowly tailored to serve its purpose. Perhaps most important of all, no deference whatsoever is due to a *political* (as opposed to an *academic*) judgment. Insofar as a college or university is reacting to the demands of a state legislature, an accrediting agency, students, or wealthy donors, *Grutter*-deference does not apply at all. In such a case, the college or university must demonstrate a compelling purpose for its racially discriminatory admissions policies without resort to any artificial presumption in its favor.

Furthermore, *Grutter* does not create an irrebuttable presumption in favor of a college or university's good faith. In this case, the facts point not towards a concern over obtaining the educational benefits of critical-mass diversity of any kind, but rather towards a desire to racially balance the student body so that it mirrors the demographics of the State of Texas. Such a purpose is never compelling. *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.).

Grutter contemplates the winding down of race-based admissions policies by the year 2028. That can only happen if the Court stops the expansion of *Grutter*-deference that is illustrated by this case.

REASONS FOR GRANTING THE PETITION

I. Runaway Expansions of *Grutter* Must Be Brought To Heel If the *Grutter* Court's Vision of Race Neutrality By the Year 2028 Is To Be Realized.

Judicial deference—even to well-meaning discriminators—is a concept that is alien to strict scrutiny. Consider, for example, *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), two historic cases in the struggle against racial segregation. At the time, there were academics who firmly (and probably sincerely) believed that students of all races learn better in racially segregated settings. If the Court had deferred to that judgment, we would be living in a considerably less desirable world now.[4]

Deference to academic judgment in matters involving race discrimination can be justified, if at all, only if it is narrowly circumscribed. *Grutter* deferred to a particular "academic" judgment—that securing the educational benefits of "critical-mass" diversity in a student body as a whole is a compelling purpose. *See Grutter*, 539 U.S. at 332 ("The Law School's *educational* judgment that *such* diversity is essential to its educational mission is one to which we defer.... Our holding today is in keeping with our tradition of giving a degree of deference to a university's *academic* decisions, within constitutionally prescribed limits." (emphasis added)). It should be extended no further.

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[4] Much to *amici*'s regret, the concept of racially segregated education has enjoyed a resurgence lately. CNN reports that a Pennsylvania high school was experimenting with separating students "by race, gender and language" for part of the school day "in an effort to boost academic scores." Monika Plocienniczak, *Pennsylvania School Experiments with Segregation*, CCN (Jan. 27, 2011).

A. *Grutter* Does Not Permit a Court to Defer to a University's Expansive Interpretation of Critical-Mass Diversity. The Limits of that Concept Are an Issue of Law.

Grutter-deference was intended to be self-limiting. It allows universities to discriminate only in a relatively few cases—only insofar as is necessary to obtain some minimum minority-student enrollment on campus.[5] The point was to ensure that minority students would not feel like isolated tokens on campus. The term "critical mass" is used fourteen times in the majority opinion; at no point is it suggested that a university may discriminate in such a way as to produce a separate "critical mass" in each and every classroom.

If a university could insist on critical mass in each classroom, the ultimate result would be that almost every admissions decision could be influenced by considerations of race. The issue wouldn't be whether a school has a critical mass of under-represented minorities overall, but whether it has "enough" African-American physics majors, Asian-Americans majoring in English and whites majoring in Ethnic Studies. Indeed, it would mean the decisions on course offerings and registration could be driven by race as well. Students could be given registration priority for courses where their group is relatively under-represented. Courses that don't attract a sufficient number of minorities could be cancelled.

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[5] *Grutter*, of course, does not in any way permit schools to keep minority enrollment to a minimum. If the non-racial aspects of a school's admissions policy would yield high numbers of previously under-represented minority students, that would be a welcome event.

If critical-mass diversity at the classroom level is Texas's goal, it must start from scratch and fully prove that education is enhanced by that goal. It must prove that any such enhancement is not outweighed by the pedagogical challenges created when students with very different academic credentials are placed in the same classroom. It must prove its admissions policy is narrowly tailored to achieve its goal of classroom critical-mass diversity. *Grutter*-deference does not apply to any of those considerations.

Amici doubt that any such proof can be offered. There is no such thing as a Swedish or a Hispanic perspective on astrophysics or an African-American or Japanese perspective on calculus. Science is science; mathematics is mathematics. Insofar as Texas's declared policies encourage students to think otherwise, it is performing a disservice to them.[6]

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[6] Even the case for the educational benefits of critical-mass diversity at the study body level is difficult to make. *See, e.g.*, Stanley Rothman et al., *Does Enrollment Diversity Improve University Education?*, 15 Int'l J. Public Opin. Res. 8 (2003) (extensive empirical study finding that, all other things being equal, faculty, students and administrators at more racially diverse universities tend to rate their general educational experience lower than those at less racially diverse universities); Stephen Cole & Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High Achieving Minority Students* (2003) (empirical study finding that affirmative action mis-

Moreover, if Texas were truly concerned about racial diversity in science and engineering, it would shun rather than embrace race preferences. *See* U.S. Commission on Civil Rights, *Encouraging Minority Students to Pursue Science, Technology Engineering and Math Careers* (2010) ("USCCR-STEM Report") (reviewing empirical studies concluding that affirmative-action beneficiaries, as well as other students whose entering academic credentials place them towards the bottom of the class, abandon their ambition to major in science and engineering in radically disproportionate numbers while their similarly-credentialed counterparts persevere and succeed at somewhat less competitive universities). Race preferences are a significant part of the reason that Texas has relatively few African-American and Hispanic students in science and engineering courses. Wrongheaded affirmative action is the problem, not the solution.

B. *Grutter*-Deference Applies Only to Academic Judgments.

Observers sometimes wonder why, despite strong evidence that faculty members are hardly of one mind on race-based preferences, colleges and univer-

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match discourages students from pursuing academic careers); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004) (finding that affirmative action mismatch reduces the number of African-American students who graduate and pass the bar); Rogers Elliott et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681 (Dec 1996) (finding that affirmative action mismatch reduces the number of minority students who pursue their ambition to major in science).

sities march in lockstep on this issue.[7] The answer is complex: It might be possible for an individual institution to buck the zeitgeist in a world of robust academic freedom like that envisioned in *Grutter*. In the world in which we live, however, complex webs of state and federal oversight authority combined with outside funding sources that heavily promote race-based admissions make that very difficult. *Cf. Berea College v. Kentucky*, 211 U.S. 45 (1908) (concerning a college attempting to operate outside the zeitgeist of an earlier era). The result is a clear lack of diversity among colleges and universities on the subject of diversity.

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[7] *See, e.g.*, Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 Minn. L. Rev. 1233 (1988); Thomas Wood, *Who Speaks for Higher Education on Group Preferences?*, 14 Academic Questions 31 (Spring 2001).

The public's opposition to race-based admissions has also been consistent over the decades—a point that is relevant to whether *Fisher* presents a question of national importance. Paul M. Sniderman & Thomas Piazza, The Scar of Race (1993). *See also* Rasmussen Reports, *32% Favor Affirmative Action, 46% Oppose It* (July 13, 2010); David W. Moore, *Public: Only Merit Should Count in College Decisions*, Gallup Poll News Service (June 24, 2003). The notion that if Americans oppose these policies or regard them as unconstitutional they can always overturn them politically appears to be erroneous. Like many special-interest policies, they have been effectively insulated from public opinion almost everywhere. Issues of their constitutionality must be addressed head-on by the Court; the political process is unlikely to make such questions go away if it has been unable to do so already.

Two prominent academic experts in public opinion have declared that the race-preferential policy agenda "is controversial precisely because most Americans do *not* disagree about it." In their careful examination of the attitudes of whites on race issues, they found "scarcely any support" for "preferences in hiring and promotion in jobs" or for "racial quotas in college admissions." Sniderman & Piazza at 130 (emphasis in original).

It was hardly the intent of *Grutter* to help foster that conformity; *Grutter* permits deference only to truly academic judgments. Once a plaintiff demonstrates the likelihood of non-academic motives, the university should have to prove by clear and convincing evidence that its faculty would have adopted the racial preferences even in the absence of non-academic motives in order to avail itself of *Grutter*-deference; otherwise, it should independently have to prove the compelling need for its policy. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

Many are tempted to think of admissions policies as products of well-reasoned academic judgment. And they sometimes are—in part. But they are also the products of pressure from state legislatures, individual state legislators, and accrediting agencies appointed by the U.S. Department of Education. Private foundations and alumni donors get their say, too, by offering carrots to institutions that do their bidding. Student groups also demand more diversity—sometimes in a civil and reasoned manner and sometimes not.[8] Admissions policies, like laws, are like sausages. The less one knows about how they are made, the more one can respect the result.[9]

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[8] Last month at the University of Wisconsin, a student mob, egged on by the University's Vice Provost for Diversity and Climate, overpowered hotel staff, knocking some to the floor, to interrupt a press conference at which the speaker was critical of race-based admissions policies. *See* Peter Wood, *Mobbing for Preferences*, Chronicle of Higher Education (September 22, 2011). Too often over the years, university faculty and administrators have allowed themselves to be pressured by such conduct. If this Court were to clarify that *Grutter*-deference does

Non-academic actors are not due *Grutter*-deference, and neither is a college or university acting at their behest. It is highly unlikely that this Court would have deferred to the University of Michigan if the explanation for its racially-discriminatory policies had been: "This is what our state legislature wants, and it is our faculty's collective judgment that without the legislature's support, our education mission will suffer"; or "Our accreditor requires this, and we have no choice but to obey"; or "The Ford Foundation is very enthusiastic about race-based admissions, and that's where the money is."[10] Such a

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not extend to judgments made under pressure from unruly mobs, *amici* are confident this would have a salutary effect on all concerned.

[9] See Marcia Synott, The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900-1970 (1979) (chronicling anti-Jewish Ivy League admissions policies). *Amici* find regrettable Justice Powell's favorable mention of Harvard University's former policy of preferential treatment for students from the nation's under-represented regions in his opinion in *Bakke*, 438 U.S. at 316. Justice Powell was apparently unaware that the policy was part of Harvard's strategy to prevent what Harvard's then-president A. Lawrence Lowell indelicately called "a dangerous increase in the proportion of Jews." Synott at 108. The intent was to minimize the number of Jewish students, who tended to be concentrated in the Northeast.

[10] *Grutter* cited *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), to support its call for academic deference. *Grutter* at 328. In *Ewing*, a student sought re-admission to a university on due process grounds after the university declined to allow him to take his qualifying examination again. It is difficult to imagine that deference would have been applied if the

judgment may be sincerely aimed at increasing a University's resources (and hence improving education), but it is a political, not an academic, judgment.

Indeed, any contrary interpretation would be inconsistent with the *Grutter* opinion. In *Grutter*, the Court stated that the "Law School's *educational* judgment that such diversity is essential to its *educational* mission is one to which we defer." *Grutter* at 332 (emphasis supplied). The double use of the word "educational" would be redundant unless the Court intended deference to be available only for true academic judgments rather than mere political ones. Academic judgments are made by college or university *faculties* based on academic considerations. They are not made by outsiders to the academic enterprise or by those bowing to pressure from outsiders.

This is no small point. Non-academic actors have a profound effect on admissions policies. Consider, for example, the American Bar Association Council of the Section on Legal Education and Admissions to the Bar (the "ABA"). The ABA is the U.S. Department of Education's duly-appointed accreditor for law schools. In most states, it also holds the authority to designate which law schools' students sit for the bar examination. It thus has life or death authority over law schools; yet it is not remotely an academic institution.[11]

University in *Ewing* had dismissed a student because the state legislature or an angry student organization had so demanded.

[11] Council members include law school professors and deans, judges, practicing lawyers, and non-lawyers. No single group holds a majority. Given the tendency of law school accreditors dominated by law professors to act in law professors' narrow

For some time, the ABA has required law schools to demonstrate their commitment to diversity. In essence, it has created a "diversity cartel" among law schools, effectively insulating schools that give large preferences from competition on issues like bar passage rate with schools that would rather give smaller preferences or none at all. In the 1990s, fully 31 percent of law schools reported that they "felt pressure" "to take race into account in making admissions decisions" for "accreditation agencies."[12] Not long after the decision in *Grutter*, the ABA revised and strengthened those standards.[13]

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interest (or accreditors dominated by practitioners to act in practitioners' interest), the council's mixed membership is probably for the best. It is not, however, even arguably an academic body and hence not entitled to *Grutter*-deference.

[12] Susan Welch & John Gruhl, Affirmative Action in Minority Enrollments in Medical Schools and Law Schools 80 (1998). The 31% figure may understate the pressure. The authors asked law and medical schools if they had felt pressure from "Federal government," "State or local government" and/or "Any group." If respondents answered "yes" to the last category, they were asked to specify which groups, and 24% of medical school respondents and 31% of law school respondents *volunteered* that accreditation agencies had done so. For law schools, 15% said they "felt pressure" from "Federal government," 15% from "State or local government" and 46% from "Any Group." The corresponding figures for medical schools were 16%, 23% and 32%. See also Ben Wildavsky, *The Diversity Issue, Again*, San Francisco Chronicle (Feb. 11, 1994) ("When New York's Baruch College was threatened with loss of accreditation ... [i]t was told it had not hired enough minority faculty and had not tried hard enough to retain black and Latino students").

[13] See USCCR-AAALS Report at 90-137, 175-80 (discussing ABA revisions). For example, its standard on student diversity's title was changed from "Equal Opportunity Effort" to "Equal Opportunity and Diversity," thus making it clear that

The ABA is fully aware that the only way to comply with its standards is to give preferential treatment to students from under-represented minorities. In its amicus brief in *Grutter*, it told the Court that "[r]ace-[c]onscious [a]dmissions [a]re [e]ssential to [i]ncreasing [m]inority [r]epresentation in the [l]egal [s]ystem." "[I]t is unquestionable," the

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the emphasis will no longer be on effort. Compare old Standard 211 to new Standard 212. Results will matter. This theme is made more concrete in the official interpretations that accompany the standards. The original version stated that the "satisfaction of [each law school's] obligation is based on the totality of *its actions*." The new version expands the basis on which law schools will be judged to add "and the results achieved." Compare old Interpretation 211-1 to new Interpretation 212-3 (emphasis supplied.) The new interpretations inform law schools for the first time that they "may use race and ethnicity" in their admissions decisions. See new Interpretation 212-2. A clause in the original text of the standards that stated "a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students" for diversity purposes was deleted. See old Standard 211. The implication is that law schools may well be obligated to do so. In addition, the old Standard had required law schools to provide opportunities for the study of law to "qualified members" of minority groups. The new version deletes the word "qualified" and requires schools to provide opportunity to "members" of those groups. Compare old Standard 211 to new Standard 212. As originally proposed, the new Interpretation 212-1 would have read, "The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standards 212." Following public criticism, an additional sentence was added. It read, "A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 212 by means other than those prohibited by the applicable constitutional or statutory provision." *Id.* at 177-78.

ABA wrote, "that the improvement in minority participation in our law schools, and thus in our legal system, has been achieved largely by the use of race-conscious admissions policies such as those under attack here." According to the ABA, prohibiting racially preferential admissions policies nationwide, as California, Washington, Michigan and Nebraska have done statewide, would cause "a precipitous decline in minority participation in the institutions of our legal system" and "undo much of what has been accomplished in the last several decades." Brief for the ABA as Amicus Curiae in *Grutter* at 18-21.

The ABA has not been afraid to overrule the judgment of the law schools it regulates. In 2006, for example, Charleston School of Law unexpectedly failed to win accreditation from the ABA after a favorable recommendation from its Accreditation Committee. According to news reports, the ABA's concerns focused in part on race. *See* James T. Hammond, *Charleston School of Law: New School Fails to Win Accreditation so Students Can Take Bar*, The State (Columbia, S.C.) (July 12, 2006). Final accreditation was not awarded until the dean had declared that "[w]hatever we have to do [to win accreditation], we'll do it" and a new "director of diversity" was publicly announced. *Id.*; *College Notes: Charleston Law Taps Diversity Director*, The State (Columbia, S.C.) B3 (August 13, 2006). *See also* David Barnhizer, *A Chilling Discourse*, 50 St. Louis L. J. 361 (2006) (describing ABA influence on faculty diversity-hiring).

The case of George Mason University Law School is very instructive. Its story—recounted in a report of the U.S. Commission on Civil Rights—began with the ABA's site-evaluation team visit in 2000. The site-evaluation team was unhappy that only 6.5 percent of entering day students and 9.5 percent of its entering evening students were minorities. USCCR-AAALS Report at 181.

Nobody could argue that GMU's problem was lack of outreach. Even the site evaluation report conceded that GMU had a "very active effort to recruit minorities." Indeed, it described those efforts at length. It noted, however, that GMU had been "unwilling to engage in any significant preferential affirmative action admissions program." Since most law schools were willing to admit minority students with dramatically lower entering academic credentials, GMU was at a recruitment disadvantage. *Id.* at 182.

GMU's faculty members did not all have the same views on affirmative action. Some members considered even small admissions preferences morally repugnant; others believed they would hurt rather than help their intended beneficiaries. But some were willing to put a slight thumb on the scale in favor of African Americans and Hispanics. What set GMU apart from many law schools was that a strong majority opposed the overwhelming preferential treatment commonly practiced elsewhere. The site-evaluation report noted its "serious concerns" with GMU's policy. *Id.*

Over the next few years, the ABA repeatedly refused to renew GMU's accreditation, citing its lack of a "significant preferential affirmative action program" and supposed lack of diversity. Back and forth the negotiations went. Although GMU could and did step up its already-extensive recruitment efforts, it was forced to back away from its opposition to significant preferential treatment. It was thus able to raise the proportion of minorities in its entering class to 10.98 percent in 2001 and 16.16 percent in 2002. *Id.* at 183.

None of this was enough. The ABA didn't want slow, deliberate movement in its direction; it wanted a headlong dive into political correctness. Shortly after the Court's decision in *Grutter*, an emboldened ABA summoned the GMU president and the law school dean to appear before it personally and threatened the institution with revocation of its accreditation on account of its alleged diversity problem. GMU responded by further lowering minority admissions standards. It also increased spending on outreach, appointed an assistant dean to serve as minority coordinator and established an outside "Minority Recruitment Council," all in hopes of soothing the ABA's wrath. As a result, 17.3 percent of its entering students were minority members in 2003 and 19 percent in 2004. USCCR-AAALS Report at 183.

Still the ABA was not satisfied. This time its attacks were focused on African-American students specifically. "Of the 99 minority students in 2003, only 23 were African-American; of 111 minority students in 2004, the number of African Americans held at 23," the ABA complained. It didn't seem to matter that sixty-three African Americans had been offered admission or that the only way to admit more was to lower admissions standards to alarming levels. It didn't even matter that many students admitted under those circumstances would incur heavy debt, but never graduate and pass the bar. GMU's skepticism about racial preferences was heresy, and the ABA was determined to stamp it out. *Id.* at 184.

GMU finally got its re-accreditation after six long years of abuse–just in time for the next round in the seven-year re-accreditation process. Even then, the ABA could not resist a warning that it would pay "particular attention" to GMU's diversity efforts in the upcoming cycle. *Id.*

Amici do not believe a decisive clarification that *Grutter*-deference applies only to academic judgments would result in a strong and immediate movement away from such policies. It would, however, be an important first step towards the race-neutral future that *Grutter* looks forward to and would have more effect over the long haul than some might realize.

Accrediting agencies acting under federal authority, state legislatures and others evidently currently believe that *Grutter*-deference allows them to pressure schools into affirmative-action orthodoxy. As non-academic actors, however, they are the very ones that academic freedom is supposed to protect academic institutions *from*.

C. *Grutter* Does Not Permit a Court to Assume a University Is Motivated by a Desire to Serve the Educational Benefits of a Student Body with Critical-Mass Diversity In the Face of Contrary Evidence.

In *Grutter*, the Court was willing to assume that the University's only motivation was to secure whatever educational benefits that might follow from a student body with a "critical mass" of students from underrepresented races. Crucially, it had no evidence to the contrary. *Grutter*, 539 U.S. at 329-30. In this case, however, there is evidence of another motivation: Texas has complained that there are "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population," and it has adopted an admissions policy that appears on its face to be far more aimed at racial balancing than at achieving any kind of critical mass of minority students. App. 23a.

Texas asserts that it is attempting to ensure that all its classrooms have a critical mass of underrepresented minority students. If so, it has selected an unusually ineffective method for achieving its goal. A more effective method for increasing classroom racial diversity would be for Texas to adopt a strongly traditional curriculum that requires all its students to take more hard science, technology, engineering and mathematics courses.

II. The Importance of the Constitutional Issues Presented in *Fisher* Is Highlighted by the Success Minority Students Have Had Under California's Proposition 209.

The constitutional issues in *Fisher* are critically important for many reasons. Not least among them is the need to make it possible for more minority students to succeed academically. The expansion of race-based admissions will mean fewer minority honor students and more minority students with unacceptably low grades; the contraction of race-based admissions will mean the opposite.

Consider the case of the University of California at San Diego—a highly selective institution, but not quite as selective as the UC's flagship campus at Berkeley. In 1997, only one African-American student at UCSD had a freshman-year GPA of 3.5 or better–a single African-American honor student in a freshman class of 3,268. In contrast, 20 percent of the white students had such a GPA. Failure rates were similarly skewed. Fully 15 percent of African-American students and 17 percent of American Indian students at UCSD were in academic jeopardy (defined as a GPA of less than 2.0), while only 4 percent of white students were. Other under-represented minority students hovered close to the line. Since UCSD didn't keep separate statistics for those minority students who needed a preference in order to be admitted and those who would have been admitted regardless, it is impossible to say exactly how high the failure rate was for preference beneficiaries in particular. *See* Gail Heriot, *The Politics of Admissions in California,* 14 Academic Questions 29 (2001).

This was not because there were no other African-American students capable of doing honors work at UCSD. The problem was that such students were often at Stanford or Berkeley, where in most cases they were not receiving honors. White students were not magically immune from failure, but those who were at high risk for it had not been admitted in the first place. Instead, they were at less competitive schools where their performance was more likely to be acceptable or even outstanding. *Id.*

Being towards the bottom of the class can be demoralizing, and an admissions policy that makes it likely that large numbers of students from particular races will be towards the bottom can be especially demoralizing. It is easy to develop an attitude under those circumstances. "It's all politics," or "getting good grades isn't really a black thing." Culture comes from shared experiences. Affirmative action was giving California minority students the shared experience of being unsuccessful at academics. *Id.*

Then came Proposition 209. California voters adopted a constitutional amendment in 1996 that held that state universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin." Proposition 209 went into effect in time to affect the undergraduate admissions decisions for the entering class of 1998, causing Berkeley's offers of admission to African Americans, Hispanics and American Indians to go from 23.1 percent of the total offers to 10.4 percent. *Id.*

Of course, the minority students who would have attended Berkeley in the past had not simply vanished. They had been accepted to somewhat less highly ranked campuses–often UCLA and UCSD–based on their own academic record rather than race. In turn, students who previously would have been admitted to UCLA or UCSD on a preference had usually been admitted to schools somewhat less competitive UC campuses. UC-Riverside and UC-Santa Cruz both posted impressive gains in minority admissions. At Riverside, for example, Black and Latino student admissions shot up by 42 percent and 31 percent respectively. UCSD reported mixed results. Black enrollment there was down 19 percent, but Filipino and Latino enrollment was up by 10 percent and 23 percent. *Id.*

At UCSD, the performance of Black students improved dramatically. No longer were African-American honor students a rarity. Instead, a full 20 percent of the African-American freshmen were able to boast a GPA of 3.5 or better after their first year. That was higher than the rate for Asians (16 percent) and extremely close to that for whites that year (22 percent). Suddenly African-American students found themselves on a campus where achieving academic success was not just a "white thing" or an "Asian thing." *Id.*

The sudden collapse in minority failure rate was even more impressive. Once racial preferences were eliminated, the difference between racial groups all but evaporated at UCSD, with Black and American Indian rate falling to 6 percent. Consequently, average GPAs converged. UCSD's internal academic performance report announced that while overall performance has remained static, "underrepresented students admitted to UCSD in 1998 substantially outperformed their 1997 counterparts" and "the majority/majority performance gap observed in past studies was narrowed considerably." *Id.*

"Narrowed" was understatement. The report found that for the first time "no substantial GPA differences based on race/ethnicity." A discreet footnote makes it clear that the report's author knew exactly how this happened: 1998 was the first year of colorblind admissions. *Id.*

Granted, UCSD had twelve fewer African-American freshmen in the first year of Proposition 209, forced as it was to reject students who did not meet its regular academic standards. But it also had seven fewer African-American students with a failing

GPA at the end of that year. Meanwhile, those twelve students probably attended a school where their chances of success were greater. *Id.*

CONCLUSION

In *Grutter*, the Court stated, "We expect that 25 years from now, the use of racial preferences will no longer be necessary ...." *Id.* at 342. But preferences are unlikely to fade away on their own. To the contrary, fueled by misinterpretations of *Grutter*, they have been expanding. To encourage a greater diversity of approaches to the problem of diversity, the Court should grant the petition for certiorari and clarify the limits of *Grutter*-deference.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 11-345

In the

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF GAIL HERIOT, PETER KIRSANOW & TODD GAZIANO, MEMBERS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

1. Did the Fifth Circuit err in upholding Respondents' race-preferential admissions policy against a Fourteenth Amendment challenge?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici[1] Gail Heriot, Peter Kirsanow, and Todd Gaziano (collectively "the Commissioner Amici") are three members of the eight-member United States Commission on Civil Rights. Commission members are part-time appointees of the President and Congress. This brief is being filed in the Commissioner Amici's individual capacities.

The Commission was established pursuant to the Civil Rights Act of 1957, P.L. 85-315, 71 Stat. 634 (1957)—the first civil rights law passed by Congress since Reconstruction. One of the Commission's core duties is to gather evidence on civil rights issues and make recommendations to Congress, the President and the American people. As then-Senate Majority Leader Lyndon Johnson put it, the Commission's task is to "gather facts instead of charges" "it can sift out the truth from the fancies; and it can return with recommendations which will be of assistance to reasonable men."[2]

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[1] Pursuant to this Court's Rule 37.2(a) , all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or their counsel made a monetary contribution to its preparation or submission.

In 2010, the Commission, with the support of the Commissioner Amici, released a report entitled *Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers.* This report examined the extensive empirical research indicating that students who attend schools where their entering academic credentials put them in the bottom of the class are less likely to follow through with an ambition to major in science or engineering than similarly-credentialed students who attend schools where their credentials put them in the middle or top of the class. Affirmative action thus works to the detriment of its supposed-beneficiaries, who are seldom informed of this risk. Three years earlier, the Commission, with the support of the Commissioner Amici then on the Commission, released a report entitled *Affirmative Action in American Law Schools*, in which it examined similar evidence in the legal education context. The research examined in that Report indicates that students, regardless of race, are less likely to graduate from law school and pass the bar if they are the beneficiaries of preferential treatment in admissions than if they attend a law school at which their entering academic credentials are like the average student's. The Commissioner Amici believe that they are in a special position to inform the Court about this research. They believe that on account of this research there is a strong public interest in preventing the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), from being expanded.

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[2] 103 CONG. RECORD 13,897 (1957) (statement of Sen. Lyndon Johnson).

SUMMARY OF ARGUMENT[3]

This Court's ruling in *Grutter v. Bollinger* was unusual. Racial discrimination, when practiced by a State, is almost always a violation of the Fourteenth Amendment's Equal Protection Clause. But in *Grutter*, the Court ruled that an exception could be made when a state university gives preferential treatment to racial minority applicants for admission.

That limited exception, however, applied only to efforts to admit a "critical mass" of minority students when those efforts are aimed at capturing any educational benefits that a diverse student body might bring. While the Court did not specifically define "critical mass" in its opinion, it was clear that the concept was a crucial limiting factor to a state university's authority to discriminate.

In this case, the Fifth Circuit has given the concept of "critical mass" an expansive reading—one that is inconsistent with the letter and spirit of *Grutter* and with the Equal Protection Clause. Even if it could be said that *Grutter* left ambiguous the meaning of "critical mass," it is an important question of Constitutional law that should be settled by this Court and not the Fifth Circuit. The evidence discussed in this brief underlines that question's crucial importance. If *Grutter* is allowed to expand, the results will be unfortunate for the very persons that affirmative action was originally designed to benefit.

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[3] The argument in this brief is based on the writings of Professor Gail Heriot, one of the amici herein.

ARGUMENT

THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO PREVENT ITS DECISION IN *GRUTTER v. BOLLINGER* FROM BEING EXPANDED BEYOND ITS INTENDED LIMITS

A. Race-Preferential Admissions Were Intended to Facilitate the Entry of Minorities Into Higher Education and Eventually into High-Prestige Careers. There Is Considerable Evidence, However, That They Have the Opposite Effect.

Over forty years ago, universities with selective admissions policies began to adopt affirmative action policies. By lowering admissions standards for African-American and Hispanic students, well-meaning administrators hoped to increase the number of minority students on campus and ultimately to promote their integration into high-prestige careers and mainstream society.

While nearly all Americans saw those goals as laudable, reasonable minds differed on the wisdom of this approach. No less a liberal icon than Justice Stanley Mosk warned of the risks associated with such temporary compromises with the principle of color-blindness, when, writing for the California Supreme Court in *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 62-63 (1976), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978), he held racially discriminatory admissions to be unconstitutional:

> To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality.

For good or ill, Mosk's vision of civil rights did not prevail. His opinion in *Bakke* was superseded by this Court's decisions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*. Race-preferential policies mushroomed, and thriving diversity bureaucracies were established to administer them.

If Mosk was right, it will take effort to correct the mistake at this late date. It isn't just the iron rule of bureaucracy at work today—that first and foremost, bureaucracies work to preserve themselves. Many distinguished citizens—university presidents, philanthropists, and legislators—have built their reputations on their support for race-preferential admissions. Their jobs are not at stake, but their sense of accomplishment may be. Overcoming that is not easy.

But if anything should cause thoughtful supporters of race-preferential admissions policies to reverse course—or at least refrain from proceeding further—it is the mounting empirical evidence showing these policies are doing more harm than good for their intended beneficiaries. If this research is right, we now have fewer minority science and engineering graduates than we would have under race neutral admissions policies. See *infra* Part B. We have fewer minority college professors, see *infra* Part C., and fewer minority lawyers too. See *infra* Part D. Preferential treatment has made it more difficult for talented minority students to enter high-prestige careers.[4]

How can it be that affirmative action reduces the number of minority professionals? One of the consequences of widespread race-preferential policies is that minority students end up distributed among colleges and universities in very different patterns from their white and Asian counterparts. When the highest schools on the academic ladder relax their admissions policies in order to admit more under-represented minority students, schools one rung down must do likewise if they are to have minority students too. The problem is thus passed on to the schools another rung down, which respond similarly. As a result, under-represented minority students are overwhelmingly at the bottom of the distribution of entering academic credentials at most selective schools.

The problem is not that there are no academically gifted minority students. But there are simply not enough at the very top tiers to satisfy the demand, and efforts to change that have created a credentials gap up and down the academic pecking order.

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[4] After *Regents of the University of California v. Bakke*, 438 U.S. 265, colleges often purported to engage in preferences to confer the benefits of diversity on all students, since that was the only purpose approved in that case. The notion that affirmative action benefits minority students in particular was downplayed rhetorically. But it is doubtful any school willing to acknowledge that minority students were thereby made worse off would continue the practice. Minority students are not public utilities.

Entering credentials matter. Students whose academic credentials are well below those of the average student in a particular school usually earn grades to match. While some students will outperform their academic credentials, just as some students will under-perform theirs, most students perform in the range that their entering credentials suggest. Anyone who thinks differently is engaging in wishful thinking at student expense.

No serious supporter of race-preferential admissions denies this. For example, former Ivy League university presidents William G. Bowen and Derek Bok, leading affirmative action advocates, candidly admit that the problem is serious: "College grades [for affirmative action beneficiaries] present a … sobering picture," they wrote. "The grades earned by African-American students at the [elite schools we studied] often reflect their struggles to succeed academically in highly competitive academic settings." William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 72 (1998) ("*Shape of the River*").

These so-called affirmative action beneficiaries are not bad students. Many would be honor students elsewhere. But they are subtly being made to feel as if they are less talented than they really are. Many may actually be learning less. Everyone knows that a good student can get in over his head if placed in a classroom with more academically prepared students. (The Commissioner Amici, who are all lawyers, have little doubt, for example, that they would learn less in a physics class at Cal Tech, which specializes in training the best-prepared science students, than they would at a university with less formidable competition.)

Divorced from the affirmative action context, this phenomenon would seem ordinary and unobjectionable. It is only when it becomes associated with this politically-charged issue that it becomes controversial.[5]

B. Extensive Research Indicates that Race-Preferential Admissions Have the Effect of Discouraging Preference Beneficiaries from Pursuing Science and Engineering Careers.

Majoring in science and engineering can be difficult. Many students who start out doing so switch to something easier. Others drop out or even flunk out. It should surprise no one that those who fail to attain their goal of a science or engineering degree are disproportionately students whose entering academic credentials put them in the bottom of their college class. Not all stereotypes about science and engineering students are accurate. But the notion that they tend to be highly-credentialed and hardworking is largely on target.

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[5] *See* James Davis, The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men, 72 Am. J. Socio. 17 (1966). Writing outside the affirmative action context, Davis found that college grades were more strongly correlated with the decision to enter a high-prestige career than was the selectivity of the institution. In some cases at least, the added self-confidence one enjoys as a result of being the big frog in the small frog pond appeared to outweigh whatever advantages an elite education in a larger, more glamorous frog pond can offer. Davis therefore offered the following advice: "Counselors and parents might well consider the drawbacks as well as the advantages of sending a boy to a 'fine' college, if, when doing so, it is fairly certain he will end up in the bottom ranks of his graduating class." *Id.* at 30-31. As a result of race-preferential admissions policies, two generations of under-represented minority students have now disproportionately had the experience of being the small frog in a highly competitive pond.

What some do find surprising is this: Three impressive empirical studies have now demonstrated that *part of the effect is relative.* An aspiring science or engineering major who attends a school where her entering academic credentials put her in the middle or the top of her class is more likely to persevere and ultimately succeed than an otherwise identical student attending a more elite school where those same credentials place her in the bottom of the class. Put differently, an aspiring science or engineering major increases her chance of success not just if her entering credentials are high, but also if those credentials compare favorably with her classmates'. *See* Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier & Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681 (1996) ("Elliott"); Frederick Smyth & John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 Res. Higher Ed. 353 (2004) ("Smyth-McArdle"); Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?*, Working Paper (Draft July 2009) ("Sander-Bolus").

Part of the reason may be that science and engineering are ruthlessly cumulative. A student who has difficulty with the calculus textbook's first chapter is apt to have difficulty with later chapters and subsequent courses. Since switching majors is easy, the attrition rate is very high.

In the first of these studies—the article by Dartmouth psychologist Rogers Elliott and his co-authors—the single most important cause for minority attrition from science at the eleven selective institutions they studied was the "*relatively* low preparation of black aspirants to science in these schools." Elliott at 700. The authors were careful to put the emphasis on "relatively." It wasn't just entering credentials demonstrating highly developed ability at science that mattered, but comparatively high credentials. A student who attended a school at which his Math SAT score was in the top third of his class was more likely to follow through with an ambition to earn a degree in science or engineering than was a student with the same score who attended a school at which his score was in the bottom third.

According to Elliott, a student with an SAT Math score of 580 "who wants to be in science will be three or four times more likely to persist at [the two least competitive schools of the eleven prestigious schools studied] ... than at [the two most competitive schools]...." *Id.* at 702.[6]

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[6] Numerous studies have found that there is no problem with minority students' initial interest in science and engineering, which tends to exceed whites'. *E.g.*, Alexander Astin & Helen Astin, Undergraduate Science Education: The Impact of

The extraordinary record of Historically Black Colleges and Universities was a second source of evidence cited in Elliott. With only 20% of total black enrollment, these schools were producing 40% of the black students graduating with natural science degrees, according to the National Science Foundation. Those same students were frequently going on to earn Ph.D.s from non-HBCUs. The National Science Foundation reported, for example, that 36% of the blacks who earned an engineering doctorate between 1986 and 1988 received their undergraduate degree from an HBCU. *Id.* at 700. *See* Elizabeth Culotta, Black Colleges Cultivate Scientists, 258 Science 1216 (Nov. 13, 1992).

Why have HBCUs been so successful? The Elliott team believed that unlike at mainstream institutions, African-American students at HBCUs are not grouped at the bottom of the class. Roughly half of black students will be in the top half of the class. Academic mismatch is not an issue at these colleges.[7]

Eight years later, University of Virginia psychologists Frederick Smyth and John McArdle used a different methodology and database. But they reported findings consistent with Elliott's conclusion

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Different College Environments on the Educational Pipeline in the Sciences 3-9, Table 3.5 (1993).

[7] One HBCU faculty member—North Carolina Central University's Dr. Walter Patillo, Jr.—vented his frustrations in 1992: "The way we see it, the majority schools are wasting large numbers of good students. They have black students with admissions statistics [that are] very high, tops. But these students wind up majoring in sociology or recreation or get wiped out altogether." Elizabeth Culotta, Black Colleges Cultivate Scientists, 258 Science 1216, 1218 (Nov. 13, 1992).

that "race-sensitive admission, while increasing access to elite colleges, was inadvertently causing disproportionate loss of talented underrepresented minority students from science majors." Smyth-McArdle at 373.

Smyth-McArdle developed a model that attempts to measure how many more minority students would have succeeded in their goal of a science or engineering degree if colleges had employed race-neutral admissions criteria. It states

> According to our model ..., if all the [Science-Mathematics-Engineering]-intending underrepresented minority students had enrolled in similarly functioning colleges where their high school grades and math test scores averaged at the institutional means among [Science-Mathematics-Engineering] intenders, 72 more of the women and 62 more of the men would be predicted to persist in [Science-Mathematics-Engineering] (45% and 35% increases, respectively).

Id.

Smyth and McArdle's recommendation was clear: "Admission officials are advised to carefully consider the relative academic preparedness of science-interested students, and such students choosing among colleges are advised to compare their academic qualifications to those of successful science students at each institution." *Id.* at 353.

The latest contribution to this literature is from UCLA law professor Richard Sander and UCLA senior statistician Roger Bolus. Using data from the nine-campus University of California, they conclude, "Minority attrition in science is a very real problem, and the evidence in this paper suggests that 'negative mismatch' probably plays a role in it." The multiple approaches to their data yielded consistent results: "[S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers." Sander-Bolus at 23-24.

The Commissioner Amici are aware of no empirical research that challenges these findings. Nevertheless, as far as they are aware, the Commission's recommendations that students be made aware of these risks have been ignored.[8]

The decision below bemoans the concentration of minorities in soft subjects. Its solution, however, is more preferential treatment, which will likely worsen the problem.

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[8] Perhaps part of the reason that institutions have ignored these findings is that in the aftermath of *Grutter*, some federally-designated accrediting agencies and state regulators have ramped up their diversity requirements. Even the most resolute faculties crumble in the face of threats to their accreditation and funding and hence fail to exercise their best academic judgment. The Commissioner Amici regard this as contrary to *Grutter*, which defers only to the *independent, academic* judgment of college faculties, not to policies that are products of non-academic factors. *See, e.g.*, David Bernstein, Affirmative Blackmail, Wall Street Journal (Feb. 11, 2006); Gail Heriot, The ABA's "Diversity" Diktat, Wall Street Journal (April 28, 2008). *See also* Susan Welch & John Gruhl, Affirmative Action and Minority Enrollments in Medical and Law Schools 80 (1998) (empirical study reporting that many schools admit being pressured by accreditors, state government and other groups to engage in race preferences).

C. Race-Preferential Admissions Appear to Have the Effect of Discouraging Minority Students from Becoming College Professors.

In 2003, Drs. Stephen Cole and Elinor Barber published *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students*–a project funded in part by the Mellon Foundation, an institution that is generally considered a strong supporter of affirmative action. The authors' mission was to determine why more minority members are not attracted to academic careers. Their conclusions, reached after extensively questioning 7,612 high-achieving undergraduates at 34 colleges and universities, pointed to mismatch as the culprit:

> The best-prepared African Americans, those with the highest SAT scores, are most likely to attend elite schools .... Because of affirmative action, these African Americans ... are admitted to schools where, on average, white students' scores are substantially higher, exceeding those of African Americans by about 200 points or more. Not surprisingly, in this kind of competitive situation, African Americans get relatively low grades. It is a fact that in virtually all selective schools ... where racial preferences in admission is practiced, the majority of African American students end up in the lower quarter of their class.
>
> ...

> African American students at the elite schools ... get lower grades than students with similar levels of academic preparation (as measured by SAT scores) than African American students at the nonelite schools .... Lower grades lead to lower levels of academic self-confidence, which in turn influence the extent to which African American students will persist with a freshman interest in academia as a career. African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools.

Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124, 212 (2003)(citations omitted).

Soon after publication, the *Chronicle of Higher Education* reported that the Mellon Foundation was "trying to distance itself" from the book's findings. Unlike similar projects with Mellon funding, this one did not receive a publicity push from the foundation. Dr. Cole told the Chronicle that there was "no chance" that he would receive money again from Mellon. "And I don't care," he said. "I was trained at a time before social science became so politicized." "I believe that social science should be objective and value-free, and you should design a study to answer a question and whatever the answer is, that's what it is." Robin Wilson, *The Unintended Consequences of Affirmative Action*, The Chronicle of Higher Education 10 (Jan. 31, 2003).

D. Race-Preferential Admissions Appear to Have the Effect of Decreasing the Number of Minority Law Students Who Graduate and Pass the Bar.

UCLA law professor Richard Sander published his attempt to gauge academic mismatch in law schools in 2003. He found that when elite law schools lower their academic standards in order to admit a more racially diverse class, the ultimate result is a gap in academic credentials between minority and non-minority law students at law schools generally. Up and down the law school hierarchy, the average black student has an academic index that is more than two standard deviations below that of his average white classmate. Only HBCUs are immune to this effect. Richard Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 367, 416 (2004).[9]

This affects student performance. Sander's research demonstrated that in elite law schools, 51.6% of African-American law students had first-year GPAs in the bottom 10% of their class as opposed to only 5.6% of white students. Nearly identical performance gaps existed at law schools at all levels. At mid-range public schools, the median African-American student's first-year grades corresponded to the 5th percentile among white students. For mid-range private schools, the corresponding percentile was 8th, and for lower-range private schools it was 7th. With disappointingly few exceptions, African-American students were grouped towards the bottom of their class. Moreover, the performance gap widened as students continued through law school. Sander at 427-36.[10]

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[9] Large credential gaps also were found in *Gratz v. Bollinger*, 539 U.S. 244 (2003), where the University of Michigan's undergraduate college added 20 points to the academic index of all African-American applicants for admission–the equivalent of an entire letter grade in the applicant's high school GPA. *See also* Althea Nagai, Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan, Center for Equal Opportunity (October 17, 2006), available at http://www.ceousa.org/content/blogcategory/78/100(finding that the University of Michigan actually increased the average preference level for African Americans after *Gratz*).

The Commissioner Amici are not aware of anyone who disputes these figures. Even Sander's most passionate critics—and there are some—have to concede that the relative performance of African-American law students is very discouraging. *See, e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1807 (2005) ("Richard Sander's study of affirmative action at U.S. law schools highlights a real and serious problem: the average black law student's grades are startlingly low.").

Only slightly more controversial is Sander's finding that all this was almost entirely the result of affirmative action. When African-American and white law students with similar entering credentials competed against each other, they performed very close to the same. Sander at 428. Race-based admissions were creating the illusion that African-

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[10] The "low black performance is not the result of test anxiety (the gap is similar or greater in legal writing classes) or some special difficulty that blacks in general have with law school." Sander at 427.

American law students are somehow destined to do poorly. The real problem is less daunting. There are fewer African-American students than anyone would prefer with the entering credentials necessary for admission on a color-blind basis to the most elite law schools. But there are many more who would do well at mid-tier schools—if they were only attending those schools.

Sander demonstrated that law students at the bottom of their class were worse off than students with the same credentials who attend less competitive law schools. It did so by noting two important effects of race-based admissions policies. First, African-American students attending law schools failed or dropped out at much higher rates than white students (19.3% vs. 8.2%). Sander at 437. Overwhelmingly, this phenomenon was associated with poor performance and not financial hardship, which mattered only very slightly. *Id.* at 439. Since many of these students who left law school would likely have performed better at a less competitive law school, they appear to have been, in a very real sense, victims of affirmative action.

Second, among African Americans who graduated and took the bar, the proportion who passed on their first attempt was not just lower than that for whites, it was lower even when one controls for academic index (LSAT and college GPA). For example, 71% of African Americans with a 400-460 index failed the bar on their first effort, while only 52% of whites did. Similarly, 26% of African Americans with an index between 640 and 700 failed their first time, while only 13% of whites did. *Id.* at 446.

Ultimately, only 45% of African Americans who entered law school passed the bar on their first attempt as opposed to over 78% of whites. Even after multiple attempts, only 57% of African Americans succeeded. The gap was thus never closed. *Id.* at 454.

Something was clearly wrong. When African-American and white law students with similar credentials competed against each other at the same school, they earned about the same grades. And when African-American and white students with the same grades from the same tier school took the bar examination, they passed at the same rate. Yet African-American students as a group had dramatically lower bar passage rates than white students with similar credentials.

As Sander pointed out, the most plausible explanation is that on the whole they were not attending the same law schools. The black and Hispanic students were more likely to be attending an elite school that spends little time on subjects covered on the bar exam and delves instead into more abstract and esoteric legal issues. *Id.* at 449. Affirmative action beneficiaries were struggling while their similarly-credentialed white and Asian peers were learning at a more appropriate pace at less elite schools.

Sander estimated that if law schools were to use race-neutral admissions policies, fewer African-American law students would be admitted to law schools. But since those who were admitted would be attending schools where they had a substantial likelihood of doing well, fewer would fail or drop out. In the end, more would pass the bar on their first try

(1859 vs. 1567) and more would eventually pass the bar (2150 vs. 1981) than under current admissions practices. *Id.* at 473.

In response to this research, the Commission urged grant-making agencies to fund research into this issue and requested state bar associations to "cooperate with this research."[11] Unfortunately, something closer to the opposite has happened. When Dr. Sander and his ideologically-diverse team of investigators attempted to obtain the data necessary to verify his initial findings, they were met with strong resistance from affirmative-action partisans and have had to institute litigation to obtain public data. *See Sander v. State Bar of California*, Civil Action A128647 (Cal. App. June 10, 2011), rev. granted (August 25, 2011) (holding that defendant's records are subject to disclosure under the common-law presumption of access to public documents)

E. *Shape of the River*'s Conclusion that Affirmative Action Benefits Minority Students Is Flawed; If Anything, that Book's Data More Closely Support the Opposite Conclusion.

Race-preferential admissions supporters sometimes assert that, despite the likelihood of poor grades, minority students are better off accepting a preference from a prestigious school. When an effort is made to support this argument, the citation is inevitably to Shape of the River. In that book, the authors calculate that the mean earnings of black men with SAT scores of less than 1000 who attend a

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[11] U.S. Comm'n on Civil Rights, Affirmative Action in American Law Schools 143 (2007).

Tier-1 school (e.g. Princeton) are higher than their counterparts at a Tier-2 (e.g. Vanderbilt) or Tier-3 school (e.g. Pennsylvania State). On this basis, they conclude:

> Black students admitted to the most selective of [the schools we studied] did not pay a penalty in life ... for having attended such competitive institutions. On the contrary, the black ... matriculants with academic credentials that were modest by the standards of these schools appear to have been well-advised to go to the most selective schools in which they were admitted.

If that was what the authors intended to show, however, their methodology was seriously flawed.

For example, they took account only of SAT scores and not of other academic credentials—like high school rank. One cannot assume that a student with a combined SAT score of 1200 at Princeton is the equivalent of a student with the same score at Pennsylvania State. There is an excellent chance that the first student has a substantially better high school GPA or other distinctions in his favor. That is why he is at Princeton, not Pennsylvania State. Comparing students with the same SAT scores and finding that the student at the more elite school has higher post-graduation earnings, even though he appears to be mismatched at the more elite school, is a false comparison. It is overwhelmingly likely that the student attending the more elite school has a more elite high school record too.[12]

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[12] This is not the kind of error that former Ivy League presidents should make. Much of their schools' publicity is

Given that and other methodological flaws, one would have to expect the data to come out as it did.[13] But even given these flaws, evidence of mismatch comes peeking out coyly from behind the charts. Their own figures show that black men with SAT scores between 1000 and 1099 earn more if they avoid Tier-1 schools. Similarly, black women with SAT scores between 1100 and 1199 earned more if they stayed away from Tier-1.

Meanwhile, buried in Appendices D.5.4 and D.5.5 is a more sophisticated analysis that is barely mentioned in the text. It attempts to tease out how various factors influence the subsequent earnings of blacks who attended one of the 28 colleges or universities. Included among the factors considered are several pre-college considerations: the student's family's socio-economic status, SAT scores, and whether the student was in the top 10% of his high school class. Also included are several factors from his college experience: the selectivity of his college or university; his major; whether his grades put him in the top, middle or bottom third of the class; and whether he went on to earn an advanced degree. Each such factor's effect was measured.

The authors purport to show that attending a Tier-1 school rather than a Tier-3 school on average

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built around the theme that they routinely reject applicants (continued) with perfect SATs who do not otherwise measure up to their standards.

[13] The study compares students within broad bands of SAT scores, rather than students with identical SAT scores. Since Tier-1 schools will tend to have more students towards the top of each band and Tier-3 schools have more towards the bottom, the comparison is biased against mismatch.

contributes to the income of both black men and women. They appear oblivious, however, to the bombshell contained in the figures just a few rows down: *College grades generally contribute more.* Again and again through the different permutations of their analysis, their own figures show it.

Imagine two black males with identical SAT scores; both were in the top 10% of their high school class and both come from middle-class families. Only their colleges are different. The authors convincingly demonstrate that if the two have the same college major and similar grades, the one who attended a Tier-1 school will earn about $17,365 more than the one who attended a Tier-3 school.

But what if they don't have similar grades? The authors also show that if one student is in the top third of his college class and the other is in the bottom third of his, the former will earn an average of $34,089 more. By the authors' own calculations, therefore it is better to be a black male at Pennsylvania State in the top third of the class than in the bottom third at Princeton. The increased earnings he gets from high grades are worth almost twice the increased earnings from attending a Tier-1 school. And the boost in earnings he would get for majoring in natural science rather than the humanities would be $49,537.

If one's class rank and major were unrelated to the selectivity level of one's college, then it would be perfectly sensible for the authors to celebrate the finding that, on average, black males get an earnings boost from attending a Tier-1 school over a Tier-3 school. But they are not unrelated. For students who would not have been admitted but for racial preferences, the chances of earning grades in the top third of the class are exceedingly remote.

The only question is whether a black student who attends a Tier-1 school and winds up in the bottom third of the class would have likely been in the top third of a Tier-3 school. And the answer to that question, at least in many cases, is yes. Consider, for example, a black male with SAT scores of 1300 who just missed being in the top 10% of his high school class. If he attends Pennsylvania State, his SAT scores will put him exactly at the 75th percentile in the entering class of 2011. That would give him an excellent shot at earning grades in the top third and/or graduating with a natural science degree. If he enrolls at Princeton instead, his SAT scores would put him ninety points *below* the 25th percentile for that school, making it much more likely his grades will be in the bottom third.[14]

Shape of the River was cited by this Court in *Grutter* as supporting the argument for race-preferential admissions policies. *Grutter*, 539 U.S. at 333. Its actual data supports their opposition.

CONCLUSION

A generation ago, Justice Mosk opposed deviating from the usual strict prohibition on race discrimination for the sake of a "dubious expediency." 18 Cal. 3d at 62. The expediency has turned out to be dubious indeed. Taken together, the evidence is quite devastating.

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[14] *See* US News College Rankings (2011)(reporting the 25th and 75th percentile SAT score for various schools, including Pennsylvania State and Princeton).

The Commissioner Amici therefore request that the petition for a writ of certiorari be granted.

DATED: October 19, 2011.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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In The
Supreme Court of the United States

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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

◆

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QUESTIONS PRESENTED

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.

Whether *Grutter* departed from this Court's longstanding equal protection jurisprudence and should be revisited to either clarify or overrule its holding.

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RULES

Supreme Court Rule 37.2 1

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

◆

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF has litigated for the equality of all persons, regardless of race, and for the application of strict scrutiny to all governmental racial classifications. For example,

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[1] Pursuant to Supreme Court Rule 37.2, letters indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. Petitioners have filed a "blanket" consent to the filing of amicus curiae briefs with this Court. Respondents have provided written consent to MSLF's amicus curiae brief in support of the Petitioner and have filed a "blanket" consent. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

MSLF attorneys represented the plaintiffs in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); and *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). MSLF has also actively participated as amicus curiae in a number of similar cases challenging racial preferences, most recently in *Ricci v. DeStefano*, ___ U.S. ___, 129 S. Ct. 2658 (2009).

MSLF can bring a unique perspective to bear in this case by examining the nature and requirements of strict scrutiny to demonstrate that the Fifth Circuit abandoned strict scrutiny. MSLF will demonstrate that this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), upon which the Fifth Circuit relied, also departed from strict scrutiny, though not so far as did the Fifth Circuit. Therefore, MSLF submits that this Court should revisit and clarify or overrule *Grutter* so that other courts do not make the same mistake as the Fifth Circuit.

◆

STATEMENT OF THE CASE

MSLF adopts Petitioner's thorough Statement of the Case.

◆

SUMMARY OF ARGUMENT

This case involves the level of judicial scrutiny a court should apply when reviewing a university's racially discriminatory admissions policy, an issue of extraordinary, fundamental importance in this nation: "Racial classifications of any sort pose the risk of lasting harm to our society," which "may balkanize us into competing racial factions [and] carry us further from the goal of a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Here, the Fifth Circuit, approved the racially discriminatory admission practices at the University of Texas at Austin ("UT" or the "University"). In so doing, the Fifth Circuit abandoned strict scrutiny and instead deferred to the University's "serious good faith judgment" that a racially discriminatory policy was necessary to achieve student body diversity. In other words, it deferred to the discriminatory decision of the discriminator. The Fifth Circuit thus adopted the equivalent of rational basis review of a racially discriminatory university admissions policy, turning the entire body of this Court's equal protection jurisprudence on its head and giving universities carte blanche to engage in racially discriminatory admission decisions.

MSLF agrees with Petitioner and its arguments that the Fifth Circuit's decision is inconsistent with the holding in *Grutter* and that this Court should grant the Petition and reverse the Fifth Circuit without revisiting *Grutter*. But the Fifth Circuit purported to follow *Grutter* when it made its radical departure from prior precedent.[2] The holding of the *Grutter* majority, because of its own departure from prior equal protection precedent, will inevitably spawn more such decisions if this Court does not grant the Petition and, in addition to reversing the Fifth Circuit, also clarify or overrule *Grutter*.

Accordingly, this Court should grant the Petition not only for the reasons stated in the Petition, but also to revisit and clarify or overrule *Grutter*, thereby returning to this Court's longstanding equal protection precedent by applying strict scrutiny to racially discriminatory university admissions policies.

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[2] Indeed, Judge Garza, though he strongly disagreed with the majority holding in *Grutter*, upheld the University's racially discriminatory policy because he believed he was compelled to do so by *Grutter*. *Fisher v. Univ. of Tex. at Austin*, 631 F.2d 213, 247 (5th Cir. 2011) (Garza, J., specially concurring).

REASONS FOR GRANTING THE PETITION

I. THE EQUAL PROTECTION CLAUSE PROHIBITS CLASSIFICATIONS OF INDIVIDUALS BASED ON RACE EXCEPT IN THE RAREST OF CIRCUMSTANCES.

A. Racial Classifications Pose A Danger Of Lasting Harm To Society.

"Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw*, 509 U.S. at 657. Indeed, "[p]referment by race . . . can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality." *Grutter* 539 U.S. at 388 (Kennedy, J., dissenting). Thus, "[t]he equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand Constrs., Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring); *see also City of Richmond v. Croson*, 488 U.S. 469, 521 (1988) ("*Croson*"), 488 U.S. at 521 (Scalia, J., concurring) (discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society").

Furthermore, "[c]lassifications based on race carry a danger of stigmatic harm." *Croson*, 488 U.S. at 493. And such racial classifications "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* Thus, a racial classification:

> [I]nevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become truly irrelevant[.]

Adarand, 515 U.S. at 229 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); *see also Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) ("The dangers of such classifications are clear [–] [t]hey endorse race-based reasoning and the conception of a nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."). Indeed, "[s]uch policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution." *Id.* at 604 (O'Connor, J., dissenting).

In short, the "central purpose [of the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV § 1] is to prevent the states from purposefully discriminating between individuals on the basis of race," *Shaw*, 509 U.S. at 642 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)), and thereby "do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

B. A Governmental Entity Must Establish A Compelling Interest By A Strong Basis In Evidence Before It Engages In Racial Preferences.

The essence of strict scrutiny is that a court may not defer to the judgment of the governmental discriminator, or its professions of good faith: "Blind judicial deference to legislative or executive pronouncements, of necessity, has no place in equal protection analysis." *Croson*, 488 U.S. at 501. "The presumption [of statutory validity] is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently 'suspect.'" *Parham v. Hughes*, 441 U.S. 347, 351 (1979). Therefore, "[a] racial classification, regardless of purported motivation, is *presumptively invalid* and will be upheld only upon an *extraordinary justification." Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (emphasis added).

Consequently, no governmental entity may institute a race-conscious policy for any reason unless it has a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 (1986) (plurality opinion); *Croson*, 488 U.S. at 510. Thus, a court must subject a governmental entity's race-conscious policy to a "most searching examination," approaching the policy with "skepticism." *Adarand*, 515 U.S. at 223, 237. The use of racial preferences is "subject to the most exacting judicial scrutiny [and] it is . . . [the discriminator's] burden to satisfy the demands of the extraordinary justification." *Hunter v. Regents of the University of California*, 190 F.3d 1061, 1069 (9th Cir. 1999).[3] In fact, even in cases subject only to intermediate scrutiny, such as gender discrimination, "the burden of justification is demanding and it rests entirely on the state." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

C. So-Called "Benign" Racial Classifications Require Strict Judicial Scrutiny.

In *Croson*, this Court ruled that "recitation of a 'benign' or legitimate purpose for a racial classification[, such as racial diversity in education,] is entitled to little or no weight" because "racial classifications are suspect and . . . simple legislative assurances of good intention cannot suffice." 488 U.S. at 500. Later, this Court departed radically from *Croson*, holding that racial classifications to achieve broadcast diversity are "benign" and, therefore, subject only to intermediate scrutiny. *Metro Broadcasting*, 497 U.S. at 566-69. Five years later, this Court emphatically repudiated the holding in *Metro Broadcasting* and returned to the teachings of *Croson*. *Adarand*, 515 U.S. at 233-34 ("*Metro Broadcasting,* itself *departed* from our prior cases, [so] by refusing to follow *Metro Broadcasting*, . . . we do not depart from the fabric of the law; we restore it.") (emphasis in original).

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[3] *See also Johnson v. California*, 543 U.S. 499, 505 (2005) ("the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests") (quotations omitted); *Wessman v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) (the government bears "a heavy burden of justification [for] their use," because "*Croson* . . . leaves no doubt that only solid evidence will justify allowing race-conscious actions."); *Association of Gen'l Contr., Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) ("[T]he state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action is necessary."); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government.").

Like *Croson*, *Adarand* ruled that "good intentions alone are not enough to sustain supposedly 'benign' racial classification[s,]" because such classifications would "inevitably [be] perceived by many as resting on the assumption that those who are granted this special preference are less qualified . . . purely by their race." *Id.* at 228-29. "Benign" racial classifications serve only to "exacerbate rather than reduce racial prejudice" and "will delay the time when race will become . . . truly irrelevant." *Id.* Consequently, "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed . . . under strict scrutiny." *Id.* at 227.

Indeed, "[t]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." *Id.* at 241 (Thomas, J., concurring).

"These [benign] programs stamp minorities with a badge of inferiority[.]" *Id.* Thus, "government-sponsored [benign] racial discrimination . . . is just as noxious as discrimination inspired by malicious prejudice[;] each . . . is racial discrimination, plain and simple." *Id.*

D. Any Interest Sufficiently Compelling To Justify A Racially Discriminatory Admissions Policy Must Be Clearly Identified And Specific.

In *Croson*, this Court made it clear that, without defining a sufficiently detailed and specific compelling interest, it is impossible to craft a narrowly tailored remedy:

> Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be *clearly identified and unquestionably legitimate*.

Croson, 488 U.S. at 505 (emphasis added). "[P]roper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects," and "[s]uch findings . . . assure all citizens that the deviation from the norm of equal treatment . . . is a temporary measure." *Id.* at 510. Thus:

> *Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the court should not uphold this kind of statute. . . . "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Croson*, 488 U.S. at 516-17.

Adarand, 115 U.S. at 229 (emphasis in original).

An interest so amorphous or indistinct that its scope and nature cannot be defined and identified with particularity cannot be "clearly articulated" or "narrowly tailored" and is not compelling. A compelling interest must be sufficiently concrete to "define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510.

Societal discrimination is an example of an interest that does not meet this test: "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 497. "Relief for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority contractors] mirrored the percentage of minorities in the population as a whole." *Id.* "Societal discrimination is insufficient and over expansive [and] . . . could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 497; *Wygant*, 476 U.S. at 276.

As demonstrated below, the Fifth Circuit failed to apply these longstanding principles of strict scrutiny analysis to the racially discriminatory admissions policies of the University. Accordingly, the Petition should be granted.

II. *GRUTTER* ABANDONED LONGSTANDING EQUAL PROTECTION PRECEDENT.

The Fifth Circuit purported to base its ruling upholding the racially discriminatory admissions practices of Respondents on *Grutter*.[4] *Fisher*, 631 F.3d at 231-47. In *Grutter*, this Court held that achieving the ostensible educational benefits that flow from diversity constitutes a compelling interest, permitting the University of Michigan Law School to racially discriminate in its admissions policies to achieve a so-called "critical mass" of preferred minority students, which is necessary to achieve diversity. *Grutter*, 539 U.S. at 333, 343.

In so holding, this Court abandoned strict scrutiny of the racially discriminatory admissions policy of the law school. In so doing, this Court presumed the law school's good faith, and deferred to its judgment that a "critical mass" of minority students was lacking and that only discriminatory admissions policies could achieve it. *Id.* at 328-29. Moreover, a "critical mass," like societal discrimination, is such an amorphous and indefinable concept that a narrowly tailored remedy cannot address it.

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[4] Justice O'Connor wrote for this Court in a 5-4 decision; Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas dissented.

A. *Grutter* Did Not Utilize Strict Scrutiny, But Instead, Simply Deferred To The Judgment Of The Law School.

In *Grutter*, the University of Michigan Law School argued that the compelling interest for its racially discriminatory admissions policy was to obtain "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. The law school asserted that these benefits could be achieved only when a "critical mass" of underrepresented minority students had been admitted, *id.* at 329, but could neither describe nor quantify "critical mass":

> "[C]ritical mass" means "meaningful numbers" or "meaningful representation," which . . . [is] a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. . . . [T]here *is no number, percentage, or range of numbers . . . that constitute critical mass.*

Id. at 318 (emphasis added). The law school further elaborated that "critical mass means numbers such that underrepresented minority students do not feel . . . like spokespersons for their race." *Id.* at 319.

Unfortunately, this Court accepted this definition and did not require the law school to either define or quantify "critical mass" or establish how it might determine when "critical mass" was absent or was present. *Id.* at 335 ("[A] permissible goal . . . requires only a good faith effort . . . to come within a range demarcated by the goal itself.") (internal quotations omitted). As demonstrated below, this Court did not engage in a searching and skeptical examination of the nature, details, and scope of the claimed compelling interest. Nor did it apply skepticism of the law school's position or require the law school to bear the substantial burden of identifying "critical mass" with sufficient clarity so that a court could determine whether the law school had made the most exact connection between justification and remedy.

Instead, this Court abandoned strict scrutiny and deferred to the law school's judgment, ruling that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Grutter*, 539 U.S. at 328. Indeed, the *Grutter* majority seemed to suggest that this Court lacked competence to strictly scrutinize the law school's racially discriminatory action, ruling that such "complex educational judgments . . . lie primarily within the expertise of the university." *Id.*

Astonishingly, *Grutter* ignored the teachings of *Adarand* and *Croson* that a court should not defer to, but critically and skeptically analyze, any justifications offered. Contrary to *Adarand* and *Croson*, the *Grutter* majority ruled that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary'" by the injured party against whom the law school discriminated. *Id.* at 329. Of course, "good faith" is not the standard by which this Court reviews governmental race discrimination: "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." *Adarand*, 515 U.S. at 226 (internal quotation omitted). In contrast, the *Grutter* majority "t[ook] the Law School at its word[.]" *Id.* at 343.

The *Grutter* majority's deferral to the judgment of the discriminator is antithetical to the concept of strict scrutiny and constitutes the "blind judicial deference" so emphatically condemned in *Croson*. 488 U.S. at 501. The presumption of validity afforded to the law school's racially discriminatory admissions policy violates the longstanding principle that any racial classification is "presumptively invalid." *Pers. Adm'r of Mass.*, 442 U.S. at 272. Indeed, the "most searching examination" with "skepticism" required by *Adarand*, 515 U.S. at 223, 227, was replaced by the *Grutter* majority with trust in the pronouncements of the law school.[5]

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[5] Under this reasoning, a university might determine, based in its expertise in educational matters, that classes should be segregated by race because it would enhance learning opportunities for minority students, who would feel more free to express themselves and participate than if in classes with non-minorities, resulting in greater achievement. Courts would be

(Continued on following page)

In short, the majority's analysis in *Grutter* bears a striking resemblance to rational basis scrutiny, rather than intermediate or strict scrutiny. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) ("The Court . . . does not apply strict scrutiny [and] undermines both the test and its own controlling precedents.") Thus, the *Grutter* majority's decision violated well-established equal protection jurisprudence, including *Adarand* and *Croson*, and this Court should grant the Petition so that it may revisit *Grutter*, which, like *Metro Broadcasting*, departed from the longstanding equal protection jurisprudence of this Court.

B. "Critical Mass," Like Societal Discrimination, Is An Amorphous And Indefinable Concept That Cannot Be Addressed By A Narrowly Tailored Remedy.

An "exact connection between justification and classification," as required by *Adarand*, 115 U.S. at 229, is impossible when one relies on "critical mass." It is impossible to determine the presence or absence of a "critical mass" of "underrepresented" minority students because "[t]here is no number that constitutes 'critical mass.'" *Grutter*, 539 U.S. at 318. In

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obligated to defer to that "complex educational judgment" and presume that the university acted in good faith. Indeed, under the *Grutter* majority's reasoning, a university might determine that it could best serve the educational needs of its students by providing a separate, but equal, higher education system.

other words, "critical mass" is an indefinable pedagogical concept, created out of thin air by educators who can't define it, but apparently "know it when they see it." *Cf. Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing pornography). To make matters worse, under *Grutter*, this Court will presume that judgment correct. Yet, because "[t]here is no number that constitutes 'critical mass,'" *Grutter*, 539 U.S. at 318, no court is able to determine whether a "critical mass" of minority students is present or lacking and whether racially discriminatory admissions policies are required.

In other words, the concept of "critical mass," like that of societal discrimination, is insufficiently particular in its scope or nature to determine "the extent of the remedy necessary to cure its effects," as required by *Croson*. 488 U.S. at 510. Also, like societal discrimination, the concept of "critical mass" "is too amorphous a basis for imposing a racially classified remedy . . . [and] has little probative value in supporting a race-conscious measure." *Id.* at 497.

Moreover, attempts to achieve "such an ill-defined [goal] could extend until [university admissions of minority students] mirrored the percentage of minorities in the population as a whole," a measure also forbidden by *Croson*. *Id.* at 498. Indeed, achieving "critical mass" may require even more than admissions proportionate to the minority population if the minority student-age population in a State is so small that it is impossible to enroll a "critical mass." Under such a circumstance, the process of achieving "critical mass" is "timeless in [its] ability to affect the future" and has no end in sight, a situation categorically prohibited by *Croson*. *Id.* at 497.

Consequently, an "exact connection between justification and classification," as required by *Adarand*, 115 U.S. at 229, is impossible for the concept of "critical mass." In other words, if lack of diversity is the absence of a "critical mass" of minority students, and "critical mass" cannot be defined, it is impossible to know whether it is present or absent or when it has been achieved. Therefore, diversity cannot constitute a compelling interest because its presence or absence ("critical mass") is impossible to ascertain. Nor, for the same reason, can there be a narrowly tailored remedy to achieve "critical mass," if it were absent.

Therefore, this Court should grant the Petition not only to reverse the Fifth Circuit, but also to revisit *Grutter* and correct its departure, like that taken in *Metro Broadcasting*, from the longstanding equal protection jurisprudence of this Court.

III. THE FIFTH CIRCUIT'S DECISION DEMONSTRATES WHY THIS COURT SHOULD REVISIT *GRUTTER*.

A. Attempting To Follow *Grutter*, The Fifth Circuit Concluded That Diversity Does Not Exist Until There Is Diversity In All Major Fields Of Study.

The Fifth Circuit found that "minority students remain clustered in certain programs limiting the beneficial effects of educational diversity." *Fisher*, 631 F.3d at 240. Therefore, if "UT is to have diverse interactions for a greater variety of colleges, not more students disproportionately enrolled in certain programs," it must racially discriminate in admissions. *Id.* Thus, without a racially discriminatory admissions policy, the University cannot "achieve the maximum educational benefits of a truly diverse student body." *Id.* In other words, the Fifth Circuit held that diversity is not achieved until a "critical mass" of minority students has enrolled in all the major areas of study. It is unlikely that this could be achieved even if the favored minorities enrolled in direct proportion to their numbers in the general population.

Importantly, this Court has rejected the concept that, in the absence of discrimination, minorities will be equally likely to choose any particular profession or field of study as non-minorities. Such an assertion "rests on the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population[.]" *Croson*, 488 U.S. at 507. Indeed, it is "'completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination.'" *Id.* (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)); *see Eng'g Contr. Ass'n of S. Fla. v. Metro. Dade County*, 122 F.3d 895, 922 (11th Cir. 1997) ("In a pluralistic and diverse society, it is unreasonable to assume that equality of opportunity will inevitably lead different groups with similar human and financial capital characteristics to make similar career choices.").

It is equally unrealistic for the Fifth Circuit to predict that racial preferences in university admissions will result in an equal distribution of all minority candidates throughout all major areas of study, much less that they will constitute the ethereal and illusive "critical mass," in each such field. Nothing in *Grutter* purported to require diversity not only at the university level, but also in all major fields of study. But it is not surprising that a court, purporting to follow the teachings of the *Grutter* majority, would make such a mistake, given *Grutter*'s abandonment of strict scrutiny and adoption of a compelling interest it could not define.

B. Worse Yet, The Fifth Circuit, Relying On *Grutter*, Determined That Diversity Does Not Exist Until There Is Diversity In Each Classroom.

The district court found that "a large percentage of [undergraduate] courses [of between 5 and 24 students] are represented by only one student or by none at all" so "the University still has not reached a critical mass at the classroom level." *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 602 (W.D. Tex. 2009). The Fifth Circuit affirmed, ruling that there was "no reason to doubt UT's considered, good faith conclusion that the university still has not reached a critical mass at the classroom level." *Fisher*, 631 F.2d at 244. This is really just a corollary to the unrealistic finding that diversity requires "critical masses" of minorities across all major fields of study. Common sense dictates that this will never occur. Moreover, nothing in *Grutter* purports to require diversity at the classroom level. The Fifth Circuit has thus approved limitless racial discrimination in university admissions that are "timeless in their ability to affect the future." *Croson*, 488 U.S. at 497.

Given *Grutter*'s departure from strict scrutiny, its deference to pedagogues, and its identification of a new compelling interest that it is unable to define, the *Grutter* majority invites just such expansive decisions by lower courts. This Court should grant the Petition so that it may reverse the Fifth Circuit and, perhaps, revisit *Grutter* to clarify or overrule it.

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CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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In the

Supreme Court of the United States

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ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, et al.,
Respondents.

◆

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AMERICAN CIVIL RIGHTS INSTITUTE, NATIONAL ASSOCIATION OF SCHOLARS, AND PROJECT 21 IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the University of Texas at Austin's race-based admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation, the Center for Equal Opportunity, the American Civil Rights Institute, the National Association of Scholars, and Project 21 respectfully submit this brief amicus curiae in support of the Petitioner Abigail Noel Fisher.[1]

For nearly 40 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The Center for Equal Opportunity (CEO) and the American Civil Rights Institute (ACRI) are nonprofit research, education, and public advocacy organizations. CEO and ACRI devote significant time and resources studying racial, ethnic, and sex discrimination by the federal government, the states, and private entities, and educating Americans about the prevalence of such discrimination. CEO and ACRI publicly advocate for the cessation of racial, ethnic, and sex discrimination by the federal government, the several states, and private entities. Both CEO and ACRI have participated as amici curiae in numerous cases relevant to the analysis of this case, including *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved*, 551 U.S. 701; and *Grutter*, 539 U.S. 306.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The National Association of Scholars (NAS) is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. NAS supports intellectual integrity in the curriculum, in the classroom, and across the campus. NAS is dedicated to the principle of individual merit and opposes race, sex, and other group preferences. As a group comprised of professors, graduate students, administrators, and trustees, NAS is intimately familiar with the issues relevant to the analysis of this case. NAS, CEO, ACRI, and PLF participated in this case in the court below. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011).

Project 21 is an initiative of The National Center for Public Policy Research designed to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work. Project 21 has participated as amicus curiae in this Court numerous times, including *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity through racial balancing in undergraduate admissions at public universities may be deemed a compelling governmental interest sufficient to justify discriminatory policies based solely on the students' race. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Texas at Austin (University) discriminated against Abigail Fisher because of the color of her skin when she applied for admission. *Fisher*, 631 F.3d at 216-17. In the decision below, the Fifth Circuit held that because the University was following the reasoning of this Court in *Grutter*, 539 U.S. 306, the race-based admissions program did not violate the Equal Protection Clause. *Fisher*, 631 F.3d at 247. By doing so, the Fifth Circuit has extended *Grutter*, sanctioning the allocation of educational opportunities at undergraduate institutions on the basis of race simply for the sake of racial balancing.

Within the Fifth Circuit, the panel decision met with harsh criticism. Judge Garza, concurring specially in the panel opinion, found the policy indistinguishable from racial quota systems long held unconstitutional by this Court. *Id.* at 252 (Garza, J., concurring specially) ("If two applicants, one a preferred minority and one nonminority, with application packets identical in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from *Gratz*?"). Then, by a narrow 9-7 margin, the Fifth Circuit voted not to rehear the case *en banc*. Dissenting, Chief Judge Jones criticized the panel decision for its disregard of strict scrutiny: "This panel decision essentially abdicates judicial review of a race-conscious admissions program that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." *Fisher v. Univ. of Texas at Austin*, 644 F.3d 301, 303 (5th Cir. 2011) (Jones, C.J., dissenting from denial of rehearing *en banc*). This wholesale abdication of judicial review "gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires." *Id.* (Jones, C.J., dissenting from denial of rehearing *en banc*).

This Court should grant review of the Fifth Circuit's decision. The decision conflicts with decisions of this Court in two important ways. First, the panel decision guts the first prong of strict scrutiny analysis by holding that all government-run universities automatically have a compelling interest in "racial diversity" at all times. *Fisher*, 631 F.3d at 220.

Second, the decision undermines the second prong of strict scrutiny by allowing government to adopt race-conscious measures without giving serious, good faith consideration to less restrictive race-neutral policies. *Fisher*, 631 F.3d at 242. This is especially problematic with new evidence demonstrating that public universities have excelled in generating increased minority enrollment under wholly race-neutral criteria.

Additionally, this Court should grant review because universities nationwide have used *Grutter* as a blueprint for employing racial criteria in university admission policies, instead of treating it as a warning to scale back reliance on race. Review is crucial to restore meaningful limits on government's authority to discriminate based on race.

REASONS FOR GRANTING THE PETITION

I

THE PANEL'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT

The Equal Protection Clause mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. This rule admits no exception for purportedly beneficial discrimination. "[A]ll governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry." *Grutter*, 539 U.S. at 326 (citations omitted). The language of Title VI of the 1964 Civil Rights Act and 42 U.S.C. § 1981 is even more explicit.

A. The Court Should Grant Review Because the Panel Decision Conflicts With This Court's Decisions Prohibiting a Generalized Compelling Interest

The panel decision waters down strict scrutiny analysis by holding that under *Grutter*, universities have an abstract compelling interest to pursue racial diversity which justifies the use of racially discriminatory admissions policies. *Fisher*, 631 F.3d at 220. But the existence of a compelling interest at the University of Michigan's law school cannot satisfy the requirement to demonstrate a compelling interest at a different public university involving different parties and different circumstances. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("The undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."). As this Court's precedents have shown, the finding of a compelling interest in race-conscious state action requires a *particularized* showing of specific circumstances to support the use of racial criteria in government decisionmaking.

Prior to *Grutter*, this Court had never sanctioned a race-based governmental program that was not predicated on remedying intentional discrimination. Even *Bakke*, 438 U.S. 265, did not accept the diversity rationale as a compelling state interest. In *Bakke*, only two points commanded a majority of the Court: (1) Alan Bakke was entitled to admission, and (2) some indefinite consideration of race is allowable under the Constitution. *Bakke*, 438 U.S. at 271-72. Dr. Peter W.

Wood, President of the National Association of Scholars, agrees:

> Powell's *Bakke* opinion, however, lifted diversity out of obscurity and gave it the respectability of seeming law . . . The happenstance that none of his Supreme Court colleagues joined Powell in extolling diversity tends to be overlooked, and those who are now committed to promoting the idea are perhaps reluctant to remember that the widely cited legal foundation for pursuing diversity in schools and colleges rests on one man's unsupported opinion.

Peter Wood, *Diversity: The Invention of a Concept* 113 (2003).

In *Bakke*, Justice Powell decided the case on narrow tailoring grounds, and acknowledged that even under his theory, the asserted diversity interest must be particular to the institution in question to be found compelling. Justice Powell's opinion discusses such factors as the type of institution, the homogeneity of the student body, the necessity of the preference, etc. *Bakke*, 438 U.S. at 313-15 (Powell, J., op.).

Writing for a plurality of the Court in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), Justice Powell ended any speculation that his *Bakke* opinion endorsed a blanket compelling interest in diversity for all educational institutions, by emphasizing that racial classifications must be justified by a need specific to that *particular governmental body* adopting such measures: "[T]he Court has insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination." *Id.* at 274 (emphasis added). The *Wygant* Court held that "societal discrimination" and the "role model theory" were "too amorphous" with "no logical stopping point" and do "not necessarily bear a relationship to the harm caused by prior [discrimination]." *Id.* at 274-76.

Grutter did not change this requirement. "[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race *in that particular context*." *Grutter*, 539 U.S. at 328 (emphasis added). The Court did not simply permit the University of Michigan's law school to invoke "diversity" without scrutiny; it required the law school to prove a specific need for diversity based upon specific circumstances and for its specific purposes.[2] Indeed, the Court emphasized that "'it is *not* an interest in simple ethnic diversity' . . . that can justify the use of race." *Id.* at 324-25 (quoting *Bakke*, 438 U.S. at 314-15) (emphasis added).

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[2] This is especially important today, since the rationale and evidence underlying the educational benefits that flow from a diverse student body have been significantly undercut in the wake of *Grutter*. *See, e.g.*, Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 425-30 (2005) (collecting studies that the social science evidence purporting to tout diversity's educational benefits was and is seriously flawed); Roger Clegg, *The Educational Benefits of 'Diversity'*, National Review Online, Feb. 1, 2011, *available at* http://www.nationalreview.com/phi-beta-cons/39876/educational-benefits-diversity?page=1 (last visited Oct. 13, 2011) (describing new studies confirming that the evidence touting diversity is "marginal" and "uncertain"); John Rosenberg, *"Diversity" Research Advances Progresses Accumulates*, Discriminations, Feb. 6, 2010, *available at* http://www.discriminations.us/2010/02/%e2%80%9c diversity%e2%80%9d-research-advances-progresses-accumulates/ (last visited Oct. 13, 2011) (analyzing new data on the educational benefits of diversity).

Many of the particular factual circumstances present in *Grutter* are not present in *Fisher*. Central to the finding of diversity as a compelling interest in *Grutter* was the fact that a law school was asserting the interest. The Court noted that "highly selective law schools" (including the University of Michigan) are unique in that they account for "25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges." *Grutter*, 539 U.S. at 332. This emphasis placed on highly selective law schools was central to the finding of a compelling interest. "Access to *legal* education (and thus the *legal* profession) must be inclusive." *Id.* at 332-33 (emphasis added). Obviously, the role of diversity will be different in law than in, say, chemical engineering or Farsi.

This Court clarified the narrow, fact-specific nature of *Grutter*'s compelling interest finding in *Parents Involved*, 551 U.S. 701. There, the Court recognized that the facts in *Grutter* gave rise to a unique compelling interest. *See id.* at 725 ("The Court in *Grutter* expressly articulated key limitations . . . noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter*."). Thus, the *Parents Involved* Court provides a clear warning to lower courts that try to extend *Grutter* into a general, free-floating "diversity" exception to strict scrutiny. *Grutter*'s holding was narrow, and all race-based classifications in support of diversity must be justified through a specific heightened factual showing.

This Court has required the same specificity in cases where the asserted compelling interest is remedial. Where the government is using racial classifications to remedy past intentional discrimination, there must also be a particularized showing tying that interest to a specific factual context. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 8 (1958) (finding state authorities "actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation"); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 432 (1968) (finding compulsory segregation mandated by the Virginia constitution and statutory provisions); *Croson*, 488 U.S. at 499 (requiring a finding of actual discrimination in the *local contracting industry* before preferences would be allowed) (emphasis added).

As *Grutter* rightly observed, "[c]ontext matters when reviewing race-based governmental action." 539 U.S. at 327. The circumstances that led the Court to find a compelling interest in "attaining a diverse student body" were unique. *Id.* at 328. But the *Fisher* panel glosses over the particularized nature of the compelling interest inquiry, and concludes that higher education institutions have a permanent compelling interest in expanding racial diversity through race-conscious measures. *Fisher*, 631 F.3d at 220. This Court should grant review to clarify that merely reciting a generalized interest in "diversity" does not satisfy the requirement for a particularized showing of why racial diversity is a compelling interest under the facts of a specific case.

B. The Court Should Grant Review to Affirm That Race-Neutral Alternatives Must Be Exhausted Before Resorting to Racial Classifications

American institutions "tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. This intolerance is necessary because racial characteristics are almost never an appropriate consideration for the government. *Id.* at 216. Accordingly, the Equal Protection Clause requires "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339.

"Universities . . . have received little or no judicial guidance as to the requirements for race-neutral alternatives, and, as a result, appear to be floundering." George La Noue & Kenneth L. Marcus, *"Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 Cath. U. L. Rev. 991, 994 (2008). Unfortunately, the panel's decision below only exacerbates this problem. Following the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the University of Texas adopted a wholly race-neutral admissions plan. *Fisher*, 631 F.3d at 223. In order to maintain a significant presence of minority students at the university, the university altered its admissions criteria in a race-neutral manner. *Id.* This change in policy, coupled with the Texas legislature's decision to adopt the Top Ten Percent Law, saw a dramatic increase in the number of minorities gaining admission to the university. *Id.* at 223-24. The numbers and percentages of minorities enrolling at the university exceeded the previous race-conscious plan in place at the university before *Hopwood*. *Id.* at 224. Despite the unquestioned success of this race-neutral plan, the university announced its intention to revert to a race-conscious admissions plan on the day *Grutter* was decided.[3]

Instead of viewing *Grutter* as a warning to exhaust race-neutral alternatives before adopting a race-conscious admissions plan, the University of Texas viewed *Grutter* as the go-ahead for creating race-conscious measures as a first option. Unfortunately, the court of appeals, rather than viewing this action with constitutionally required skepticism, embarked on a lengthy discussion of perceived faults with the Top Ten Percent Law. *See Fisher*, 631 F.3d at 238-42. Indeed, the *Fisher* panel went so far as to say that race-neutral policies have a "talismanic ring in the law, but can be . . . misleading." *Id.* at 242.

Yet the panel's decision to ignore the requirement that race-conscious measures be a last resort finds no support in the law. Narrow tailoring requires determining whether "lawful and less restrictive means could have been used." *Wygant*, 476 U.S. at 280 n.6 (Powell, J., op.) (plurality opinion); *see also Parents Involved*, 551 U.S. at 796 (Kennedy, J., concurring) ("The State must seek alternatives to the classification and different treatment of individuals by race, at least absent some extraordinary showing not present here."); *Croson*, 488 U.S. at 507 ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies.") (citations omitted); *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 545 F.3d 1023, 1036 (Fed. Cir. 2008) ("[E]ven where there is a compelling interest supported by a strong basis in evidence, [the court must consider] the efficacy of alternative, race-neutral remedies.") Further, this Court in *Adarand* specifically remanded the case because the lower court had failed to consider the availability of race-neutral alternatives. 515 U.S. at 237-38.

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[3] University of Texas at Austin website, *The University of Texas at Austin Reacts to the Supreme Court's Affirmative Action Decisions*, June 23, 2003, *available at* http://www.utexas.edu/news/2003/06/23/nr_affirmativeaction (last visited Oct. 13, 2011).

The requirement to exhaust race-neutral measures before resorting to race-conscious ones extends to university admissions. In fact, the race-conscious plan adopted by the law school in *Grutter* was deemed constitutional only because the Court found that it had engaged in a "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. Moreover, this Court in *Parents Involved* rejected a race-conscious assignment plan because "several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration." *Parents Involved*, 551 U.S. at 735. As Justice Kennedy recognized, "measures other than differential treatment based on racial typing of individuals first must be exhausted." *Id.* at 798 (Kennedy, J., concurring).

The *Fisher* panel abandoned narrow tailoring when it ignored the need for the University to seek out race-neutral alternatives before resorting to a race-conscious admissions policy. This Court should grant review to clarify that *Grutter* does not sanction this race-first attitude in university admissions.

1. Race-Neutral Remedies Are Available and Successful at Achieving a Diverse Student Body Where Minorities Can Excel

In *Grutter*, this Court recognized California's race-neutral admission policy. *Grutter*, 539 U.S. at 342. Indeed, the Court recommended that, "Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." *Id.* California's experiment shows that minority students do not need racial preferences to succeed.

In 1996, the people of California passed Proposition 209, banning the use of racial, ethnic, or sex-based preferences in admissions to public universities. By looking at a broad range of educational outcome measures, it is clear that following adoption of Proposition 209, California's K-12 public schools began focusing their attention on improving minority students' preparation for college rather than relying on racial preferences.

a. Offers of Admission to Minority Students Have Risen for University of California Freshmen

The University of California (UC) system consists of nine undergraduate campuses.[4] The UC schools tracked the offers for admission by race and/or ethnicity to the University of California from 1997 through 2011. These data show:

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[4] Due to the newness of the Merced campus, it is not included in much of the data set forth in this brief. Campuses dedicated solely to graduate level courses are also not included.

- University-wide, underrepresented minorities (defined as American Indian, African American, and Chicano/Latino students) constituted 19.6% of the students (7,385 total offers) to whom admission was offered as freshmen in 1997.[5] By 2010, underrepresented minorities received 28.3% of the freshmen offers of admission (16,635 total offers), an increase of 9,250 offers of admission to underrepresented minority students. Meanwhile, offers of admission to white students declined from 42.6% in 1997 to 30.6% in 2010.[6]

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[5] While Proposition 209 was passed in 1996, an injunction delayed its effective date until August of 1997. *See* Eva Paterson & Oren Sellstrom, *Equal Opportunity in a Post-Proposition 209 World*, 26 Hum. Rts. 9 (Summer 1999). It should also be noted that the UC initially stopped considering race in its undergraduate admissions decisions pursuant to Regents Resolution SP-1, that went into effect January 1, 1995. UC Irvine website, Office of Equal Opportunity and Diversity, *A Brief History of Affirmative Action*, *available at* http://www.eod.uci.edu/aa.html (last visited Oct. 13, 2011).

[6] Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2008 (UC 2008 Admissions), Table 4, *available at* http://www.ucop.edu/news/factsheets/fall2008adm.html (last visited Oct. 13, 2011); Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2010 (UC 2010 Admissions), Table 3, *available at* http://www.ucop.edu/news/factsheets/fall2010adm.html (last visited Oct. 13, 2011); Univ. of Cal., Office of the President, New California Freshman Admits Fall 1997, 1998, 1999, and 2000, Table A, *available at* http://www.ucop.edu/ucophome/commserv/preadm_a0400.pdf (last visited Oct. 13, 2011). Preliminary data for 2011 show that these trends have continued (for 2011, underrepresented minorities received 30.8% of the freshman offers of admission, while offers to white students fell to 30.6% of offers), but, for reliability, this brief uses the finalized 2010 data. Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2011 (UC 2011

(continued...)

- The percentage of offers of freshmen admission that were extended to underrepresented minorities was higher or the same in 2010 than 1997 on six of the eight UC campuses that had data for 1997 through 2010.[7] Preliminary data for 2011 show that this is the same for seven of the eight campuses.[8]

Thus, the university-wide rise in the number of underrepresented minorities who are offered admission as freshmen to the University of California and the rise in the percentage of freshmen who are underrepresented minorities conclusively refute any claim that, under Proposition 209, minorities have suffered devastating decreases in admissions from which they have yet to recover.

b. In 2003, Incoming University of California Freshmen Constituted a Higher Percentage of Underrepresented Minority California High School Graduates Than in 1995

The University of California's Eligibility and Admissions Study Group prepared a report under the direction of UC President Robert C. Dynes entitled *Analysis of Undergraduate Admissions to University of California Campuses by Race and Ethnicity* (Mar.

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[6] (...continued)
Admissions), Table 3, *available at* http://www.ucop.edu/news/factsheets/fall2011adm.html (last visited Oct. 13, 2011).

[7] UC 2008 Admissions, Table 4 and UC 2010 Admissions, Table 3.

[8] UC 2011 Admissions, Table 3.

2004) (UC Undergraduate Race Analysis Report).[9] Additionally, the California Postsecondary Education Commission (CPEC) produced "Ethnicity Snapshot Tables" regarding High School Graduates and First Time Freshmen at UC.[10] The UC Undergraduate Race Analysis Report shows the gap between the percentage of minorities graduating from high school and the percentage of minorities as new UC freshmen was increasing in the years immediately preceding the adoption of Proposition 209. Between 1995 and 1998 the gap increased from 17.3% to 23.9%. In contrast, the CPEC report shows that after Proposition 209, the gap between the percentage of minorities graduating from high school and the percentage of minorities as new UC freshmen decreased (or, in the case of Latinos, remained approximately the same):

- In 1999, the gap between percentage of African American as high school graduates and percentage of African Americans as first time freshmen in the UC system was 4.5%. In 2009, that gap was 3.1%.
- In 1999, the gap between percentage of Latinos as high school graduates and percentage of Latinos as first time freshmen in the UC system was 19.8%. In 2009, that gap was 21.6%.
- In 1997, the gap between percentage of Native Americans as high school graduates and percentage of

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[9] *Available at* http://www.universityofcalifornia.edu/news/compreview/0308_meeting/Data_release_summary_FINAL_Mar_8_20041_with_data.pdf (last visited Oct. 13, 2011).

[10] Ethnicity Snapshots Table—High School Graduates; and First Time Freshman at UC, *available at* http://www.cpec.ca.gov/StudentData/EthSnapshotMenu.asp (last visited Oct. 13, 2011).

Native Americans as first time freshmen in the UC system was 0.4%. In 2009, that gap was 0.1%.

Since Proposition 209 became effective in 1997, minorities continue to seek and be offered admission to the University of California in greater numbers without resorting to racial preferences. Accordingly, the University of Texas's argument that a race-conscious admissions policy is necessary to ensure a diverse student body rings hollow.

The California experience also shows that racial and ethnic preferences are generally unpopular with the general public. The list of states that have rejected racial admission preferences by ballot initiatives (a process not available in all states, of course) continues to grow: not only California, but also Michigan, Washington, Arizona, and Nebraska, with Oklahoma slated to consider the issue next year. Florida has ended preferential admissions, too, by order of the governor. To this list can be added two other states that, for a period of time in recent years, were limited in their use of racial admissions discrimination because of federal court decisions: Texas, of course, and Georgia. In light of this list, representing about 37% of the U.S. population, it is simply not plausible that successful higher education demands the use of such discrimination. And this does not even include less selective schools, which usually do not consider race or ethnicity; *see also* Clegg, *supra*, *Attacking "Diversity"*, at 431 (listing other schools that have indicated they do not use racial and ethnic preferences).

II

REVIEW IS REQUIRED BECAUSE UNIVERSITIES AND COLLEGES THROUGHOUT THE COUNTRY VIEW *GRUTTER* AS AN UNQUALIFIED ENDORSEMENT OF RACE-BASED ADMISSION STANDARDS

Too many public university admissions officers across this country assume that under *Grutter* the use of race is always permissible. They read *Grutter* not as a narrowly tailored exception to the general prohibition of racially motived decisionmaking, but as a blueprint for creating a student body with their preferred racial composition.[11] Amicus Center for Equal Opportunity (CEO) has produced many studies examining the admission practices of dozens of institutions of higher education. Each study has resulted in the same conclusion—public universities are using racial criteria to favor preferred minorities and then turn away applicants for admission of disfavored races. This brief will focus on CEO's studies of post-*Grutter* admissions.

CEO's studies assessed the degree of racial and ethnic admission preferences in admissions by using a statistical model that predicts the probability of admission at a university for members of different ethnic and racial groups, holding their other qualifications constant. A multiple logistic regression equation, and its corresponding odds ratio, allowed CEO's statisticians to present admissions data in terms of the relative odds of members of Group A being admitted as compared with members of Group B, while controlling for other important variables like test scores, grades, and residency status.

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[11] The extent of racial preferences is generally conceded even by those who advocate in favor of them. *See, e.g.*, William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 26-27 (1998) ("[A]lmost all academically selective institutions [share] a commitment to enrolling a diverse student population—and, as one way of achieving this objective, to paying attention to race in the admissions process."); Thomas J. Espenshade & Alexandria Walton Radford, *A New Manhattan Project*, Inside Higher Ed., Nov. 12, 2009, *available at* http://www.insidehighered.com/views/2009/11/12/radford (last visited Oct. 13, 2011).

The following chart shows the admissions practices at the University of Wisconsin Law School for the 2005 and 2006 applicant pools.[12]

University of Wisconsin Law School

Univ. of WI - Law	Odds Ratio[13]
Black over White	61.4 to 1
Hispanic over White	14.2 to 1

Accordingly, at the University of Wisconsin Law School, blacks and Hispanics were strongly preferred to whites.

The odds ratio measured the magnitude of the preference given relative to the baseline group (in these studies, whites). As the study explained, an odds ratio equal to or greater than 3.0 to 1 is commonly accepted to reflect a strong association; an odds ratio less than 3.0 to 1, but greater than 1.5 to 1, reflects a moderate association; an odds ratio of 1.5 or less to 1 indicates a weak association. A very strong association might be taken to be the rough equivalent of the relative odds of smokers versus non-smokers dying from lung cancer, which in one-well known study is calculated as 14 to 1. Nagai, *supra*, *University of Wisconsin Law School*, at 13-14.

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[12] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Wisconsin Law School*, Center for Equal Opportunity, at 12-13, *available at* http://www.ceousa.org/component/option,com_docman/task,doc_view/gid,275/ (last visited Oct. 13, 2011).

[13] The odds ratio here, and in all subsequent tables, is arrived at after controlling for both academic (LSAT/SAT, GPA, class rank) and non-academic factors (year of admission, gender, residency, etc.).

According to CEO's study, these numbers, however, are not nearly as extreme as those found in even more recent years in the University of Wisconsin-Madison undergraduate admissions.[14]

University of Wisconsin-Madison
(2007 and 2008 applicant pools)

Univ. of WI-Madison (2007 and 2008)	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	576 to 1	1330 to 1
Hispanic over White	504 to 1	1494 to 1
Asian over white	1 to 1	1 to 1

The above table shows that Blacks and Hispanics were preferred at ratios of between 500 and 1500 to 1 over both Asian and white students. Other reports confirm that it is increasingly the case that Asians are discriminated against in addition to, and sometimes even more than, whites. *See* Russell K. Nieli, *How Diversity Punishes Asians, Poor Whites and Lots of Others*, Minding The Campus, July 12, 2010.[15]

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[14] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Wisconsin-Madison*, Center for Equal Opportunity, at 16, *available at* http://www.ceousa.org/component/option,com_docman/task,doc_view/gid,274/ (last visited Oct. 13, 2011).

CEO's studies also found that the law schools at the University of Nebraska, Arizona State University, and the University of Arizona have granted very strong preferences for preferred minorities (blacks and Hispanics), and comparatively small (but still significant) preferences for non-preferred minorities (Asians).

University of Nebraska College of Law
(2006 and 2007 applicant pools)[16]

Univ. of NE - Law	Odds Ratio
Black over White	442 to 1
Hispanic over White	90 to 1
Asian over white	6 to 1

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[15] *Available at* http://www.mindingthecampus.com/originals/2010/07/how_diversity_punishes_asians.html (last visited Oct. 13, 2011).

[16] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Nebraska College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/628/100/ (last visited Oct. 13, 2011).

Arizona State University College of Law
(2006 and 2007 applicant pools)[17]

ASU - Law	Odds Ratio
Black over White	1,115 to 1
Hispanic over White	85 to 1
Asian over white	2 to 1

University of Arizona College of Law
(2006 and 2007 applicant pools)[18]

Univ. of Ariz. - Law	Odds Ratio
Black over White	250 to 1
Hispanic over White	18 to 1
Asian over white	3 to 1

CEO studies on undergraduate admissions at universities in Ohio demonstrated strong preferences for certain preferred minorities.

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[17] Althea K. Nagai, Ph.D., *Racial and Ethnic Admission Preferences at Arizona State University College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/623/119/ (last visited Oct. 13, 2011).

[18] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Arizona College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/623/119/ (last visited Oct. 13, 2011).

Ohio State University and Miami University

Miami University	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	8.0 to 1	10.2 to 1
Hispanic over White	2.2 to 1	2.2 to 1
Asian over white	2.1 to 1	1.6 to 1
OH State University	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	3.3 to 1	7.9 to 1
Hispanic over White	4.3 to 1	6.5 to 1
Asian over white	1.5 to 1	2.1 to 1

Even at the University of Michigan itself, CEO's studies showed severe undergraduate, law, and medical school admission preferences after *Grutter*.[19]

These odds ratios indicate the extent of racial and ethnic preferences at the different schools. Because the statistical analysis holds all factors constant except for race, the ratios demonstrate the strength of preferences given to preferred minority students over white students. The schools grant very strong preferences to blacks, and generally to Hispanics as well. Very little preference, if any, is given to Asian students. In other words, blacks and Hispanics are preferred minorities who are given significant admission preferences *solely because of their race*, while Asians are non-preferred minorities who fare no better than similarly situated white applicants. There can be no other conclusion than that admission preferences are pervasive among institutions of higher education.

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[19] *See, e.g.*, Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/521/100/ (last visited Oct. 14, 2011); Althea K. Nagai, Ph.D., *Racial and Ethnic Admission Preferences at the University of Michigan Medical School*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/523/100/ (last visited Oct. 14, 2011); Althea K. Nagai, Ph.D., *Racial and Ethnic Admission Preferences at the University of Michigan Law School*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/522/100/ (last visited Oct. 14, 2011).

CONCLUSION

The latest Census numbers demonstrate dramatically that our nation is increasingly multiethnic and multiracial, and that individual Americans are more and more likely to be multiethnic and multiracial. In such a nation, it is dangerous to allow the inevitably divisive racial and ethnic discrimination by public institutions to become wider and more entrenched. For the foregoing reasons, Amici respectfully request that this Court grant the writ of certiorari.

DATED: October, 2011.

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ABIGAIL NOEL FISHER,

Petitioner.

v.

UNIVERSITY OF TEXAS, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE FOR RICHARD SANDER AND STUART TAYLOR, JR. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The past decade has witnessed a profusion of careful research on the subject of racial preferences, much of it stimulated by this Court's decisions in *Grutter v. Bollinger*, 549 U.S. 306 (2003), and *Gratz v. Bollinger*, 549 U.S. 244 (2003). *Amici curiae* have written this brief to bring to the Court's attention the portions of this research that seem most relevant to the issues under consideration in *Fisher v. University of Texas, et al.*

Richard Sander is an economist and law professor at UCLA, and a leading scholar in the field of affirmative action. Stuart Taylor, Jr. is a lawyer and journalist who has written many articles and a book on various civil rights issues and episodes. They are collaborating on a book about the social science research on, and policy dilemmas involving, racial preferences in higher education admissions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Many of the issues involved in judicial oversight of racial affirmative action in university admissions turn on empirical questions that can be better understood through social science research. This brief identifies important findings in recent research that suggest that the Court's decision in *Grutter*, and indeed affirmative action practices in general, are not having their intended effects.

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission. Counsel of record for both petitioner and respondents received timely notice of *amicis'* intent to file the brief and consented to it, except that *amici* have not succeeded in giving timely notice to Rachel Multer Michalewicz, co-plaintiff in the courts below. We believe she is no longer represented by counsel or participating in this case. To the extent this situation my require *amici* to move for leave to file this brief, we respectfully so move.

ARGUMENT

I. Social Science Research Has Undermined The Central Assumption Underlying All Racial Preference Programs In University Admissions: That They Are Good For The Intended Beneficiaries

Affirmative action is an intensely controversial policy, and the social science work done in this field is far from immune to politics. But a growing volume of very careful research, some of it completely unrebutted by dissenting work, suggests that racial preferences in higher education often undermine minority achievement.

This Court's decisions make clear that racial preferences in higher education are tolerated under constitutional law — to the extent that they are tolerated — only on the assumption that they are benefits conferred upon relatively powerless minorities.[2] If preferences turn out to have mostly harmful effects — or even if the effects are often harmful and on balance ambiguous — then the fundamental legal premise for permitting this type of racial classification is gone.

Admissions preferences are often described by universities as essentially tie-breaking exercises or as efforts to create a "level playing field." If this were true it would be hard to imagine any harmful effect on the intended beneficiaries. But in fact the racial preferences used by the University of Texas, and those used by most flagship state universities, elite colleges, and graduate professional schools are very large indeed.[3] Those blacks and Hispanics who are admitted due to preferences typically enter with markedly less academic preparation (as measured by test scores and high school/college records) than nearly all of their white and Asian classmates.

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[2] This has always been implicit and often explicit in the Court's opinions. *E.g.*, *Grutter*, 549 U.S. 309, 313-14, 316, 331-33 (2003); *Regents of University of California v. Bakke*, 438 U.S. 265, 325 (1978) (joint opinion of Brennan, White, Marshall and Blackmun, JJ).

For example, among freshmen entering the University of Texas at Austin in 2009 who were admitted outside the top-ten-percent system, the mean SAT score (on a scale of 2400) of Asians was a staggering 467 points and the mean score of whites was 390 points above the mean black score. In percentile terms, these Asians scored at the 93rd percentile of 2009 SAT takers nationwide, whites at the 89th percentile, Hispanics at the 80th percentile, and blacks at the 52nd percentile.[4]

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[3] T.J. Espenshade, C.Y. Chung, and J.L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 Social Science Quarterly 1422 (2004); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev.367 (2004).

[4] The mean SAT scores were 1991 for Asians, 1914 for whites, 1794 for Hispanics, 1524 for blacks. The mean GPA's were 3.07, 3.04, 2.83, and 2.57. Univ. of Tex. Off. of Admissions, Implement. and Results of Tex. Aut. Admissions Law, (HB 588) at Univ. of Texas, Sec. 1: Demographic Analysis of Entering Freshmen, Fall 2010, at 14 (hereafter "Demographic Analysis") http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf. Data on distribution of 2009 SAT takers is from College Board, SAT Percentile Ranks for Males, Females, and Total Group http://professionals.collegeboard.com/profdownload/sat_percentile_ranks_composite_cr_m_w.pdf

For decades, it was unclear whether very large preferences generally benefited the preferred students (through the positive peer effects of very able classmates) or, on balance, harmed them by subjecting them to academic "mismatch" (because teachers would aim instruction at the median student, and those with weaker preparation would fall behind and learn less).[5] A growing array of evidence suggests that mismatch effects predominate.

A. Studies Of Preferred Minorities' Low Grades, Abandonment Of Initial Aspirations By Shunning Hard Courses, Low Graduation Rates, And Bar Exam Failure Rates Show Academic "Mismatch" To Be A Costly Side-Effect Of Racial Preferences

1. It is now generally conceded that large admissions preferences — regardless of whether these are based on race, "legacy" considerations, or other factors — cause students to receive lower grades. The median black receiving a large admissions preference to an elite law school, for example, ends up with grades that put her at the 6th percentile of the white grade distribution — an effect that is almost entirely due to the preference itself.[6] (Data made available to researchers *after* the *Grutter* decision revealed that 60% of blacks admitted to the University of Michigan Law School had GPAs in

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[5] See Esther Duflo, Pascaline Dupas, and Michael Kremer, *Peer Effects, Teaching Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya*, 101 American Economic Review 1739 (2011) for an outstanding overview of the learning tradeoffs between separating -- and placing in a single classroom -- students with very different levels of academic preparation.

[6] Sander, *supra* note 3, 57 Stan. L. Rev. at 425-36.

bottom tenth of their class.)[7] Low grades interconect with other preference-related problems, as discussed below.

2. Dartmouth psychologist Rogers Elliott and several colleagues published a study in 1996 that found very high attrition rates from the sciences in four Ivy League schools for students admitted with large preferences.[8] Students who had weaker academic preparation than their peers were particularly vulnerable in science and engineering classes, where grading is on a rigid curve, professors often teach at a challenging pace and material builds sequentially from one course to the next. Students with significantly weaker preparation than the median student can become overwhelmed, and consequently transfer to less rigorous majors at a high rate. This phenomenon came to be known as "science mismatch," because similar students attending less elite colleges appeared to have higher persistence rates in science. The cumulative effect is that even though black entering freshmen have levels of interest and aspiration in science comparable to (or higher than) whites,

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[7] See Richard Sander, *Do Elite Schools Avoid the Mismatch Effect?* http://www.elsblog.org/the_empirical_legal_studi/2006/09/do_elite_school.html (September 2006) ("In the 5-year [Michigan] Alumni dataset, the mean final (standardized) GPA of black respondents is -1.48; in the 15-year [Michigan] Alumni dataset, it's the same. Interestingly, in the PDS dataset [another survey of Michigan graduates], the mean final GPA of black respondents is even lower, -1.75. These are very low figures – translated, they imply that over 60% of Michigan's black students are in the bottom tenth of their classes.")

[8] Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier and Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Research in Higher Education 681 (1996).

they make up only a small proportion of those with degrees in science and engineering.[9]

This tendency for students admitted based on large preferences to transfer out of difficult majors at high rates was recently confirmed by a study at Duke University.[10] A direct test of the "science mismatch" hypothesis, using data from the University of California, also found strong evidence of the effect.[11] In 2008, the U.S. Civil Rights Commission held hearings on the problem, and issued a report that expressed great concern about the role of racial preferences in undermining minority graduation from science and engineering programs.[12] So far as we are aware, no scholar has shown any of these findings to be in error.

3. In 2003, sociologists Stephen Cole and Elinor Barber (by then deceased) published *Increasing Faculty Diversity*,[13] a study of the minority "pipeline" problem in academia. Drawing on questionnaires and other detailed data from 7,612 graduating seniors at 34 colleges, Cole and Barber found significant evidence that large racial preferences were hurting the minority pipeline to academia. Such

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[9] *Id.* at 681-82, 699-702.

[10] Peter Arcidiacono, Esteban M. Acejo, and Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice* (2011 working paper, available at http://www.seaphe.org/working-papers/)

[11] See Richard Sander and Roger Bolus, *Do Credential Gaps in College Reduce the Number of Minority Science Graduates?* (2009 working paper, available at http://www.seaphe.org/working-papers/).

[12] U.S. Commission on Civil Rights, *Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers*, Briefing Report, October 2010.

[13] Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* (Harvard University Press 2003).

students tended to get significantly lower grades and struggle academically, hurting their self-confidence. The idea of pursuing a doctorate to enter academia became less appealing, even among those who had started college with that ambition.[14] Similar students at colleges with smaller or no racial preferences were far more likely to do well, develop self-confidence, and pursue their original goals.[15]

The Cole and Barber finding was striking in part because it was emphatically contrary to the assumptions of the authors' funders and sponsors — Ivy League presidents and foundations that passionately supported racial preferences in admissions. Yet we are unaware of any comparable research that contradicts their conclusion.[16]

4. In 2005, one of the authors of this brief (Sander) published in the Stanford Law Review an analysis suggesting that large racial preferences seriously damaged the academic performance of black law students, contributing to lower graduation rates and much lower success rates on bar exams.[17] The law school setting is uniquely appropriate for studying the mismatch effect, because – unlike in college and many graduate programs – there are more or less uniform tests taken by graduates to measure their legal learning. There are also huge racial disparities in outcomes: blacks entering law school are only half as likely as their white peers ever to become lawyers.[18]

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[14] *Id.* at 116-21.

[15] *Id.* at 208.

[16] See *id.* at xi-xii; Robin Wilson, *The Unintended Consequences of Affirmative Action*, Chronicle of Higher Education, January 31, 2003 at 10.

[17] Sander, *supra* note 3, 57 Stan. L. Rev. at 440-48.

[18] For a discussion of recent trends in black bar passage, see Richard Sander, *Are Black/White Disparities in Graduation*

Unlike the "science mismatch" and "academic mismatch" research discussed above, Sander's "law school mismatch" research generated extensive public discussion, and many critiques have been published.[19] Although Sander's data and calculations have been confirmed by replication,[20] several of the critics have advanced alternate empirical models to test whether the mismatch effect is large enough to actually reduce the number of black lawyers produced each year. As economist Doug Williams has pointed out, almost none of these social science critiques have disputed the central contention of the law school mismatch hypothesis: that large preferences undermine learning in law school.[21] Indeed, using some of the same models employed by critics, Williams has demonstrated that the basic finding – that large preferences substantially reduce the rate at which a given student will graduate and pass the bar on his first attempt — holds up robustly under a wide variety of tests.[22]

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and Passing the Bar Getting Worse, or Better? http://www.elsblog.org/the_empirical_legal_studi/2006/09/sander_2_black_.html

[19] http://www2.law.ucla.edu/sander/Systemic/Critics.htm catalogs a number of the critiques.

[20] See, e.g., Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?* 57 Stan. L. Rev. 1807, 1808 n. 4 (2005); Richard Sander, *A Reply to Critics*, 57 Stan. L. Rev..1963, 1984-86 (2005).

[21] Doug Williams, *Does Affirmative Action Create Educational Mismatches in Law Schools*? (2009 working paper, available at http://www.seaphe.org/working-papers/).

[22] Doug Williams, *Do Racial Preferences Reduce Minority Learning in Law Schools?* (2011 working paper, available at http://www.seaphe.org/working-papers/).

Some of the critics have not themselves stood up to scrutiny. For example, in 2007 law professor Katherine Barnes published a widely-discussed critique of Sander that turned out to be based on erroneous calculations. In her corrected version, published this year, Barnes found that, if eliminating racial preferences in law schools reduced the number of black matriculants by 21%, the number of blacks to graduate and pass the bar exam (including those passing after multiple attempts) would nonetheless remain the same.[23] This implies that the success rate of black law students would rise sharply, with the number who never become lawyers falling by more than half.[24]

5. The social science literature arguing that racial preferences do not hurt the intended beneficiaries has overwhelmingly focused on graduation rates from college. Some studies find that graduation rates are undermined by large preferences, and some find that they are not.[25] But the controversy may be more apparent than real. Graduation rates are under the control of college administrators, who can adjust

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[23] Katherine Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?: A Correction, A Lesson, and an Update*, 105 Northwestern L. Rev. 791 (2011).

[24] Doug Williams, Richard Sander, Marc Luppino, and Roger Bolus, *Revisiting Law School Mismatch: A Comment on Barnes (2007, 2011)*, 105 Northwestern L. Rev. 813 (2011).

[25] *Compare* William G. Bowen and Derek Bok, *The Shape of the River* (Princeton University Press 1998) 59-70 (high graduation rates for racial-preference recipients at more selective institutions) *with* Linda Loury and David Garman, *College Selectivity and Earnings*, 13 Journal of Labor Economics 289 (1995) *and* Audrey Light and Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?* 35 Journal of Human Resources 299 (2000).

policies or inflate grades to minimize academic "failures." This is common at elite private colleges.[26] But a student can graduate and still be harmed by science mismatch, academic mismatch, and lower grades, aspirations, and academic self-confidence.

B. Experience at the University Of California Provides a Uniquely Valuable Perspective on Racial Preferences' Effects

1. In 1996, California voters passed Proposition 209, which banned the use of racial preferences in state programs, including in university admissions. The University of California implemented this ban starting with freshmen matriculating in the fall of 1998. The aftermath is a uniquely valuable but understudied "real-world" experiment in what happens when racial preferences are eliminated.

The University in 1998 had eight undergraduate campuses (a ninth was added in 2005); all are considered excellent colleges, but they span a wide range of academic competitiveness. For example, the median SAT at UC Berkeley is a couple hundred points higher than the median SAT at the least "elite" of the eight campuses.[27] Proposition 209, by eliminating racial preferences, reduced the number of blacks and Hispanics admitted to UC's most elite campuses. But most of those "displaced" students ended up at other UC campuses.[28]

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[26] Stuart Rojstaczer and Christopher Healy, *Grading in American Colleges and Universities*, Teachers College Record (March 2010).

[27] Richard Sander, *An Analysis of the Effects of Proposition 209 Upon the University of California* (2011 working paper, available at http://www.seaphe.org/working-papers/).

[28] *Id.*

2. In the immediate aftermath of 209's implementation, black enrollment fell by about half at the UC's most elite campuses and fell systemwide (for all eight campuses) by almost 20%.[29] Strikingly, with the elite campuses not able to achieve their usual levels of minority enrollment through simple racial preferences, both Berkeley and UCLA launched significant efforts to improve K-12 education in their communities and to increase the number of strong minority candidates.[30] Most UC schools also introduced socioeconomic preferences. Although much smaller than the racial preferences had been, these made Berkeley and UCLA by far the most socioeconomically diverse elite college campuses in the nation. They also added some racial diversity.[31]

At present, by a wide range of metrics — including relative to state population share and changes in total UC enrollment — black and Hispanic enrollments at UC are higher than before Proposition 209.[32] UC black enrollment had returned to pre-209 levels by 2002 and averaged some 40% above pre-209 levels by 2007-1010.[33] The various post-209 changes in campus policies had even more positive effects on Hispanic enrollments. By 2000, Hispanic enrollment UC-wide had reached a new record, and by 2008 Hispanic enrollment UC-wide was double its pre-209 levels.[34]

3. If blacks and Hispanics were often "mismatched" before Proposition 209, we would expect their academic performance and graduation rates to have risen after 209. Exactly this happened, though

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

just how large the increase has been depends on the actual periods compared.

From 1992-94 to 1998-2005, black four-year graduation rates UC-wide improved by more than half and black six-year graduation rates improved by a fifth. Similar improvements occurred for Hispanics. Black and Hispanic GPAs also increased post-209, even though more minority students were sticking with less-generously-graded science and engineering studies.[35] Transfers of minority students increased sharply too — once again, as predicted by mismatch theory.

All of this helps explain why by the time the early post-209 cohorts had worked their way through the UC system, the University of California was graduating dramatically more blacks and Hispanics than at any time in its history.[36]

4. A common argument for engineering diversity through racial preferences is the perceived need for a "critical mass" of members of each minority group at each school — or even in every classroom. This notion helped spur complaints that Proposition 209 had "resegregated" the UC system. The ironic truth is that blacks were significantly more integrated across UC campuses after 209 than before.[37] Pre-209, Berkeley and UCLA had used very large racial preferences to compete aggressively with the less elite campuses for black freshmen; as a result, about half of all blacks enrolling at UC in the early 1990s went to the two elite campuses. After Proposition 209, blacks became more evenly distributed across all eight campuses.[38]

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Id. The "index of dissimilarity" for blacks and non-blacks across UC campuses was 0.21 in 1996 and 0.18 in 2001. *Id.*

Research suggests a similar pattern nationally; scholars have found that the use of large racial preferences by elite colleges has the effect of reducing diversity at second-tier schools.[39]

5. Another important question about racial preferences is whether they help motivate minority high school students or, to the contrary, make it easier for them to coast into selective colleges. Careful research on 209's effect upon minority high school students is still underway, but the one central fact supports the second hypothesis: The proportion of black California high school students whose academic performance put them in the top tenth of all students jumped by more a third in the first cohort affected by Proposition 209, and continued to rise in subsequent years.[40] This suggests that strong black high school students may have raised their games as UC preferences disappeared.

II. Other Research Suggests That *Grutter* And *Gratz* Have Not Had Their Intended Effects Of Preventing Racial Balancing, Fostering Diversity Without Undue Reliance On Race, And Preparing For An End To Preferences By 2028

Gratz and *Grutter* expressed strong misgivings about racial preferences in admissions. They sought to ban particularly heavy-handed uses of race and to set higher education on a course towards phasing out such preferences altogether. The available quantitative evidence suggests that these decisions have had the opposite of their intended effects.

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[39] Peter Arcidiacono, Shakeeb Khan, and Jacob Vigdor, *Representation versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?* (forthcoming in J. of Pub. Ec. 2011) (available at http://www.seaphe.org/working-papers/).

[40] Sander, *supra* note 27.

A. *Grutter's* Holding Was Largely Derived From A Simple Empirical Error

1. In determining that the University of Michigan Law School's racial preferences were constitutional and the undergraduate College's were not, the Court placed great importance on the fact that the Law School used a "highly individualized, holistic review of . . . all the ways an applicant might contribute to a diverse educational environment." *Grutter,* 539 U.S at 337. The Court said that the College's "point" system, on the other hand, gave far more weight to the "mechanical, predetermined diversity 'bonuses' based on race or ethnicity," *id.*, than to "the differing backgrounds, experiences, and characteristics" of students from non-preferred groups, *Gratz,* 539 U.S. at 273 (2003). The Court inferred that the Law School gave less weight to race and more to multiple other "diversity" factors.

2. Two major analyses after *Grutter* and *Gratz* by legal empiricists of diverse views and methodologies reached the same definitive conclusion: Contrary to the Court's inference, the racial preferences used by the University of Michigan Law School before *Grutter* and *Gratz* were larger and more mechanical than those used by the College.[41] Race was more often the deciding factor in an application at the Law School than at the College. And the Law School gave less weight to other diversity factors. "Holistic" admissions did not produce the outcomes that the Court said it desired; they simply made it harder for students, parents, and other non-experts to deduce

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[41] Ian Ayres and Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz,* 85 Tex L. Rev. 517 (2007); Sander, *supra* note 3, 57 Stan. L. Rev. at 400-410. Ayres strongly supports racial prefrerences; Sander is a skeptic.

how the Law School's admissions system actually worked.[42]

3. The data on practices since *Grutter* and *Gratz* confirms this point. For example, the University of Michigan undergraduate College had fully shifted, by the 2005-06 admissions year, to the kind of "holistic" system mandated by the Court. Analysis of the College's admissions data shows that, in 2005-06, it gave substantially greater weight to race, more often making it the decisive factor in individual admissions decisions, than it had under the pre-*Gratz* point system.[43]

The new system also pursued proportionate racial prepresentation — the essence of the "racial balancing" that Justice O'Connor held to be "patently unconstitutional" — by systematically preferring blacks over better-prepared Hispanics. The same is true at the University of Texas, whose data for enrolled freshmen admitted outside the Top-Ten-Percent system show very large preferences for blacks not only over whites and Asians but also over Hispanics. The mean Hispanic SAT score and high school GPA were 1794 and 2.83; the corresponding numbers for blacks were 1524 and 2.57. The data also show substantial preferences for whites over Asians, who could be seen as objects of systematic discrimination.[44]

4. Admissions data from a sample of six state law schools (including the University of Michigan Law School) from 2002-03 and 2005-07 shows that,

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[42] See also *Gratz*, 349 U.S. at 305 (Ginsburg, J., dissenting), 297-98 (Souter, J., dissenting).

[43] Richard Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, forthcoming in Kevin McGuire, ed., New Directions in Judicial Politics (2012) (available at http://www.seaphe.org/working-papers/).

[44] See Demographic Analysis, *supra* note 4.

on average, their racial preferences became both larger and more mechanical after *Grutter* and *Gratz*.[45] There is no evidence that these schools give substantial weight to any other diversity factor than race -- and, as we discuss below, students admitted from all racial groups at such schools are overwhelmingly from relatively privileged backgrounds.[46] Analysis of a much larger sample of public law schools (over forty) shows that the patterns at the six law schools in the smaller sample are representative of national patterns.[47]

B. Contrary To The Court's Expectation In *Grutter* That Racial Preferences Would Be Phased Out Over 25 Years, There Is Little Evidence After Eight Years That Respondent Or Any Other University Has Any Such Intent

In *Grutter*, Justice O'Connor held that "race-conscious admissions policies must be limited in time [and] must have a logical end-point," and specified that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary." 539 U.S. at 343. One-third of that period has elapsed. We are aware of no organized effort by higher education leadership to phase out preferences, or even to formulate a plan for doing so. To the contrary, the evidence cited above is illustrative of the actual patterns since *Grutter*: Preferences have become larger and more pervasive.

The *Fisher* case illustrates a similar trend: In states that had developed successful efforts to shift to race-neutral admissions, post-*Grutter* initiatives in Texas have reintroduced preferences under rationales[48] at war with *Grutter*'s assertion that the Constitution forbids "[e]nshrining a permanent justification for racial preferences," 539 U.S. at 342. Powerful interest groups in states that have banned racial preferences in admissions, notably California, are constantly seeking to overturn or evade the bans.[49]

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[45] Sander, *supra* note 43.

[46] Richard Sander, *Class in American Legal Education*, 89 University of Denver Law Review 631, 651 (2011).

[47] Sander, *supra* note 43.

The drift of policy is unmistakably towards using large racial preferences for many decades, or even centuries, in pursuit of proportional representation of every racial and ethnic group at every higher education institution.

Meanwhile, despite this Court's optimism in *Grutter* that the number of qualified minority applicants was increasing, 539 U.S. at 343, indisputable data show that the racial gap in academic preparation widened substantially from 1989 until 1999[50] and at least slightly on some tests in the past decade.[51] Numerous studies show that on average blacks do not catch up with their white classmates during college or graduate school. They tend to fall farther behind.[52]

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[48] As Judge Garza pointed out in his special concurrence, "the University's reliance on race at the departmental and classroom levels will, in practice, allow for race-based preferences in seeming perpetuity." App. 87a

[49] See, e.g., Editorial, "We're sorry Californians voted for Prop 209. But the Legislature's attempt to undo it is wrong," *Los Angeles Times* (Oct. 6, 2011) at 18; Peter Wood, *A Veto for Racial Preferences,* Chronicle of Higher Education, Oct. 12, 2011, http://chronicle.com/blogs/innovations/.

[50] Abigail and Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, Constitutional Commentary 209, 224-27 (2004) (racial gaps in reading, mathematics, and science scores at the end of high school on federally-administered National Assessment of Educational Progress (NAEP) tests and similar pattern with SAT scores). See also *Id.* at 227 ("In 1999, . . . [w]hite students were 9.8 times as likely as their black peers to score 750 or better on the verbals, and 13.1 times as likely to do that well in math.")

III. Key Assumptions Accepted By The Court Below Are Doubtful: Evidence Suggests Large Racial Preferences Add Little Classroom Diversity And Do Not Make the University More Attractive To Minority Candidates

A. Self-Segregation Into "Soft" Courses by Recipients of Large Preferences Limits Classroom Diversity

1. As noted above, a pervasive characteristic of large admissions preferences is that the recipients are at a competitive disadvantage in courses. Many of them consequently seek out courses and majors where they will suffer least — academically and personally — from their relatively weaker preparation. Over time, this means that students admitted with large preferences tend to concentrate in the "softest" majors and courses.[53]

This process of self-segregation directly undercuts a central premise of UT's reintroduction of racial preferences in 2004. Officials justified the new preferences primarily on the ground that too many courses at the University lacked meaningful "diversity," meaning a significant presence of blacks and Hispanics. App. 23a, 156a-157a. But admitting students with large racial preferences is not an effective strategy for diversifying classrooms. The larger the preference, the more ill-prepared students will self-segregate into soft majors and courses. UT's policy will at best produce a high ratio of racial engineering to classroom diversity — the opposite of "narrow tailoring."

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[51] For example, the white-black gap in combined verbal and math SAT scores rose from 196 points in 2000 to 208 in 2011. *See* College Board, *2000 College-Bound Seniors: A Profile of SAT Program Test Takers* at 6; *College-Bound Seniors 2011* at 3, http://professionals.collegeboard.com/profdownload/cbs2011_total_group_report.pdf/ /

[52] E.g., Thernstrom, *supra* note 50, at 227-32; Sander, *supra* note 3, at 435-36; Bowen & Bok, *supra* note 25, at 77.

[53] Arcidiacono *et al., supra* note 10.

2. Such self-segregation into soft courses will result from any system of admissions preferences that create large disparities in academic preparation within the student body. Most relevant here, the Texas Top Ten Percent plan, whatever its merits in advancing diversity, created a student body with very wide disparities in academic preparation, largely (though not entirely) along racial lines. This may well explain the fact that, according to the University of Texas, classroom diversity decreased between 1996 and 2002 even though minority enrollment increased. App. 86a.

B. Experience After Racial Preferences Were Banned At The University Of California Shows A "Warm ing" Effect On Minority Applications And Enrollments

1. Respondents have advanced the familiar argument that racial preferences are vital to persuade racial minorities that they are "welcome" on a college campus, and that reducing preferences would have what some call a "chilling effect" on minorities' interest. And the court below suggested that minorities were discouraged from attending UT after it implemented *Hopwood*. But the best available evidence suggests that this is a myth, and that in fact bans on racial preferences seem to produce a "warming effect," making the affected institutions more

desirable — not less — to prospective black and Hispanic students.

2. An authoritative analysis by two leading labor economists, David Card and Alan Krueger, found that the propensity of highly-qualified blacks to apply to Berkeley, UCLA, and the University of Texas at Austin did not meaningfully change after those schools implemented bans on racial preferences.[54]

3. Strikingly, labor economist Kate Antonovics and Richard Sander (a coauthor of this brief) found that black and Hispanic students admitted to the UC system after the race-preferences ban were substantially more likely to accept the offer and enroll, compared to similarly qualified students before Prop 209.[55] This "warming effect" for blacks and Hispanics at UC Berkeley was approximately 15%. Although we do not know why this happened, the available evidence is consistent with the hypothesis that these students believed their diplomas would be more valuable without the taint of being presumed to have been admitted because of their race.

4. This reinforces all of the findings discussed in Part I of this brief. While race-based advocacy groups overwhelmingly express support for racial preferences, the warming effect evidence suggests that individually, many blacks and Hispanics strong-

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[54] David Card and Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 Industrial & Labor Relations Review 416 (2005). Card & Krueger examined "highly-qualified" blacks because their admission chances would be minimally affected by the ban, which reduced the chances most other blacks; students are less likely to apply when their admission chances are low.

[55] Kate Antonovics and Richard Sander, *Affirmative Action Bans and the Chilling Effect* (2011 working paper, available at http://www.seaphe.org/working-papers/).

ly prefer to avoid settings where they may be stigmatized by a racial preference.

IV. The Lack Of Socioeconomic Diversity At Elite Schools Refutes The Notion That Large Racial Preferences Can Qualify As Narrowly Tailored

1. An outpouring of research since *Grutter* and *Gratz* has documented the shocking lack of socioeconomic diversity in the upper reaches of higher education. Whether we measure "socioeconomic status" (hereafter "SES") by the incomes, education, or occupations of a student's parents (or some combination), highly selective colleges draw three-quarters of their students from the top quartile of the SES spectrum, and half from the top tenth.[56] A young person from the bottom quartile of the SES distribution is less than one-hundredth as likely to attend a "top ten" law school as a young person from the top tenth of the SES distribution.[57]

2. Low-and-moderate-SES students can confer as much or more intellectual and viewpoint "diversity" benefit upon universities, the available research and real-world observation suggest, as the mostly high-SES racial minorities currently favored by preferential admissions.[58] By recruiting and giving admissions preferences to such low-and-moderate-SES students, universities could also increase social mobility in, and the legitimacy of, American institutions no less than do their current racial preference

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[56] Anthony Carnevale and Stephen Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in Richard Kahlenberg, editor, America's Untapped Resource: Low-Income Students in Higher Education (2004).

[57] Richard Sander, *supra* note 46 (2011).

[58] Richard Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 89 Denv. L. Rev. 881 (2011).

programs.[59] Favoring low-and-moderate-SES students could also increase racial diversity (if not as much as racial preferences) because disproportionate numbers of low-and-moderate-SES students are black and Hispanic. So socioeconomic preferences could confer net diversity benefits equal to or greater than racial preferences without the costs of spurring resentment among non-preferred racial groups and straining fundamental equal protection principles.

3. Many low-and-moderate-SES students are better-prepared for college and graduate school at every level of selectivity than most of black and Hispanic students currently entering those schools under preferential admissions programs.[60]

4. But while universities often imply that their "diversity" policies embrace socioeconomic disadvantage, the available evidence suggests that the vast majority do very little to recruit or to give admissions preferences to low-and-moderate-SES students, and that their racial-preference programs do very little to foster SES diversity because the vast majority of preferentially admitted blacks and Hispanics are from relatively privileged backgrounds.[61] Indeed, data from law schools suggests that low-or-moderate SES is a *disadvantage* in admissions, when controlling for other credentials like LSAT scores and college grades.[62]

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[59] *Id.* We submit that the following from *Grutter*, 539 U.S. at 332, is equally true of low-and-moderate SES students: "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training [for future leaders]."

[60] Sander, *supra* note 58.

[61] Sander, *supra* note 46, at 651.

[62] *Id.* at 657.

5. The principle that racial classifications must be a last resort[63] and the above-cited empirical data showing a rich, untapped supply of low-and-moderate-SES students who could enhance diversity point to the same conclusion:

The narrow-tailoring requirement should be interpreted to mean that universities must subordinate racial preferences to socioeconomic ones. Specifically, any university seeking to continue to use racial preferences should first have the burden of proving that (a) socioeconomic preferences could not provide educational benefits as valuable as those provided by racial preferences; and (b) any racial preferences that can still be justified will be no larger than the same school's socioeconomic preferences.

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[63] *E.g.*, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No.* 1, 551 U.S. 701, 735 (2007); *id.*, at 789-90 (Kennedy, J., concurring in part and concurring in the judgment) ("individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest"); *Grutter*, 539 U.S. at 339; *Id.*, at 387-95 (Kennedy, J., dissenting).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Counsel of Record	*Counsel for Amicus Curiae*

OCTOBER 2011

DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-345
Title: Abigail Noel Fisher, Petitioner
v.
University of Texas at Austin, et al.
Docketed: September 19, 2011
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (09-50822)
Decision Date: January 18, 2011
Rehearing Denied: June 17, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Sep 15 2011	Petition for a writ of certiorari filed. (Response due October 19, 2011)
Sep 27 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Oct 12 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Oct 19 2011	Brief amici curiae of Gail Heriot, Peter Kirsanow, and Todd Gaziano, Commissioners filed.
Oct 19 2011	Brief amici curiae of California Association of Scholars,et al. filed.
Oct 19 2011	Brief amici curiae of Richard Sander, and Stuart Taylor, Jr. filed.
Oct 19 2011	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Oct 19 2011	Brief amicus curiae of Asian American Legal Foundation filed.
Oct 19 2011	Brief amicus curiae of Mountain States Legal Foundation filed.
Oct 31 2011	DISTRIBUTED for Conference of November 22, 2011.
Oct 31 2011	Response Requested . (Due November 30, 2011)
Nov 8 2011	Order extending time to file response to petition to and including December 7, 2011.
Dec 7 2011	Brief of respondents University of Texas at Austin, et al. in opposition filed.
Dec 20 2011	Reply of petitioner Abigail Noel Fisher filed.
Dec 21 2011	DISTRIBUTED for Conference of January 13, 2012.
Jan 17 2012	DISTRIBUTED for Conference of January 20, 2012.
Feb 3 2012	DISTRIBUTED for Conference of February 17, 2012.
Feb 21 2012	Petition GRANTED. Justice Kagan took no part in the consideration or decision of this petition.
Feb 22 2012	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents.

Mar 12 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 21, 2012.
Mar 12 2012	The time to file respondents' brief on the merits is extended to and including August 6, 2012.
May 1 2012	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
May 16 2012	Brief amicus curiae of Texas Association of Scholars filed.
May 21 2012	Joint appendix filed (with Supplemental volume). (Statement of costs filed)
May 21 2012	Brief of petitioner Abigail Noel Fisher filed.
May 24 2012	Brief amicus curiae of Center for Individual Rights filed.
May 25 2012	Brief amicus curiae of Mountain States Legal Foundation filed.
May 25 2012	Brief amicus curiae of The Honorable Allen B. West, Member of Congress and Lieutenant Colonel, United States Army (Ret.) filed.
May 29 2012	Brief amici curiae of California Association of Scholars, et al. filed.
May 29 2012	Brief amici curiae of Louis D.Brandeis Center for Human Rights Under Law, et al. filed.
May 29 2012	Brief amici curiae of Richard Sander, and Stuart Taylor, Jr. filed.
May 29 2012	Brief amicus curiae of Gail Heriot, et al. filed.
May 29 2012	Brief amici curiae of Judicial Watch, Inc., et al. filed.
May 29 2012	Brief amici curiae of Asian American Legal Foundation, et al. filed.
May 29 2012	Brief amicus curiae of American Civil Rights Union filed.
May 29 2012	Brief amici curiae of Pacific Legal Foundation, et al. filed.
May 29 2012	Brief amicus curiae of Equal Employment Advisory Council in support of neither party filed.
May 29 2012	Brief amici curiae of Abigail Thernstrom, et al. in support of neither party filed.
May 29 2012	Brief amicus curiae of Southeastern Legal Foundation, Inc. filed.
May 29 2012	Brief amicus curiae of Cato Institute filed.
May 29 2012	Brief amicus curiae of American Center for Law and Justice filed.
May 29 2012	Brief amici curiae of Scholars of Economics and Statistics filed.
May 29 2012	Brief amici curiae of Current and Former Federal Civil Rights Officials filed.
Jul 13 2012	CIRCULATED.
Jul 23 2012	SET FOR ARGUMENT ON Wednesday, October 10, 2012
Aug 1 2012	Record received from U.S.C.A. for 5th Circuit. (1 box)
Aug 2 2012	Record received from U.S.D.C. for Western District of Texas. (1 box)
Aug 6 2012	Brief of respondents University of Texas at Austin, et al. filed. (Distributed)
Aug 8 2012	Brief amicus curiae of National Black Law Students Association filed. (Distributed)
Aug 9 2012	Brief amicus curiae of University of North Carolina at Chapel Hill filed. (Distributed)
Aug 9 2012	Brief amicus curiae of Harvard Graduate School of Education Students for Diversity filed. (Distributed)
Aug 9 2012	Brief amici curiae of American Association for Affirmative Action filed. (Distributed)
Aug 9 2012	Brief amici curiae of American Social Science Researchers filed. (Distributed)
Aug 10 2012	Brief amici curiae of Emory Outlaw and Emory Latin American law Students Association filed. (Distributed)
Aug 10 2012	Brief amicus curiae of Anti-Defamation League filed. (Distributed)

Aug 10 2012	Brief amici curiae of Amherst, et al. filed. (Distributed)
Aug 10 2012	Brief amici curiae of Human Rights Advocates, et al. filed. (Distributed)
Aug 10 2012	Brief amici curiae of Fordham University, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Social and Organizational Psychologists filed. (Distributed)
Aug 13 2012	Brief amici curiae of Coalition of Bar Associations of Color filed. (Distributed)
Aug 13 2012	Brief amici curiae of Asian American Legal Defense and Education Fund, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Association of American Medical Colleges, et al. filed. (Distributed)
Aug 13 2012	Brief amicus curiae of the United States filed. (Distributed)
Aug 13 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 13 2012	Brief amici curiae of Former Student Body Presidents of University of Texas at Austin filed. (Distributed)
Aug 13 2012	Brief amici curiae of 38 Current Members of the Texas State Senate and House of Representatives filed. (Distributed)
Aug 13 2012	Brief amici curiae of Ruben Hinojosa, member of Congress, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Distinguished Alumni of the University of Texas at Austin filed. (Distributed)
Aug 13 2012	Brief amici curiae of National Women's Law Center, et al. filed. (Distributed)
Aug 13 2012	Brief amicus curiae of Law School Admission Council filed. (Distributed)
Aug 13 2012	Brief amici curiae of National Latino Organizations filed. (Distributed)
Aug 13 2012	Brief amici curiae of Fortune-100 and other leading American businesses filed. (Distributed)
Aug 13 2012	Brief amici curiae of Dean Robert Post and Dean Martha Minow filed. (Distributed)
Aug 13 2012	Brief amicus curiae of Howard University School of Law Civil Rights Clinic filed. (Distributed)
Aug 13 2012	Brief amici curiae of Constitutional Law Scholars and Constitutional Accountability Center filed. (Distributed)
Aug 13 2012	Brief amici curiae of National Association of Basketball Coaches, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of 28 Undergraduate and Graduate Student Organizations within the University of California filed. (Distributed)
Aug 13 2012	Brief amici curiae of New York, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Former Commissioners and General Counsel of the FCC, et al. filed. (Distributed)
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Aug 13 2012	Brief amici curiae of Empirical Scholars filed. (Distributed)
Aug 13 2012	Brief amici curiae of the Advancement Project filed. (Distributed)
Aug 13 2012	Brief amici curiae of NAACP, et al. filed. (Distributed)
Aug 13 2012	Brief amicus curiae of Teach for America, Inc. filed. (Distributed)
Aug 13 2012	Brief amici curiae of National League of Cities, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)
Aug 13 2012	Brief amicus curiae of Houston Community College System filed. (Distributed)
Aug 13 2012	Brief amici curiae of Black Student Alliance at the University of Texas at Austin, et al.

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Aug 13 2012	Brief amici curiae of American Council on Education, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of American Educational Research Association, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Members of Asian American Center for Advancing Justice, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Council for Minority Affairs at Texas A&M, et al. filed. (Distributed)
Aug 13 2012	Brief amicus curiae of Society of American Law Teachers filed. (Distributed)
Aug 13 2012	Brief amici curiae of California Institute of Technology, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Small Business Owners and Associations filed. (Distributed)
Aug 13 2012	Brief amici curiae of American Jewish Committee, et al. filed. (Distributed)
Aug 13 2012	Brief amicus curiae of American Psychological Association filed. (Distributed)
Aug 13 2012	Brief amici curiae of Brown University, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Applachian State University, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of U.S. Senators Harry Reid, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of President and Chancellors of the University of California filed. (Distributed)
Aug 13 2012	Brief amicus curiae of New York State Bar Association filed. (Distributed)
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Aug 13 2012	Brief amicus curiae of American Bar Association filed. (Distributed)
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Aug 13 2012	Brief amici curiae of National Education Association, et al. filed. (Distributed)
Aug 13 2012	Brief amicus curiae of American Civil Liberties Union filed. (Distributed)
Aug 13 2012	Brief amicus curiae of David Boyle filed. (Distributed)
Aug 13 2012	Brief amicus curiae of United States Student Association filed. (Distributed)
Aug 13 2012	Brief amicus curiae of Kimberly West -Faulcon filed. (Distributed)
Aug 13 2012	Brief amicus curiae of Family of Heman Sweatt filed. (Distributed)
Aug 13 2012	Brief amici curiae of Lt. Gen. Julius Becton, et al. filed. (Distributed)
Aug 13 2012	Brief amici curiae of Brennan Center for Justice at NYU School of Law, et al. filed. (Distributed)
Aug 13 2012	Brief amicus curiae of United Negro College Fund filed. (Distributed)
Sep 5 2012	Reply of petitioner Abigail Noel Fisher filed. (Distributed)

Sep 25 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Oct 10 2012	Argued. For petitioner: Bert W. Rein, Washington, D. C. For respondents: Gregory G. Garre, Washington, D. C.; and Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Oct 11 2012	Proposal from counsel for the respondents to lodge copies of the 2008 ApplyTexas Application for Admission and the Common Application for Admission.
Oct 16 2012	Lodging proposal of respondent approved. 20 copies of the 2008 ApplyTexas Application for Admission, and the Common Application for Admission received and distributed.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 11-345

In the Supreme Court of the United States

ABIGAIL N. FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS, et al,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Brief of the Texas Association of Scholars As Amicus Curiae In Support of the Petitioner

---

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Interest of Amicus[1]

The Amicus are college and university faculty who teach at institutions of higher education in Texas. They approach this appeal solely as American citizens who are concerned about the future of their country. The Amicus deeply believe in a merit based society and not an "equality of results" society. This desire is what motivates the University of Texas and others who support any form of racially preferential treatment. It does not matter whether that policy is described as "a hard quota" or "a holistic plus-up" or a self-serving need for "diversity". It is wrong under all circumstances. The Constitution's 14th Amendment requires that this practice be banned in state university admissions.

The Texas Association of Scholars is an organization that represents college and university professors through-out Texas. The Association has two key areas of concern. The first is preservation of the ideal that an academic institution of higher learning ought to be a merit based institution. Therefore, no preferential treatment should be accorded, directly or by subterfuge, in the admission of students or the selection or promotion of faculty.

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no counsel for a party, or party, made a monetary contribution to fund the preparation of this brief. No entity or person, aside from the amicus curiae and its counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties consented to the filing of this brief.

The Association opposes the alleged rationales for the University using any type of racially based preferences in its admissions process. These preferences are not only bad law, they are bad educational policy, for sociological, psychological and historical reasons. Therefore, the University of Texas' "holistic" admissions policy must be rejected.

Summary of Argument

The critical, unspoken, issue in this case is the undermining of merit as the outcome determining factor of success in American life. Starting in the mid-13th century, a feudal inspired, caste system existed in Europe, and in many parts of Asia. It still exists in some of those countries today. Ancestry determined destiny. American was founded on the opposite assumption. The preservation of America's merit based society is the unspoken issue in this case.

The University of Texas engages in two racially and ethnically discriminatory admissions practices, which constitute racial and religious discrimination that violates the 14th amendment's Equal Protection requirements.

1. The University of Texas (hereafter either "the University" or "Texas") grants a "plus factor", increasing applicants' chances of admission, based on an applicant being African-American or of Hispanic origin. The University does not grant non-merit "plus-ups" to applicants of Asian-American ancestry or to any religious minority.

As evidence of the University's lack of candor in attempting to justify its racially based "plus up – holistic admissions policy", the University does not impose this policy throughout all of the University undergraduate schools and colleges. There are stringent, non-race based additional admissions requirements for the School of Engineering, the

School of Business Administration and for admissions to undergraduate programs in all branches of engineering, chemistry, physics and the School of Business Administration. There is no "plusing up" in meeting those requirements.

2. Under Texas' Top Ten Percent program the University is required, by State law, to admit any student graduating in the top 10 percent of his or her high school class. Admission is granted irrespective of how that high school's top ten percent stands, in terms of grade point averages relation to the top ten percent of any other high school in the State. A student whose GPA places him (or her) in the top ten percent of that high school's class will be admitted even if, in another school, the identical grade point average would place that student in the bottom 10 percent.

3. The State of Texas claims that racial and ethnic diversity within its student-body is a critical facet of the total educational process and that the challenged practices that enable the State to attain this goal. Nevertheless, *the University employs these discriminatory admissions policies only at the University of Texas main campus in Austin and its satellite campus in Dallas. It is not imposed on its campuses in El Paso, Tyler, Arlington or San Antonio.* If diversity is so critical an educational value, why isn't it required everywhere in the University of Texas System?

Diversity's lack of educational value is further demonstrated by the fact that the entire Texas A&M

University System, including its flag ship campus in College Station, refused to use any form of racially biased admissions criteria. This has not diminished the quality of education at Texas A&M.

In baseball, the size of the strike zone does not change based on the pitcher's race or national origin. Black quarterbacks do not get a 5th down to gain 10 yards, even at the University of Texas. The University's admissions system is Constitutionally required to operate on the same equality of performance standard.

Argument

I. Dr. Martin Luther King Told Americans That We Should Judge Men by the Content of Their Character and Not the Color of Their Skin. The University of Texas Does Not.

A. The University of Texas' Holistic Admissions Policy is a de Facto Quota System. The Use of Such Policies is Banned by This Court's Decision in *Grutter v. Bollinger*.

The University is using a *de facto* quota system to regulate admissions. This is demonstrated by Judge Higginbotham's opinion in *Fisher v. University of Texas,* 631 F. 2d 213 (5th Cir. 2011). Judge Higginbotham stated that the University's race plus admissions program requires "that [it] must [review] an array of variables, *including an ever present question of whether to adjust the percentage of students admitted under the two diversity initiatives*", 631, F. 3d at 217 (emphasis added). In other words, if the number of protected minorities, e.g. African-Americans and Hispanics but not Asian-Americans, admitted is insufficient, then the criteria must be changed in order that an acceptable level of politically protected minorities are admitted the following academic year. This is a *de facto* hard quota.

Under this rubric, an "illegal quota" is not a "quota" when a court says so. Thus, there are no "quotas" unless a university openly states it wants

"10 percent of this group" or "no more than 20 percent of that group" in its freshman class. "Attempting to ensure that the student body contains some specified percentage of a particular racial group "is patently unconstitutional. . .[R]acial balance is not to be achieved for its own sake", *Fisher* at p. 234.

But, without a numerical goal, how does the University decide if its need, "for preparing students for work and citizenship within an increasingly diverse work force" is being met? *See Fisher,* 231 F. 3rd at 219-220. Without a numerical goal, how does the University determine if a protected minority is "underrepresented" unless it has already established "a satisfactory level of representation". How does the University determine if the required "critical mass" has been attained, if it does not use a set numerical target? See *Fisher* at p. 231

Notwithstanding this race conscious policy, various minorities are excluded from the alleged benefits that their presence is supposed to bring to the educational process. There is no "plus up" for students of Asian-American backgrounds, or for students of South American backgrounds, but *only for Hispanics.* That appears to mean exclusively persons of Mexican ancestry. If "Hispanic" means "of Hispanic ancestry", why are students whose parents were born in Spain excluded? If applicants whose parents came from Brazil are included, why exclude students whose parents came from Portugal?

If diversity is of such educational importance, why is religious diversity ignored? The religious backgrounds of applicants, be they Catholic, Jewish, Baha'i, Buddhist, Hindu or any other eastern religion, are of no interest to the admissions office. They are not beneficiaries of the University's "holistic" admissions policy. Clearly, these applicants' diverse religious views, opinions and related life experiences are of value in stimulating classroom and dormitory interaction. Why is "diversity" for these favored groups more educationally important than "diversity" for the disfavored groups?

This Court held, in *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003) that ["The law School's] admissions policy makes it clear that there are many possible bases for diversity admissions." The opinion provided, as examples, admittees who have lived or travelled widely abroad, are fluent in several languages, have overcome personal adversity [or] have exceptional records of extensive community service [or] have had successful careers in other fields". This non-racial standard was held to be constitutional.

The critical difference between the factors enumerated in the prior paragraph and Texas' "racial plus factors" is that those factors are 1) not based on impermissible considerations of race or ethnic background and 2) are quantifiable thus leaving little room for racial prejudice to contaminate the admissions process. This does not validate what the University Michigan did in *Grutter* since it clearly used race as the dominant basis for giving "extra points" to an applicant.

B. The Fifth Circuit's Opinion Conflicts with *Grutter's* Ban on Using Quotas in College Admissions Decisions.

The Fifth Circuit distorted the meaning of the word "quotas" in order to evade *Grutter's* prohibition against hard quotas. The Court redefined the term "quota" into meaningless poetry about "diversity" and its "value to society". When Harvard came under intense criticism for having an outright quota for Jewish students, starting in the 1920s, it sought to evade responsibility for what it was doing by announcing that it wanted "a national student body" meaning more students from the plains states, the Rocky Mountain States and the southwest. Conveniently, those states had few "undesirable" minorities in their populations.

What real difference is there between a fixed number of students (whether admitted or excluded) and "a good faith" effort to come within a range demarcated by the goal itself? Neither the Fifth Circuit, nor the University, ever admit what that precise range is or how the University determines if it has met its "goal" without having established an illegal "quota". The University's "acceptable range" must be based on the percentage of African-American and Hispanics as a percentage of Texas' overall population or another numerical frame of reference. Once such a policy is established, it is a quota no matter how it is linguistically disguised.

The discrimination inherent in the University's admissions policies is amply demonstrated by the 5th Circuit's statement that:

> The District Court expressly found that race can enhance the personal achievement score of a student from any racial background including whites and Asians. For example, *a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student* at the same school, 631 F. 3d at 236, (emphasis added).

Thus, if a white student associates himself or herself with students of a politically protected race or ethnic background, that student's work as a volunteer at a local hospital or soup kitchen is more valuable to society, and therefore more worthy of admission to the University, than that student doing the identical volunteer work but attending a predominantly white high school. If this philosophy is not unconstitutional race discrimination, barred by the 14th amendment, then no policy could be.

C. The University's Top Ten Percent Admissions Requirement is a *De Facto* Quota System.

Texas' Top Ten Percent law requires that the University admit any student in the top 10 percent of his, or her, high school class, irrespective of that applicant's grade point average or SAT scores. This constitutes a *de facto* quota system. Despite its claims that it is not engaged in using an unconstitutional quota, Texas admitted that *the Top Ten percent plan, "was animated by efforts to increase minority enrollment and, to the extent it succeeds, it is because, at key points, it proxies for race". Fisher*, 321 F. 3rd at 243 (emphasis added).

These proxies injure all disfavored or excluded minorities. As Judge Garza stated in his dissent:

> *Courts now simply assume, in the absence of evidence to the contrary, that university administrators have acted in good faith, in pursuing racial diversity. . . [T]he deference called for in Grutter seems to allow universities, rather than the courts, to determine when the use of racial preferences is no longer compelling. . .* This new species of strict scrutiny only that those admissions programs employing the most heavy handed racial preferences. . . will be subject to exacting judicial examination. . .Others, like the University of Michigan, in *Grutter* and the University of Texas, here, can get away with something less", 631 F. 3d at 250 (emphasis added).

D. The Origin of the Top Ten Percent Plan was the Ivy League's Desire to Limit Minority Enrollment by Seeking a "National" Student Body.

Ivy League prejudice formed the basis for a new proposal that Harvard adopted in 1923. Wanting to limit the admission of "undesirable" students, a special Harvard Board of Overseer's Committee recommended that:

> Harvard [will] admit students whose scholastic rank places them in the Top Seventh of their graduating class. . .[This policy is] designed to facilitate the admission of 'a new group of men from the West and South...[T]he *Top One Seventh plan seemed to men like [Charles] Eliot and [Felix] Frankfurter [to be] a thinly disguised attempt to lower the Jewish proportion of the student body by bringing in boys who are – some of them academically ill-equipped for Harvard - from regions of the country where there were few Jews*" (emphasis added).

This proposal was adopted on April 24, 1923. See *Report of the Committee Appointed to Report to the Governing Boards Principles & Methods for More Effective Sifting of Candidates for Admission to the University*, April 1923, cited by Karabel at pages 101-102.

Harvard's Top Seventh admissions policy is very similar to the University's state mandated Top Ten Percent admissions policy. That policy discriminates against students residing in Houston, San Antonio, Dallas and Austin. These students could be in the top 25 percent of their high school class but still have academic qualifications higher than students in the top 10 percent of their classes residing in the 250 rural and small town counties in Texas. It is no accident that those students residing in those 250 counties will substantially tend to be minority group members.

Yale officials were as outspoken as President Lowell in their desire to restrict the admission of Jewish applicants. Robert Corwin, the Chairman of Yale's Board of Admissions wrote that:

> *The [Yale] Corporation's Committee* on Educational Policy has asked me to report. . .*on the number and status of students of Jewish origin now in the Undergraduate Schools and to discuss with the [Committee] the advisability or necessity of concerning measures limiting the number of this race or religion to be admitted to [Yale] college.* . . .We make the serious consideration of this question imperative. Letter from Robert M. Corwin to Fredrick S. Jones, Dean of Yale College, May 3, 1922. See, Professor Marcia Graham Synnott, *The Half Opened Door: Discrimination & Admissions at Harvard, Yale & Princeton, 1900-1970,* at page 125 (emphasis added).

Fifty years later, little in academia has changed. As another example, in 1970, the University of Wisconsin, "introduced a system whereby out-of-state admissions would be reduced to 15 percent. By September 1970, the number of Jewish students had dropped by two-thirds. Marcia Graham Synnott, *The Half Opened Door: The History of Discrimination at*

Harvard, Yale & Princeton (2006) at page 225. One motivation for this quota was that ,"New York Jews were a particular target of some Wisconsin legislators because of the Jews alleged campus 'activism". . .". This policy was denounced as being latently anti-Semitic, Synnott, op. cit. at page 225. Has the University of Texas really behaved differently?

II. The Historical Origin of Texas' Discriminatory Admissions Policies are the Anti-Semitic Admissions Policies Employed by Harvard, Yale, and Princeton Starting in the 1920s.

The Ivy League's history of anti-Jewish discrimination is well documented. *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton,* by Jerome Karabel, details the religious bigotry the controlled admissions at Harvard, Yale, Princeton, and at many other top tier academic institutions, from the early 1920s through the mid-1960s. Strictly enforced quotas barred substantial numbers of students from admission exclusively because they were Jewish. Students with appropriate blue blood and prep school backgrounds were admitted at 5 to 10 times the rate of far better academically qualified Jewish students.

Being Episcopalian or Presbyterian, especially if one had attended Groton, Hotchkiss or St. Paul's especially if coupled with being a legacy (i.e. the son of an alumnus) virtually guaranteed a student's acceptance. The sons of "St. Grottlesex" did not want to associate with socially inferior students. The Jews presence created "*too much* diversity". Now, the same victims of political prejudice are, again, denied admission because "their presence fails to create *enough* diversity". The University of Texas, as did the Universities of Michigan, Washington and California, all employed the mirror image of what the Ivy League did in the 1920s.

In 1914, Columbia's Dean, Fredrick Keppel openly acknowledged that the large number of immigrants made Columbia, "socially uninviting for students who came from homes of refinement", Karabel at page 87. The only reason that Italian and other students of eastern European backgrounds did not face identical discrimination is that they did not apply for admission in any noticeable numbers. Having the highest grades at nationally recognized New York City public high schools such as the Bronx High School of Science or Stuyvesant High School virtually guaranteed an applicant's rejection. These schools were known to have very high proportions of Jewish students. See, generally, Daniel P. Moynihan and Nathan Glazer, *Beyond the Melting Pot*.

California, Michigan and Texas made similar references to the "need for a critical mass" of minority students in order to make "diversity" work. Harvard, Yale and Princeton also used the concept of "critical mass" as their reason for limiting the enrollment of Jewish students. Their critical mass was too high. As a result, the Columbia "undergraduate body [in 1908] contained a predominating (sic) element of students who have few social advantages and that, as a consequence, there is little opportunity for making friendships of permanent value. . .As a result, most parents send their out of [New York] city to college". Karabel at page 86. "Every undesirable student admitted is not an advantage but a detriment to the University" Karabel, note 62, page 577. The difference between Columbia's thinking in 1908 and Texas' thinking, in 2012 is not all that different, nor is the identity of its victims.

III. The Challenged Policies of Racially Preferential Admissions Have Been Condemned by Eminent Jurists and Scholars Alike.

In *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) Justice Douglas denounced racial preferences in college admissions. "One other assumption must clearly be disapproved: that blacks or browns cannot make it on their own. That is a stamp of inferiority that a State is not permitted to place on any lawyer". The University of Texas seems intent on doing precisely that.

Justice Douglas further opined that:

> *The Equal Protection clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.* The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, [or] Irish lawyers for Irish. It should be

> to produce good lawyers for Americans. . . ", *DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) (emphasis added).

Judge Henry Friendly fully shared Justice Douglas' views. Judge Friendly wrote that:

> *I have read a good many articles on the subject but [I] cannot get away from my gut reaction that reverse discrimination is just as unconstitutional as the other kind. . .* My criticism is addressed to the kind of discrimination where applicants known by everyone to be inferior are being selected over those better qualified. . . [T]he reverse discrimination in admissions procedures generally has to be accomplished by a continuation of this discrimination in grading, with the result that the institution is putting its imprimatur on people who have not really met its standards". See David M. Dorsen, *Henry Friendly: The Greatest Judge of His Era,* at pages 203-204 (emphasis added).

Even Justice Powell, who supported some types of racial preferences, believed that:

> *[T]here are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is, in fact, benign.* . .Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise

impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth, *Regents of the University of California v. Bakke,* 438 U.S. 265, 298 (emphasis added).

Scholars, of national repute, share this judicial opposition to racial preferences. *"Those who use the term 'diversity', to justify their actions, 'have an agenda that favors ethnic and racial discrimination in order to achieve a particular and predetermined demographic mix while opposing merit and assimilation to American culture"* (emphasis added). See Professor Peter Wood, *Diversity: The Invention of a Concept* at page 3, (2003). Diversity is, "above all *a political doctrine asserting that some social categories deserve compensatory privileges* . . .(emphasis added). [I]t is a *belief* that the portion of our individual identities that derives from our ancestry. . .is somehow more powerful than our individuality. . .or our common humanity", id. at page 5 (emphasis in original).

Dr. Charles Murray, a nationally recognized sociologist and historian wrote that, "Asian Americans have long been represented in elite colleges far beyond their proportion of the population, even though they suffer systematic disadvantage in the [college] admissions process. . ." ., Charles Murray, *Coming Apart* (2012) at pages

80-81, citing *Harvard Gazette,* May 11, 2011 found at news.harvard.edu/gazette/story. See, generally, T.J. Espanshade & Alexandria W. Radford, *No Longer Separate, Not Yet Equal: Race & Class in Elite College Admissions & Campus Life* (2009).

IV. Racial Preferences in State University Admissions are Unconstitutional Under All Circumstances.

A. Assertions of 'Academic Freedom' Do Not Authorize Destruction of a Citizen's Constitutional Right to be Free From Invidious Discrimination That Violates the 14th Amendment.

In *DeFunis v. Odegaard,* 416 U.S. 312 (1974), Justice Powell sought to sustain using race as a legitimate factor in determining law school admissions on the grounds that it was an element of an educational institution's academic freedom. He relied on just two cases: *Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) and *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967) to support his contention. *Neither case had anything to do with the controversies in DeFunis, Bakke, Grutter* or *Fisher. Sweezy* dealt exclusively with the constitutional validity of a state legislature investigating possible communist subversion among the faculty of the University of New Hampshire and the possibility that the suspect professors were teaching subversive ideas. *Keyishian* dealt only with a professor's dismissal from the faculty at the State University of

New York for refusing to sign a mandatory, state imposed, loyalty oath.

Neither case had anything to do with academic freedom in the context of racial preferences violating the 14th amendment rights of disfavored applicants for admission to a university. The Court found in favor of both plaintiff's because their First Amendment's free speech rights had been violated. This Court must rule in Fisher's favor because her 14th Amendment rights have similarly been violated. Nothing in the text, or history, of the 1st Amendment gives the University the right to engage in racial favoritism under the rubric of "academic freedom".

What Texas was forbidden from doing in 1950, it cannot do, in 2012, merely because the color of the victim's skin has changed from black to white. See *Sweatt v. Painter*, 339 U.S. 629 (1950).

B. Justice O'Connor's Hope That Race Based Preferences Will End Was an Illusion. Once Started, They Will Never Stop.

Justice O'Connor's view that, "Grutter requires that any race-conscious measure must have a logical end point and must be limited in time" 539 U.S. at 342 is to wish upon an unreachable star. *Once a politically favored minority is given a race based preference, the favored minority will always insist that it still "suffers from the effects of past discrimination", that the preference's termination would be "prejudicial to its interests" and that* *anyone supporting its termination is "biased against minorities".*

The validity of this fear is proven in recent statements made by Lee Bollinger, the former President of the University of Michigan and now the President of Columbia. He stated that, *"Diversity is not merely a desirable addition to a well-run education. It is as essential as the study of the Middle Ages, of international politics and of Shakespeare"*, Washington Post, April 29, 2012, Page B 5 (emphasis added). "Diversity" is no longer a means of "assisting the disadvantaged". "Diversity" now is on a par with Shakespeare and western civilization, ironically two subjects no longer required in many elite universities. Race based preferences will never end based on this "new criteria". There are few more powerful arguments for repudiating the reverse racism underlying *Bakke v. University of California* and *Grutter v. Bollinger* than Lee Bollinger's contemptible theory.

V. The Challenged Practices Harm Disfavored Minority Students.

A. Asian Americans are Seriously Injured by the University's Policies

Texas' prejudicial admissions process does not harm only white students versus African-American or Hispanic students. Students of Asian backgrounds are equally injured and it is no longer even an "open secret" that the University of California attempted to limit enrollment by Asian students because the more academically qualified Japanese and Chinese ancestry student as were being admitted in numbers far beyond their ethnic groups' percentage of California's overall population. The practice ended only after California voters approved a state constitutional amendment barring its use.

Asian students are similarly burdened in violation of the 14th Amendment's equal protection requirements. There is substantial documented evidence proving this. Numerous elite academic institutions have openly stated that they use race based preferences in selecting students to be admitted. Other, equally elite institutions do not.

Table 1. Asian Americans as a Percentage of Matriculates at Several Highly Competitive Schools

Schools with Preferences		**Schools with No Preferences**	
Brown	11%	Cal Tech	42%
Dartmouth	14%	Berkeley	42%
Chicago	16%	UCLA	33%
Yale	16%		
Cornell	17%		
Harvard	17%		
Princeton	19%		
Penn	18%		
Stanford	21%		
Columbia	22%		
MIT	25%		

Source: College Board 2012, "College Search", See, *bigfuture.collegeboard.org/find-colleges*, accessed on April 12, 2012.

Such quotas, although they are never called "quotas" but merely "a holistic approach to admissions" or "a plus factor", injure disfavored minorities. Factually this is not disputable. These institutions are the famous STEM (i.e. science, technology, engineering and mathematics) schools that are the finest in the world. As examples, Harvard, Yale, Princeton and Columbia limit the number of Asian-Americans admitted. California Institute of technology, as a matter of deeply held belief, and the University of California at Berkeley, and UCLA, because they are compelled to evaluate applicants on a no-race preference basis by Proposition 209, admit substantially higher percentages of Asian-American students than do the Ivy League universities that openly disfavor Asian-American applicants.

During a meeting of the National Association for College Admissions Counseling an admissions officer at Stanford of how real is the bias against Asian-American applicants. Among applicants with the same academic and personal characteristics, whites were more likely to be admitted than Asians; literally four times as likely at the California Institute of Technology versus Brown and nearly three times as likely at Harvard, Yale, Dartmouth or Cornell. See Scott Jaschik, *"Too Asian"*, Inside Higher Education, October 10, 2006 where another admissions officer referred to Asian applicants as "one more AA applicant majoring in math", "they all play the violin" and "another boring Asian applicant". See: http://ered.com/news/2006/10.

This open bias against Asian-American applicants is known throughout the Asian-American community. One major company that consults with parents of Asian-American applicants stated that:

> College admissions directors will say that in addition to academic criteria, their applicants will be evaluated through "holistic" methods. This is a code word for racial discrimination *and an undocumented quota system* (emphasis added). It's no wonder that Asian applicants refer to their ethnicity as "the anti-hook" learning that it hurts their chances for admission. See *Asian American College Consultation*, "Frequently Asked Questions", http://www.asianadvantage.net.faq.

B. The University's Admissions Policy Discriminates Against Applicants Who Attend High Schools Operated by Religious Groups.

The University's policy also discriminates against students who attend religious secondary schools. A student attending a Yeshiva or a Catholic Church sponsored parochial school, or a Chinese or French immersion Montessori school (which may have a disproportionately smaller number of Hispanic or black students) will, under the University's policy, automatically have his or her extra-curricular and educational achievements devalued because that applicant did not associate with a sufficient number of politically approved minority group students. Moreover, the University does not define how many Hispanic students are required in a given school for white or Asian students to be deemed to have associated with enough Hispanics to have an "acceptable rate of association with minorities" to qualify as attending a "minority school".

This policy equally injures a Hispanic child who attended a Catholic Church's parochial school. That child would likely not associate with a sufficient number of white students, so their academic and extracurricular accomplishments, at a hospital or on a baseball field, will similarly be devalued by the University's admissions committee.

If these activities were not devalued then the University would, again, be applying an unconstitutional double standard depending on whether the school's student body was predominantly white or predominantly Hispanic. Once the impact of the University's admissions policy is evaluated in this light, it cannot survive 14th amendment scrutiny under any standard, even an alleged "compelling state interest". A state cannot be permitted to have an "interest" in an applicant's racial associations in or out of the classroom.

Professor Peter Wood wrote that:

> The new perspective of diversity is not just about emphasizing groups at the expense of the whole; it is also about treating [politically

protected groups] as having saved up a right to special privileges in proportion to how much their purported ancestors were victimized in the past. . It is invoked as a reason why the federal government should set aside a certain percentage of contracts for minority owned businesses and why the federal courts should not apply the equal protection clause of the 14th amendment to college admissions. Wood, *Diversity: The Invention of a Concept,* at pps. 44. 44-45. 3-4.

VI. Both the Ivy League and University of Texas Instituted Racial Preferences in Order to Protect their Perceived Institutional Interests. The University of Texas Perceived Institutional Interests Constitute Discriminatory State Action Prohibited by the 14th Amendment.

A. The Ivy League Imposed its Quotas to Appease the Prejudices of Wealthy Alumni.

Prior to the 1920's Harvard, Yale and Princeton, "admitted students almost entirely on the basis of academic criteria". See Karabel, pages vii-viii. Starting in the mid-1920s, this was no longer acceptable to these schools administrations and alumni. *"[I]t had become clear that a system of selection focused solely on scholastic performance would lead to the admission of increasing numbers of Jewish students, most of them of eastern European backgrounds",* Karabel at p. viii (emphasis added). The absence of similar animus towards students of Italian, Irish and Polish ancestry did not arise because of an absence of applications from students of those ethnic and religious backgrounds.

"Charged with protecting their institutional interests the presidents of the Big Three wanted the latitude to admit the dull sons of major donors and to exclude the brilliant but unpolished children of immigrants. . .[s]uch latitude was missing from a policy of selection focused exclusively on academic excellence", Karabel at pages 101-102, citing, Harvard University Archives.

B. The University of Texas Instituted its Challenged Policies to Protect its Institution's Political Interests.

1. Currying Political Favor is Not a Compelling State Interest. It is Merely Politics.

Texas wants to protect its institution's political interests by currying favor with minority populations – and politicians – who now account of 48.1 percent of Texas' population. It needs to maintain political support within these minority communities and among their elected state officials. In order to do so, and to evade the underlying problem of poor academic achievement by minority students from rural and inner city public schools, Texas devised its own quota system. Not wanting to run afoul of the University of Michigan's undergraduate hard quota system that was rejected in *Gratz v. Bollinger*, 539 U.S. 244 (2003). Texas devised its "race is a plus factor" system in order to evade this Court's decision banning hard quotas.

Achieving a quota, without using that term, was also the approach followed by Yale, during the 1920s. The Chairman of Yale's Board of Admissions, Robert Corwin, received a letter from a prominent member of the Yale Corporation complaining about the large number of Jewish students being admitted. Cowin assured him that "the racial problem is never far from the minds of the Board of Admissions. *Rather than stir up a major controversy, as had happened at Harvard, 'which is now. . .sawing through wood and not saying a word'. . . .Yale should follow a middle course, limiting the number of Jews to roughly 10 percent without publicity and informally"*, Karabel at page 117 (emphasis added).

2. Using "Character" as an Admissions Criteria is a Subterfuge for a Quota. Texas' "Holistic" Admissions Policy Does the Same Thing.

Harvard began to place a premium on unquantifiable concepts such as "character" to weed socially undesirable applicants. "To prevent a dangerous increase in the proportion of Jews, I know at present only one which is. . .effective, and that is a selection by a personal estimate of [an applicant's] character on the part of the Admissions authorities . . .", Harvard President A. Lawrence Lowell, quoted by Karabel at page 107.

Princeton also adopted new admissions criteria is similar to those employed today by Texas. Princeton's 1921 Committee on Limitation of Enrollment recommended that each applicant "be assessed on 'mental qualifications', 'manhood qualifications', 'physical qualifications', and 'leadership qualifications' and not 'mere book worms'. There was also an emphasis on. . . extra-curricular activities' as proof of leadership. Finally, the Committee proposed to. . .collect data on 'home influence' and 'race and nationality'. *Committee on Limitation of Enrollment,* 1921, Princeton University Archives, cited in Karabel, pages 121-122.

Is Texas' "holistic" admissions policy, which asses character, community service - versus the Ivy League assessing an applicant's "value to the Yale family" - different in any meaningful way?

VII. Diversity is Not a State Interest, Let Alone a Compelling One. "Compelling Interest" is Merely a Euphemism for Racial Quotas.

A. The Historical Development of the Doctrine of a Compelling State Interest Proves That it Does Not Apply to College Admissions.

Justice Powell conceded that racially based factors were "non-objective". No one should be permitted to use non-objective criteria to establish a compelling state interest in violating someone else's Constitutional rights. Prior to *Bakke*, the only instances where the Court sustained race based discrimination was during the Second World War when it upheld the forced removal of Japanese-Americans from the west coast and their forced internment in detention centers in the interior of the United States. The reasons were "war time national security". See *Korematsu v. United States,* 323 U.S. 214 (1944) and *Hirabayashi v. United States,* 320 U.S. 81 (1943). Those race based "compelling state interest" policies were so immoral that the United States apologized and paid reparations to that policy's victims.

"Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Parents Involved in Community Schools v. Seattle School District #1,* 551 U.S. 701, 720 (2007). "At the heart of the Constitutional guarantee of equal protection lies the command that the government must treat citizens as individuals, not simply as components of a racial, religious, sexual or national class", 551 U.S. at 730, quoting *Johnson v. Miller,* 515 U.S. 900, 911 (1995). *"The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a 'compelling state interest' simply by relabeling it 'racial diversity'"*, 551 U.S. at 762 (emphasis added).

["T]he 14th Amendment itself was framed in universal terms without reference to color, ethnic origin or condition of prior servitude. . .[T] 39th Congress was intent upon establishing in the federal law a broader principle than would be necessary simply to meet the particular and immediate plight of the newly freed Negro slaves", 438 U.S. at 293, quoting *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 296 (1976). Therefore, no racial or ethnic group may benefit from, or be disadvantaged by, racial or ethnic preferences

B. Mandated "Diversity" is an Illegitimate Governmental Interest.

Government mandated "diversity" is a subversive attempt to destroy the cultural assumptions that underlie the American ideal of equal opportunity and not government mandated equal results. "Diversity has contributed to falling educational and performance standards (e.g. attacking SAT scores, undermining love of country (by elevating racial separatism . . .and [it has] made certain forms of racialism respectable again", Peter Wood, *Diversity: The Invention of a Concept*, at p. 3.

1. Diversity Has No Societal Value, and May Cause Significant Harm, to All Americans.

In *Bakke,* the Court asserted that a medical student "with a particular background – whether ethic, geographic culturally advantaged or disadvantaged – may bring a professional school of medicine experiences, outlooks and ideas that enrich the training of its student body. . ." *Bakke,* 438 U.S. at 314.

That assertion is pernicious. Is small pox diagnosed or treated differently if a patient is black instead of white? Does an Asian-American patient with a fractured spinal cord require different treatment that a Hispanic with the same injury? Would a black physician use different diagnostic tests, or standards, for determining if a patient had suffered a heart attack?

The national danger posed of Texas' policies is emphasized by American history. There was no mandatory "diversity" at Los Alamos. The scientists and engineers working on the Manhattan Project came from very similar cultural and religious backgrounds and national origins. No asked about "diversity" in recruiting them. They were asked only to demonstrate high levels of expertise. It did not matter that Nobel Prizes in Chemistry and Physics are not awarded on a culturally diverse basis. No one thought that anyone's life experiences mattered. Consideration of the hardships these scientists faced in being forced to emigrate to America or the fact that English was a foreign language to virtually all of these men - and there were no women - would have been thought madness if used as selection criteria.

2. The Absence of Racially Based Preferences Does Not Harm Minority Students.

Students from economically or socially disadvantaged backgrounds are not injured by the absence of racially or ethnically based preferential treatment. Moreover, they are not entitled to preferential treatment. At a Conference on The Theology of Work and the Dignity of the Worker, William, Cardinal Egan, of New York, told the Conference that:

> [I] would not agree that students today are needier and less able to learn because of poor family life than were students when my grandparents came to this nation. Read the histories of New York, Chicago and other urban centers of this nation of ours during the era of great immigration from Europe. Crime, horrendous health conditions and poverty were everywhere; and somehow, the children were taught the essentials and built this nation as a result. I believe that the problems back then were as challenging as the problems we have now". William, Cardinal Egan, *St. John University Law School, 50 Journal of Catholic Legal Studies* 45, 69 (2011).

Moreover, these terrible problems were overcome without racial and ethnic preferences being given and without anyone's college application being "plused-up" based on their national origin.

VIII. The University's Diversity Programs Have No Quantifiable Educational Benefit.

The University claims that "diversity" provides an educational benefit to its students. It fails to offer any documented, scientifically peer reviewed, proof of that assertion. The record is devoid of validated studies, to substantiate what are, at essence bogus, politically motivated, assertion as to diversity's value.

These assertions assume that there are significant racial and ethically based differences that can only be brought to the academic fore in a racially diverse setting. The University's assertion is pedagogic nonsense. The methodology for conducting a multiple-regression analysis of social science survey data is the same whether a student is black, white or brown. The engineering techniques for designing a micro-processor are the same no matter what the ethnic background of the engineer. The validity of Einstein's theory of relativity does not change based on the class' racial make-up. Texas' rationalization make as little educational sense as Michigan's Law School's implicit argument that there is a black point of view about the Rule Against Perpetuities, a Hispanic view on the last clear chance doctrine and white point of view as to the requirements of permissible versus compulsory joinder of parties under the Federal Rules of Civil Procedure.

The University's theory also implicitly assumes that all African-Americans or all Hispanics have a uniform point of view about major issues that substantially differs from those held by white students and that this creates a legally compelling state interest in broadening the interaction between diverse ideas.

> [R]ace is not a 'plus factor' in performing surgery, practicing law any other form of advanced study. The diversity achieved by racially preferential admissions does not affect the quality of the medical care given. *Diversity is not educationally invigorating; it is intellectually threadbare and ethically contemptible*", Peter Wood, *Diversity: The Invention of a Concept*, at page 145 (emphasis added).

IX. The University is Incapable of Evaluating its Racial Preference Program Objectively.

If the University's assertions as to the educational value of diversity were genuine, then one ought to inquire how many conservative political science, economics, history and sociology professors are on the University of Texas faculty. Dr. Charles Murray noted, in *Coming Apart: The State of White America* that, *"The dominance of liberal views among faculty members at elite universities is well documented*", *Coming Apart* at page 95 (emphasis added).

This overwhelming partisan bias, which cannot help but affect faculty and administration views towards racial preferences, was documented by Christopher Cardiff and Daniel B. Klein in Volume 17 *Critical Review* pages 237-255. Their study determined that, in the humanities and social sciences, liberals on the faculty outnumbered conservatives by 7.4 to 1 in English, 6.2 to in history and political science 5.8 to 1 in the humanities, 4.1 to in physics and 4.0 to 1 in biology. Faculties in elite schools are even further to the left than they are in less selective schools. See *Coming Apart The State of White America,* Note 25, pages 370-371.

The constitutional significance of this data is that these are the very same faculty and administration members who determined the need for these preferences. They are the same individuals who determine how racially preferential admissions policies are administered. Most senior admissions policy setting administrators were originally members of the faculty. They are the individuals making decisions about the "value of diversity" and the self-justifying determination that "diversity is a societal and an educational benefit" that "compels" the violation of an applicant's Constitutionally protected right to equal protection of the law. No proof is offered, merely their self-justifying conclusion. Some judges insist that judicial deference must be given to any educational institution's admissions criteria with little explanation of why save for unsupported references to a First Amendment right to set admissions standards.

X. Achieving Genuine Equality is Possible Within the Mandate of the 14th Amendment.

The path to genuine equality of opportunity is not paved with racial and ethnic preferences. It is paved with genuine achievement. In 1947, John Gunther wrote, in *Inside the U.S.A,* that major Wall Street law firms were, "the last frigid citadel of

Anglo-Saxon Protestantism" and the Jews were barred from being hired, even as associates, at these law firms. See *Inside the U.S.A.*, chapter entitled *"New York City"*. Similarly, World War I hero, and founder of the Office of Strategic Services, General William Donovan, was forced to found his own law firm because of a similar anti-Catholic animus on Wall Street.

That world has substantially changed during the past 40 years. Wall Street law firms are heavily staffed with Jewish and Asian-American partners and associates, not because of quotas or ethnic "plusing up" but because genuine talent and law school achievement became the criteria for hiring attorneys and not an applicant's religious affiliation or ranking in the Social Register.

The University seeks to create artificial diversity. "It is, at best, a morally neutral contrivance. But sometimes it is much worse: a set of social arrangements that are unjust and thwart our higher aspirations", Wood, op. cit., at pages 39-40. Moreover, these false admissions demean the alleged beneficiaries of reverse discrimination.

> To admit students in this fashion is to tell them that the college - and perhaps society at large - does not believe that they could succeed on their own abilities. It plants the idea that "equality itself is an artificial social arrangement imposed by the actions of others. . .To indict people into college even partly because of race is to hand down a life

> sentence of corrosive self-doubt, based on the suspicion that one could not have made it on merit alone". Wood, at page 41

Nowhere in the Constitution, or the Declaration of Independence, does the word "diversity" appear. Nor does it appear in the 14th Amendment. "Equality" and "liberty" are discussed repeatedly. Diversity is never mentioned. *"Diversity is not about fine tuning American society. . .it aims no less than transforming American society through and through*", Wood, op. cit., at page 15 (emphasis added). There is no Constitutional basis for the Courts, let alone a state university, to engage is such a radical restructuring of America, allocating education, jobs and contracts, based or race.

There is no Constitutional underpinning for Justice Powell's lone opinion in *University of California v. Bakke*, 348 U.S. 265, 305, that a state government has any interest, let alone a compelling state interest, in the diversity of the student body in its medical school. It became so only because Justice Powell said that it was so.

Is a Hispanic doctor better qualified to treat a Hispanic patient needing open heart surgery than a better trained white surgeon merely because he is Hispanic? When an African-American needs a kidney transplant does she really want to be operated on by a doctor who gained admission to medical school because of a racial preference or does she want the best nephrologist available?

XI. The Imposition of State Compelled Diversity Programs Harms Society.

The diversity movement has substantially harmed America. "[It] has contributed significantly to declining academic standards (e.g. attacks on SAT testing as a method of identifying which students who have an aptitude to succeed in college...and made certain forms of racialism respectable again", Wood, op. cit. at 16. And so they have, for "*what proclaims itself as diversity turns out to be little more than prejudice*. . . .the [civil rights] movement has appropriated the name of diversity, not to achieve a better kind of national unity, but to give license to ethnic privilege and other forms of separatism", Wood at page 17 (emphasis added).

As Professor Wood wrote, "*Such group identities may seem real enough to politicians trolling for votes. . .but they are shadowy formulations and deeply at odds with our cultural imperative to treat individuals as individuals regardless of their ethnic backgrounds*", Wood, op. cit. at page 25 (emphasis added). Political expediency is not a compelling state interest to violate the civil rights of everyone in Texas who is not African-American or Hispanic, as Texan "defines" Hispanic.

The value of a merit based society is exemplified by the history of merit based hiring, by the New York Police Department (during the Depression) as opposed to the race based hiring rejected by this court in *Ricci v. DeStefano*, 129 U.S. 2658 (2006). In 1939, with the Depression still in full fury, the NYPD had nearly 33,000 applicants for 350 positions. "The NYPD decided to select exclusively on the basis of test scores. . .and no edge for a favorable impression in a job interview. The Applicants took two tests, one of cognitive ability. . .and a test of physical ability" with the cognitive test being 70 percent of an applicant's grade. As a result, "only those applicants with the highest scores were accepted. "The best estimate is that they had a mean I.Q. of 130-near the mean I.Q. of incoming freshmen at elite schools today.

In 1980, a review was made of the professional accomplishments of that group of merit selected candidates. "[T]he results had been spectacular. Within the Department the class produced 4 [police chiefs, 4 deputy police commissioners, 2 chiefs of personnel, 1 chief inspector and 1 Police Commissioner". Many who subsequently left the department to pursue other careers, as the Depression ended, in 1945, "had successful careers as lawyers, businessmen and academics", Murray, *Coming Apart: The State of White America* at pages 117-118.

Politically inspired "diversity" prevents this merit based achievement from happening. As Professor Wood wrote:

> Diversity that is achieved by racial, ethnic or other quotas in college

> admissions; diversity that . . .consists of books included or excluded because of the race, nationality, gender or gender preference of the authors. . .these are, every one of them, pernicious forms of diversity. . .To admit students in this fashion is to tell them that the college – and perhaps society at large – does not believe that they could succeed on their own abilities. It plants the idea that "equality" itself is an artificial social arrangement. . .and it negates the idea of equality as the underlying and inherent condition of all humanity. *To induct people into college even party because of race is to hand down a life sentence of corrosive self-doubt, based on the suspicion that one could not have succeeded on merit alone.*" Peter Wood, *Diversity: The Invention of a Concept,* at pages 40-41.

Historian Victor Davis Hanson summed up the damage that race based programs have caused to the United States:

> Identities. . .are sometimes put on and taken off, like clothes, as elf-interest dictates-given that thy are no longer ascertainable by appearance. If that sounds crass or unfair, ask Elizabeth Warren who dropped her Native American claims as soon as she received tenure and found her 1/32 con suddenly

> superfluous-to the apparently similarly cynical but now mum employer Harvard [Law School]. . . [N]o on knows who qualifies as an oppressed victim... The real worry is that soon we will have so many recompense-seeking victims that we will run out of concession-granting oppressors. Wall Street Journal, page A 15, May 14, 2012.

E Pluribus Unum has been replaced by "*E Unum Pluribus*". America is the worse for it.

Conclusion

For all of the foregoing reason, *Fisher v. University of Texas* must be reversed, and the prior holdings in *University of California v. Bakke* and *Grutter v. Bollinger* must be overruled.

Respectfully submitted,

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JOINT
APPENDIX

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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United States Court of Appeals for the Fifth Circuit
Court of Appeals Docket #: 09-50822

ABIGAIL NOEL FISHER; RACHEL MULTER MICHALEWICZ,

Plaintiffs - Appellants

v.

UNIVERSITY OF TEXAS AT AUSTIN; DAVID B. PRYOR, Executive Vice Chancellor for Academic Affairs in His Official Capacity; WILLIAM POWERS, JR., President of the University of Texas at Austin in His Official Capacity; BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; R. STEVEN HICKS, as Member of the Board of Regents in His Official Capacity; WILLIAM EUGENE POWELL, as Member of the Board of Regents in His Official Capacity; JAMES R. HUFFINES, as Member of the Board of Regents in His Official Capacity; JANIECE LONGORIA, as Member of the Board of Regents in Her Official Capacity; COLLEEN MCHUGH, as Member of the Board of Regents in Her Official Capacity; ROBERT L. STILLWELL, as Member of the Board of Regents in His Official Capacity; JAMES D. DANNENBAUM, as Member of the Board of Regents in His Official Capacity; PAUL FOSTER, as Member of the Board of Regents in His Official Capacity; PRINTICE L. GARY, as Member of the Board of Regents in His Official Capacity; KEDRA ISHOP, Vice

Provost and Director of Undergraduate Admissions in Her Official Capacity; FRANCISCO G. CIGARROA, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants – Appellees

09/18/2009 CIVIL RIGHTS CASE docketed. NOA filed by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz [09-50822] (RFP)

* * *

12/21/2009 APPELLANT'S BRIEF FILED by Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz. Date of service: 12/21/2009 via email - Attorney for Appellee(s): Ho, Hughes [09-50822] REVIEWED AND/ OR EDITED. APPELLANT'S BRIEF FILED by Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz. . # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 01/05/2010 for Appellant Abigail Noel Fisher and Appellant Rachel Multer Michalewicz.. Appellee's Brief due on 01/20/2010 for Appellee Board of Regents of the University of Texas System, Appellee Francisco G Cigarro, Appellee James D Dannenbaum, Appellee Paul Foster, Appellee Printice L Gary, Appellee R Steven Hicks, Appellee James R Huffines, Appellee Kedra Ishop, Appellee Janiece Longoria, Appellee Colleen McHugh, Appellee William Eugene Powell, Appellee William Powers Jr., Appellee David B Pryor, Appellee Robert L Stillwell and Appellee University of Texas at Austin [09-50822] (Claire Evans)

12/21/2009 RECORD EXCERPTS FILED by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz. Date of service: 12/21/2009 via email - Attorney for Appellee(s): Ho, Hughes ; [09-50822] REVIEWED AND/OR EDITED. RECORD EXCERPTS FILED by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 01/05/2010 for Appellant Abigail Noel Fisher and Appellant Rachel Multer Michalewicz. [09-50822] (Claire Evans)

* * *

12/29/2009 AMICUS CURIAE BRIEF FILED by The Asian American Legal Foundation. The Consent is Included in the Brief Brief NOT Sufficient as it requires an Appearance Form from counsel signing the brief. # of Copies Provided: 7 Sufficient Brief due on 01/12/2010 for Amicus Curiae The Asian American Legal Foundation. [09-50822] (RFP)

* * *

12/29/2009 AMICUS CURIAE BRIEF FILED by Mountain States Legal Foundation. The Consent is Included in the Brief Brief NOT Sufficient as it requires an Appearance Form from counsel signing the brief. # of Copies Provided: 7 Sufficient Brief due on 01/12/2010 for Amicus Curiae Mountain States Legal Foundation. [09-50822] (RFP)

* * *

12/29/2009 AMICUS CURIAE BRIEF FILED by American Civil Rights Institute, Center for Equal Opportunity, National Association of Scholars and Pacific Legal Foundation. The Consent is Included in the Brief Brief NOT Sufficient as it requires an Appearance Form from counsel signing the brief. # of Copies Provided: 7 Sufficient Brief due on 01/12/2010 for Amicus Curiae American Civil Rights Institute, Amicus Curiae Center for Equal Opportunity, Amicus Curiae National Association of Scholars and Amicus Curiae Pacific Legal Foundation. [09-50822] (RFP)

* * *

03/08/2010 APPELLEE'S BRIEF FILED by Board of Regents of the University of Texas System, Mr. Francisco G Cigarro, MD, Mr. James D. Dannenbaum, Mr. Paul Foster, Mr. Printice L. Gary, Mr. R Steven Hicks, Mr. James R. Huffines, Mr. Kedra Ishop, Ms. Janiece Longoria, Ms. Colleen McHugh, Mr. William Eugene Powell, Mr. William Powers, Jr., Mr. David B Pryor, Mr. Robert L Stillwell and University of Texas at Austin. . # of Copies Provided: 7 E/Res's Brief deadline satisfied. Reply Brief due on 03/25/2010 for Appellant Abigail Noel Fisher and Appellant Rachel Multer Michalewicz [09-50822] (RFP)

03/08/2010 RECORD EXCERPTS FILED by Appellees Board of Regents of the University of Texas System, Mr. Francisco G Cigarro, MD, Mr. James D. Dannenbaum, Mr. Paul Foster, Mr. Printice L. Gary, Mr. R Steven Hicks, Mr. James R. Huffines, Mr. Kedra Ishop, Ms. Janiece Longoria, Ms. Colleen McHugh, Mr. William Eugene Powell, Mr. William Powers, Jr., Mr. David B Pryor, Mr. Robert L Stillwell and University of Texas at Austin. # of Copies Provided: 4 [09-50822] (RFP)

* * *

03/12/2010 AMICUS CURIAE BRIEF FILED by United States. Date of service: 03/12/2010 via US mail - Attorney for Amicus Curiae(s): Detamore, Fauth, Keller; Attorney for

Appellant(s): McCarthy, Rein; email - Attorney for Amicus Curiae: Sandefur; Attorney for Appellant(s): Evans, Terrill; Attorney for Appellee(s): Ho, Hughes [09-50822] REVIEWED AND/OR EDITED. AMICUS CURIAE BRIEF FILED by USA. Consent is Not Necessary as Amicus is a Government Entity. # of Copies Provided: 0 Paper Copies of Brief due on 03/22/2010 for Amicus Curiae United States of America. [09-50822] (Diana Katherine Flynn)

03/12/2010 AMICUS CURIAE BRIEF FILED by Texas League of United Latin American Citizens. Date of service: 03/12/2010 via email - Attorney for Amicus Curiae(s): Detamore, Fauth, Keller, Sandefur; Attorney for Appellant(s): Evans, McCarthy, Rein, Terrill; Attorney for Appellee(s): Ho, Hughes [09-50822] REVIEWED AND/OR EDITED. AMICUS CURIAE BRIEF FILED by Texas League of United Latin American Citizens. The Consent is Included in the Brief. # of Copies Provided: 0 Paper Copies of Brief due on 03/19/2010 for Amicus Curiae Texas League of United Latin American Citizens. [09-50822] (Sri Srinivasan)

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03/12/2010	AMICUS CURIAE BRIEF FILED by Racial Justice Project and New York Law School. The Consent is Included in the Brief. # of Copies Provided: 7 [09-50822] (RFP)

* * *

03/12/2010	AMICUS CURIAE BRIEF FILED by Asian American Institute, Asian American Justice Center, Asian Law Caucus and Asian Pacific American Legal Center. The Consent is Included in the Brief Brief NOT Sufficient as it requires an Appearance Form from counsel signing the brief. Appearance form being processed. # of Copies Provided: 7 Sufficient Brief due on 03/26/2010 for Amicus Curiae Asian American Institute, Amicus Curiae Asian American Justice Center, Amicus Curiae Asian Law Caucus and Amicus Curiae Asian Pacific American Legal Center. [09-50822] (RFP)

* * *

03/15/2010	AMICUS CURIAE BRIEF FILED by NAACP Legal Defense & Educational Fund, Inc. and Black Student Alliance at the University of Texas at Austin. The Consent is Included in the Brief. # of Copies Provided: 7 [09-50822] (RFP)

* * *

03/15/2010	AMICUS CURIAE BRIEF FILED by American Association of Community Colleges, American Association of State Colleges and Universities, AAUP, American Council of Education, American Dental Education Association, Hispanic Association of Colleges and Universities, National Association of College and University Business Officers, National Association of Independent Colleges and Universities, The American College Personnel Association, The Association of American Colleges and Universities, The Association of American Medical Colleges, The Association of American Universities, The Association of Public and Land-Grant Universities and The Association of Research Libraries. The Consent is Included in the Brief Brief NOT Sufficient as it requires an Appearance Form from counsel signing the brief (being processed). # of Copies Provided: 7 Sufficient Brief due on 03/29/2010 for Amicus Curiae American Association of Community Colleges, Amicus Curiae American Association of State Colleges and Universities, Amicus Curiae American Association of University Professors, Amicus Curiae American Council of Education, Amicus Curiae American Dental Education Association, Amicus Curiae Hispanic Association of Colleges and Universities, Amicus Curiae National

Association of College and University Business Officers, Amicus Curiae National Association of Independent Colleges and Universities, Amicus Curiae The American College Personnel Association, Amicus Curiae The Association of American Colleges and Universities, Amicus Curiae The Association of American Medical Colleges, Amicus Curiae The Association of American Universities, Amicus Curiae The Association of Public and Land-Grant Universities and Amicus Curiae The Association of Research Libraries. [09-50822] (RFP)

* * *

03/25/2010 APPELLANT'S REPLY BRIEF FILED by Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz. Date of service: 03/25/2010 via email - Attorney for Appellee(s): Ho, Hughes [09-50822] REVIEWED AND/OR EDITED. APPELLANT'S REPLY BRIEF FILED by Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz. . # of Copies Provided: 0 Reply Brief deadline satisfied. Paper Copies of Brief due on 03/30/2010 for Appellant Abigail Noel Fisher and Appellant Rachel Multer Michalewicz. [09-50822] (Claire Evans)

* * *

08/03/2010	ORAL ARGUMENT HEARD before Judges King, Higginbotham, Garza. Arguing Person Information Updated for: Joshua Ian Civin arguing for Amicus Curiaes Black Student Alliance at the University of Texas at Austin and Inc. NAACP Legal Defense & Educational Fund; Arguing Person Information Updated for: James C. Ho arguing for Appellees University of Texas at Austin, David B. Pryor, William Powers Jr., James R. Huffines, Janiece Longoria, Colleen McHugh, James D. Dannenbaum, Paul Foster, Printice L. Gary, Board of Regents of the University of Texas System, R. Steven Hicks, William Eugene Powell, Robert L. Stillwell, Kedra Ishop, and Francisco G. Cigarro; Arguing Person Information Updated for: Bert W Rein arguing for Appellants Abigail Noel Fisher and Rachel Multer Michalewicz [09-50822] (VLB)

* * *

01/18/2011	PUBLISHED OPINION FILED. [09-50822 Affirmed] Judge: CDK , Judge: PEH , Judge: EMG. Mandate pull date is 02/08/2011 [09-50822] (ARC)
01/18/2011	JUDGMENT ENTERED AND FILED. [09-50822] (ARC)

02/01/2011	PETITION filed by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz for rehearing en banc [6729784-2]. Date of Service: 02/01/2011 via email - Attorney for (null)(s): Hughes, Mitchell; Attorney for Amicus Curiae(s): Adegbile, Archer, Bhargava, Civin, Detamore, Eng, Fauth, Flynn, Fox, Hacker, Hinojosa, Keller, Liu, Perales, Sandefur, Srinivasan, Su, Thome; Attorney for Appellant(s): Consovoy, Evans, McCarthy, Rein, Terrill [09-50822] REVIEWED AND/OR EDITED. PETITION filed by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz for rehearing en banc [6729784-2] Number of Copies:0. Mandate pull date canceled.. Paper Copies of Rehearing due on 02/07/2011 for Appellant Abigail Noel Fisher and Appellant Rachel Multer Michalewicz.. Date of Service: 02/01/2011 [09-50822] (Claire Evans)
02/01/2011	COURT DIRECTIVE ISSUED requesting a response Response/Opposition to the petition for rehearing en banc filed by appellants and due on 02/11/2011. [09-50822] (POK)

* * *

02/02/2011	UNOPPOSED MOTION filed by Appellees Board of Regents of the University of Texas System, Mr. Francisco G. Cigarro,

M.D., Mr. James D. Dannenbaum, Mr. Paul Foster, Mr. Printice L. Gary, Mr. R. Steven Hicks, Mr. James R. Huffines, Mr. Kedra Ishop, Ms. Janiece Longoria, Ms. Colleen McHugh, Mr. William Eugene Powell, Mr. William Powers, Jr., Mr. David B. Pryor, Mr. Robert L. Stillwell and University of Texas at Austin to extend the time to file a response to the petition for rehearing en banc [6729784-2] filed by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz in 09-50822 until 02/22/2011 at 11:00 pm [6731720-2]. Date of service: 02/02/2011 via email - Attorney for Amicus Curiae(s): Adegbile, Archer, Bhargava, Civin, Detamore, Eng, Fauth, Flynn, Fox, Hacker, Hinojosa, Keller, Liu, Perales, Sandefur, Srinivasan, Su, Thome; Attorney for Appellant(s): Consovoy, Evans, McCarthy, Rein, Terrill; Attorney for Appellee(s): Ho, Hughes, Mitchell [09-50822] (Joseph David Hughes)

02/03/2011 COURT ORDER granting motion to extend time to file a response filed by Appellees University of Texas at Austin, Ms. Colleen McHugh, Board of Regents of the University of Texas System, Mr. David B. Pryor, Mr. William Powers, Jr., Mr. James R. Huffines, Ms. Janiece Longoria, Mr. James D. Dannenbaum, Mr. Paul Foster, Mr. Printice L. Gary, Mr. R. Steven Hicks, Mr. William

Eugene Powell, Mr. Robert L. Stillwell, Mr. Kedra Ishop and Mr. Francisco G. Cigarro, M.D. [6731720-2] Judge(s): PEH. [09-50822] (RFP)

* * *

02/22/2011 RESPONSE/OPPOSITION filed by Board of Regents of the University of Texas System, Mr. Francisco G. Cigarro, M.D., Mr. James D. Dannenbaum, Mr. Paul Foster, Mr. Printice L. Gary, Mr. R. Steven Hicks, Mr. James R. Huffines, Mr. Kedra Ishop, Ms. Janiece Longoria, Ms. Colleen McHugh, Mr. William Eugene Powell, Mr. William Powers, Jr., Mr. David B. Pryor, Mr. Robert L. Stillwell and University of Texas at Austin [6747003-1] to the petition for rehearing en banc filed by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz in 09-50822 [6729784-2] Date of Service: 02/22/2011 via email - Attorney for Amicus Curiae(s): Adegbile, Archer, Bhargava, Civin, Detamore, Eng, Fauth, Flynn, Fox, Hacker, Hinojosa, Keller, Liu, Perales, Sandefur, Srinivasan, Su, Thome; Attorney for Appellant(s): Consovoy, Evans, McCarthy, Rein, Terrill; Attorney for Appellee(s): Ho, Hughes, Mitchell. [09-50822] (Jonathan F. Mitchell)

* * *

03/04/2011	AMICUS CURIAE BRIEF FILED by Mountain States Legal Foundation. Consent is Not Necessary a Motion has been Granted. # of Copies Provided: 0 Paper Copies of Brief due on 03/11/2011 for Amicus Curiae Mountain States Legal Foundation. [09-50822] (RFP)
03/04/2011	AMICUS CURIAE BRIEF FILED by Asian American Legal Foundation. Consent is Not Necessary a Motion has been Granted. # of Copies Provided: 0 Paper Copies of Brief due on 03/09/2011 for Amicus Curiae Asian American Legal Foundation. [09-50822] (RFP)
03/04/2011	AMICUS CURIAE BRIEF FILED by Black Student Alliance at the University of Texas at Austin and NAACP Legal Defense & Educational Fund, Inc.. Consent is Not Necessary a Motion has been Granted. # of Copies Provided: 20 [09-50822] (RFP)

* * *

06/17/2011	COURT ORDER denying petition for rehearing en banc filed by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer Michalewicz [6729784-2] With Poll (IN DETAIL)(EHJ, with EGJ,JES,EBC, PRO JOIN DISSENTS). [09-50822] (RMF)

06/17/2011	MANDATE ISSUED FORTHWITH. [09-50822] (NFD)
09/20/2011	SUPREME COURT NOTICE that petition for writ of certiorari [6907928-2] was filed by Appellant Ms. Abigail Noel Fisher on 09/15/2011. Supreme Court Number: 11-345. [09-50822] (LGL)
02/22/2012	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Ms. Abigail Noel Fisher in 09-50822 on 02/21/2012. [7021042-1] [09-50822] (LGL)

U.S. District Court
Western District of Texas (Austin)

CIVIL DOCKET FOR CASE #: 1:08-cv-00263-SS

Fisher v. State of Texas et al

Date Filed	#	Docket Text
04/07/2008	1	COMPLAINT and MOTION FOR DECLARATORY JUDGMENT (Filing fee $ 350.00; receipt number 416146), filed by Abigail Noel Fisher. (Attachments: # 1 Exhibit A; # 2 Civil Cover Sheet & copy of receipt)(mm5) (Entered: 04/07/2008)
04/07/2008		MOTION for Preliminary Injunction; and MOTION for Permanent Injunction; contained within 1 COMPLAINT; by Abigail Noel Fisher. (mm5) (Entered: 04/07/2008)

* * *

Date Filed	#	Docket Text
04/17/2008	29	MOTION for Preliminary Injunction *and Memorandum in Support of Motion for Preliminary Injunction* by Abigail Noel Fisher. (Attachments: # 1 Declaration of Paul Terrill, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit E, # 8 Exhibit F, # 9 Exhibit G, # 10 Exhibit H, # 11 Exhibit I, # 12 Exhibit J, # 13 Exhibit

K, # 14 Exhibit L, # 15 Exhibit M, # 16 Exhibit N, # 17 Exhibit O, # 18 Exhibit P, # 19 Exhibit P, # 20 Exhibit Q, # 21 Exhibit R, # 22 Exhibit R, # 23 Exhibit R, # 24 Exhibit S, # 25 Exhibit T, # 26 Exhibit U, # 27 Exhibit V)(Terrill, Paul) (Entered: 04/17/2008)

04/17/2008 30 AMENDED COMPLAINT against David B. Pryor, Barry D. Burgdorf, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker, State of Texas, University of Texas at Austin, Mark G. Yudof amending 1 Complaint., filed by Rachel Multer Michalewicz, Abigail Noel Fisher. (Attachments: # 1 Exhibit)(mc2,) (Entered: 04/18/2008)

* * *

04/18/2008 32 SUPPLEMENT to 30 Amended Complaint, by Abigail Noel Fisher, Rachel Multer Michalewicz. (Attachments: # 1 Exhibit C, # 2 Exhibit D)(Terrill, Paul) (Entered: 04/18/2008)

* * *

05/05/2008 42 Response in Opposition to Motion, filed by David B. Pryor, Barry D. Burgdorf, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker, State of Texas, University of Texas at Austin, Mark G. Yudof, re 29 MOTION for Preliminary Injunction *and Memorandum in Support of Motion for Preliminary Injunction* filed by Plaintiff Abigail Noel Fisher (Attachments: # 1 Affidavit Lavergne affidavit, # 2 Affidavit Roeckle Bus. Records Affidavit, # 3 Affidavit Ishop Affidavit, # 4 Affidavit Roeckle Gen Affidavit, # 5 Affidavit Frederick Affidavit, # 6 Affidavit Orr Affidavit, # 7 Affidavit Vincent Affidavit-part 1, # 8 Affidavit Vincent Affidavit-part 2, # 9 Proposed Order Order)(Ho, James) (Entered: 05/05/2008)

* * *

05/08/2008 44 ANSWER to 30 Amended Complaint, by David B. Pryor, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James

		R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker, University of Texas at Austin, Mark G. Yudof.(jg3,) (Entered: 05/08/2008)
05/14/2008	45	REPLY to Response to Motion, filed by Abigail Noel Fisher, Rachel Multer Michalewicz, re 29 MOTION for Preliminary Injunction *and Memorandum in Support of Motion for Preliminary Injunction* filed by Plaintiff Abigail Noel Fisher (Attachments: # 1 Exhibit A)(Terrill, Paul) (Entered: 05/14/2008)
05/15/2008	46	AMENDED ANSWER to 30 Amended Complaint, by David B. Pryor, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker, University of Texas at Austin, Mark G. Yudof. (jg3,) (Entered: 05/15/2008)

* * *

05/19/2008	48	Minute Entry for proceedings held before Judge Sam Sparks: Motion Hearing held

on 5/19/2008 re MOTION for Preliminary Injunction MOTION for Permanent Injunction filed by Abigail Noel Fisher, 29 MOTION for Preliminary Injunction *and Memorandum in Support of Motion for Preliminary Injunction* filed by Abigail Noel Fisher (Minute entry documents are not available electronically.). (Court Reporter Lily Reznik.)(mc2,) (Entered: 05/19/2008)

* * *

05/20/2008 52 SEALED Letter Brief with attachments re: 48 Motion Hearing, by David B. Pryor, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker, University of Texas at Austin, Mark G. Yudof.(Document is not available electronically.) (mc2,) (Entered: 05/21/2008)

* * *

05/22/2008 54 SEALED Letter Brief by Abigail Fisher, Rachel Michalewicz. (Documents are not available electronically.) (mc2,) Modified on 5/28/2008 to correct filers (mc2,). (Entered: 05/23/2008)

* * *

05/29/2008	57	ORDER DENYING [] Motion for Preliminary Injunction; MOOTING 29 Motion for Preliminary Injunction. Signed by Judge Sam Sparks. (mc2,) (Entered: 05/29/2008)
06/23/2008	58	Transcript filed of Proceedings held on May 19, 2008, Proceedings Transcribed: Amended Transcript of Preliminary Injunction Hearing. Court Reporter/Transcriber: Lily I. Reznik, Telephone number: (512)916-5564. Parties are notified of their duty to review the transcript to ensure compliance with the FRCP 5.2(a)/FRCrP 49.1(a). A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Notice of Redaction Request must be filed within 21 days. If no such Notice is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed Redaction Request due 7/14/2008. Redacted Transcript Deadline set for 7/24/2008. Release of Transcript Restriction set for 9/22/2008. (Reznik, Lily) (Entered: 06/23/2008)

* * *

07/07/2008	59	Proposed Scheduling Order *(Joint Proposed Scheduling Order)* by David B. Pryor, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, Abigail Noel Fisher, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker, Rachel Multer Michalewicz, University of Texas at Austin, Mark G. Yudof. (Kneeland, Mishell) (Entered: 07/07/2008)
07/10/2008	60	SCHEDULING ORDER: Amended Pleadings due by 7/14/2008. Discovery due by 10/3/2008. Joinder of Parties due by 7/14/2008. Motions due by 2/2/2009.. Signed by Judge Sam Sparks. (jk,) (Entered: 07/11/2008)

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08/13/2008	85	SECOND AMENDED COMPLAINT against David B. Pryor, Barry D. Burgdorf, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker,

Kenneth I. Shine, University of Texas at Austin amending 1 Complaint; 30 Amended Complaint, filed by Abigail Noel Fisher, Rachel Multer Michalewicz. (mm5) (Entered: 08/15/2008)

* * *

08/22/2008 87 ANSWER to 85 Second Amended Complaint, by David B. Pryor, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker, Kenneth I. Shine, University of Texas at Austin.(mm5) (Entered: 08/25/2008)

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01/23/2009 94 MOTION for Summary Judgment by Abigail Noel Fisher, Rachel Multer Michalewicz. (Attachments: # 1 Exhibit A, # 2 Statement of Facts, # 3 Appendix, # 4 Exhibit 1, # 5 Errata 2, # 6 Exhibit 3, # 7 Exhibit 4, # 8 Exhibit 5, # 9 Exhibit 6, # 10 Exhibit 7, # 11 Exhibit 8, # 12 Exhibit 9, # 13 Exhibit 10, # 14 Exhibit 11, # 15 Exhibit 12, # 16 Exhibit 13, # 17 Exhibit 14, # 18 Exhibit 15, # 19

Exhibit 16, # 20 Exhibit 17, # 21 Exhibit 18, # 22 Exhibit 19, # 23 Exhibit 20, # 24 Exhibit 21, # 25 Exhibit 22, # 26 Exhibit 23, # 27 Exhibit 24, # 28 Exhibit 25, # 29 Exhibit 26, # 30 Exhibit 27, # 31 Exhibit 28, # 32 Exhibit 29, # 33 Exhibit 30, # 34 Exhibit 31, # 35 Exhibit 32)(Terrill, Paul) (Entered: 01/23/2009)

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02/23/2009 96 Cross MOTION for Summary Judgment *and in Opposition of Plaintiff's Motion for Partial Summary Judgment* by David B. Pryor, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker, Kenneth I. Shine, University of Texas at Austin. (Attachments: # 1 Memo in Support, # 2 Appendix, # 3 Exhibit Tab 1 to Appendix, # 4 Exhibit TAB 2 to the Appendix, # 5 Exhibit TAB 3 - to the Appendix, # 6 Exhibit TAB 4 - to the Appendix, # 7 Exhibit TAB 5 - to the Appendix, # 8 Affidavit TAB 6 - to the Appendix, # 9 Affidavit TAB 7 -to the Appendix, # 10 Affidavit TAB 8 - to the Appendix, # 11 Affidavit TAB 9 - to the

		Appendix, # 12 Affidavit TAB 10 - to the Appendix, # 13 Affidavit TAB 11 - to the Appendix, # 14 Proposed Order)(Ho, James) (Entered: 02/23/2009)

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03/27/2009	98	REPLY to Response to Motion, filed by Abigail Noel Fisher, Rachel Multer Michalewicz; re 94 MOTION for Summary Judgment filed by Plaintiff Abigail Noel Fisher, Plaintiff Rachel Multer Michalewicz, (Hurley, Suzzette) Modified on 3/30/2009 to include additional filing party (mm5,). Modified on 3/30/2009 to correct document link (mm5,). (Entered: 03/27/2009)
03/27/2009	99	RESPONSE in Opposition to Motion, filed by Abigail Noel Fisher, Rachel Multer Michalewicz, re 96 Cross MOTION for Summary Judgment *and in Opposition of Plaintiff's Motion for Partial Summary Judgment* filed by Defendant William Powers, Jr., Defendant Board of Regents of the Texas State University System, Defendant Kenneth I. Shine, Defendant University of Texas at Austin, Defendant Printice L. Gary, Defendant Bruce Walker, Defendant Paul Foster, Defendant H. Scott Caven, Jr., Defendant David B.

		Pryor, Defendant Janiece Longoria, Defendant Colleen McHugh, Defendant James D. Dannenbaum, Defendant John W. Barnhill, Jr., Defendant James R. Huffines, Defendant Robert B. Rowling (Attachments: # 1 Exhibit Ex. 1, # 2 Exhibit Ex. 2, # 3 Proposed Order)(Hurley, Suzzette) Modified on 3/30/2009 to correct document link (mm5,). Modified on 3/30/2009 to include additional filer and correct event (mm5,). (Entered: 03/27/2009)
03/27/2009	100	APPENDIX by Abigail Noel Fisher *Attachments to Docket No. 98*. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Proposed Order)(Hurley, Suzzette) (Entered: 03/27/2009)

* * *

04/13/2009	102	REPLY to Response to Motion, filed by David B. Pryor, Barry D. Burgdorf, William Powers, Jr, Board of Regents of the Texas State University System, John W. Barnhill, Jr, H. Scott Caven, Jr, James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary, Bruce Walker, Kenneth I. Shine, University of Texas at Austin, re 96 Cross MOTION for Summary Judgment *and in Opposition of Plaintiff's Motion*

		for Partial Summary Judgment filed by Defendant William Powers, Jr., Defendant Board of Regents of the Texas State University System, Defendant Kenneth I. Shine, Defendant University of Texas at Austin, Defendant Printice L. Gary, Defendant Bruce Walker, Defendant Paul Foster, Defendant H. Scott Caven, Jr., Defendant David B. Pryor, Defendant Janiece Longoria, Defendant Colleen McHugh, Defendant James D. Dannenbaum, Defendant John W. Barnhill, Jr., Defendant James R. Huffines, Defendant Robert B. Rowling (Attachments: # 1 Exhibit, # 2 Exhibit) (Ho, James) (Entered: 04/13/2009)
04/13/2009	103	BRIEF by Chad Stanton, Black Student Alliance, Anthony D. Williams, Ariel Cecil Barrett, Devon Robertson, Trenton Stanton, Eric Tre Stanton *(Amicus Brief of NAACP Legal Defense & Educational Fund, Inc., et al.)*. (Attachments: # 1 Appendix Index to Appendix, # 2 Appendix A, # 3 Appendix B, # 4 Appendix C)(Thomas, Holly) (Entered: 04/13/2009)

* * *

06/12/2009	112	Minute Entry for proceedings held before Judge Sam Sparks: Hearing on All Pending Matters held on 6/12/2009

		(Minute entry documents are not available electronically.) Written order forthcoming. (Court Reporter Lily Reznik.)(mm5,) (Entered: 06/15/2009)

* * *

08/17/2009	116	ORDER GRANTING 104 Motion for Leave to File Amicus Brief; DENYING 94 Motion for Partial Summary Judgment; GRANTING 96 Motion for Summary Judgment, and the Court GRANTS summary judgment in favor of all Defendants on all claims; GRANTING 115 Motion to Withdraw as Attorney by Suzzette Rodriguez Hurley. FINALLY ORDERED that all pending motions are DISMISSED AS MOOT. Signed by Judge Sam Sparks. (mm5) (Entered: 08/17/2009)
08/17/2009	117	JUDGMENT. Signed by Judge Sam Sparks. (mm5) (Entered: 08/17/2009)
09/01/2009	118	Transcript filed of Proceedings held on June 12, 2009, Proceedings Transcribed: All Pending Matters. Court Reporter/Transcriber: Lily I. Reznik, Telephone number: (512)916-5564. Parties are notified of their duty to review the transcript to ensure compliance with the FRCP 5.2(a)/FRCrP 49.1(a). A copy may be purchased from the court reporter

		or viewed at the clerk's office public terminal. If redaction is necessary, a Notice of Redaction Request must be filed within 21 days. If no such Notice is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed Redaction Request due 9/22/2009. Redacted Transcript Deadline set for 10/2/2009. Release of Transcript Restriction set for 11/30/2009. (Reznik, Lily) (Entered: 09/01/2009)
09/14/2009	119	NOTICE OF APPEAL by Rachel Multer Michalewicz. Filing fee $ 455, receipt number 100003678. Per 5th Circuit rules, the appellant has 10 days, from the filing of the Notice of Appeal, to order the transcript. To order a transcript, the appellant should fill out Form DKT-13 (Transcript Order) and follow the instructions set out on the form. This form is available in the Clerk's Office or by clicking the hyperlink above. (mh,) (Entered: 09/14/2009)

* * *

09/28/2009	121	USCA Appeal Info Sheet received. USCA Case Number 09-50822 for 119

		Notice of Appeal,, filed by Rachel Multer Michalewicz. (jk,) (Entered: 09/29/2009)
10/14/2009		NOTICE OF CERTIFIED RECORD ON APPEAL SENT TO USCA VIA EMAIL in re 119 Notice of Appeal,, (mh,) (Entered: 10/14/2009)

* * *

06/23/2011	127	Certified copy of USCA JUDGMENT/ MANDATE Affirming THE JUDGMENT OF THE DISTRICT COURT, in re 119 Notice of Appeal,, filed by Rachel Multer Michalewicz. (Attachments: # 1 Part 2)(mh,) (Entered: 06/23/2011)
06/23/2011	128	ORDER of USCA (certified copy) regarding Petition for Rehearing En Banc ; re 119 Notice of Appeal,, (mh,) (Entered: 06/23/2011)

* * *

07/25/2011	130	Appeal Record Returned/Disposed by USCA: (mh,) (Entered: 07/25/2011)

* * *

02/27/2012	134	The Petition for a Writ of Certiorari is GRANTED re 119 Notice of Appeal. (klw,) (Entered: 02/27/2012)

APPENDIX B — SCHEDULING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED JULY 10, 2008

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
(Austin Division)

ABIGAIL NOEL FISHER; and
RACHEL MULTER MICHALEWICZ

Plaintiffs,

v.

STATE OF TEXAS; UNIVERSITY OF TEXAS AT AUSTIN; MARK G. YUDOF, CHANCELLOR OF THE UNIVERSITY OF TEXAS SYSTEM IN HIS OFFICIAL CAPACITY; DAVID B. PRYOR, EXECUTIVE VICE CHANCELLOR FOR ACADEMIC AFFAIRS IN HIS OFFICIAL CAPACITY; BARRY D. BURGDORF, VICE CHANCELLOR AND GENERAL COUNSEL IN HIS OFFICIAL CAPACITY; WILLIAM POWERS, JR., PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN IN HIS OFFICIAL CAPACITY; BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM; JOHN W. BARNHILL, JR., H. SCOTT CAVEN, JR., JAMES R. HUFFINES, JANIECE LONGORIA, COLLEEN MCHUGH, ROBERT B. ROWLING, JAMES D. DANNENBAUM, PAUL FOSTER; PRINTICE L. GARY, AS MEMBERS OF THE BOARD OF REGENTS IN THEIR OFFICIAL CAPACITIES; BRUCE WALKER, VICE PROVOST

AND DIRECTOR OF UNDERGRADUATE ADMISSIONS IN HIS OFFICIAL CAPACITY

Defendants.

Civil Action No. 1:08-cv-00263-SS

SCHEDULING ORDER

Consistent with the goal of "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding," as outlined in Federal Rule of Civil Procedure 1, the parties propose that the Court's standard scheduling order be modified to address the issue of liability in this case prior to addressing the issue of remedy. Remedy issues are likely to be much more fact intensive than liability issues and the Court's determination of the liability issue may resolve the entire case. Bifurcating this case into two phases—liability, followed by remedy should defendants be found liable—will conserve both scarce judicial resources and the parties' resources. Accordingly, in the interest of judicial economy and consistent with the Federal Rules of Civil Procedure, the parties have agreed to the following schedule for the liability phase of this case. Nothing in this scheduling order will be deemed to waive or otherwise alter the parties' rights in the remedy phase of this case.

The Court agrees that this approach is in the interest of the Court and the parties and, Pursuant to Rules 16 and 26 of the Federal Rules of Civil Procedure, the Court issues the following Scheduling Order and Discovery Plan:

1. The parties have discussed the possibility of alternative dispute resolution in compliance with Local Rule CV-88, but do not believe that this case may be disposed of by ADR at this time.

2. The parties have discussed the possibility of settlement, but do not believe that settlement of this case is feasible at this time.

3. Defendants have taken steps to preserve electronically stored information ("ESI"). At this time, the parties do not anticipate any issues relating to ESI in the liability phase of this case.

4. The parties will file all motions to amend or supplement pleadings or to join additional parties by **July 14, 2008.**

5. The parties will exchange initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) by **July 21, 2008.**

6. Plaintiffs will serve initial fact discovery requests relating to liability by **July 7, 2008**, and Defendants will respond by **August 20, 2008.** Plaintiffs will serve any follow up discovery requests relating to liability by **September 3, 2008**, and Defendants will respond by **October 3, 2008.** Defendants will serve any discovery requests relating to liability by **September 3, 2008**, and Plaintiffs will respond by **October 3, 2008.** The Parties will notice any depositions (except for expert depositions as noted below) by **September 3, 2008**, and all depositions will be completed by **October 3, 2008.**

7. Plaintiffs will state whether they intend to designate an expert witness or expert witnesses by **September 3, 2008** and will provide the name and resume of any experts they intend to use at that time. If Plaintiffs designate an expert witness, Plaintiffs will file their designation of testifying experts and will serve on all parties, but not file, a summary of testimony of any witness who will present any opinion in trial in an expert report by **September 17, 2008.** Any opinion or testimony not contained in the summary will not be permitted at trial. Within **thirty (30) days** from the date upon which Plaintiffs either (a) state that they will not designate an expert witness or (b) serve Defendants with a summary of testimony of any expert witness, Defendants will file their designation of testifying experts and will serve on all parties, but not file, a summary of testimony of any witness who will present any opinion in trial in an expert report. Any opinion or testimony not contained in the summary will not be permitted at trial. All designations of rebuttal experts will be filed within **fifteen (15) days** of receipt of the report of the opposing expert. The Federal Rule of Civil Procedure 26 standard is not applicable to this paragraph; it does not make any difference whether or not the expert witness is a "retained expert," as any opinion or testimony of any expert not contained in the summary will not be permitted at trial.

8. Any deposition of an expert must be taken within **thirty (30) days** of receipt of the written summary of the expert's proposed testimony.

9. Any objections to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702

will be made by motion, specifically stating the basis for the objection and identifying the objectionable testimony, within **eleven (11) days** of receipt of the written report of the expert's proposed testimony, or within **eleven (11) days** of the expert's deposition, if a deposition is taken, whichever is later.

10. The parties contemplate resolving the case via cross-motions for summary judgment. Although the parties contemplate that dispositive motions will be filed as soon as possible after expert discovery (if any), all dispositive motions will be filed no later than **February 2, 2009.** Plaintiffs will file a motion for summary judgment of no more than thirty (30) pages in length no later than **January 2, 2009.** Defendants will file a combined opposition to Plaintiffs' motion for summary judgment and any cross-motion for summary judgment of no more than thirty-five (35) pages in length within **thirty (30) days** of the date upon which Plaintiffs file their motion for summary judgment. Plaintiffs will file a combined reply in support of their motion for summary judgment and opposition to Defendants' cross-motion for summary judgment of no more than thirty (30) pages within **thirty (30) days** of the date upon which Defendants file their combined opposition to Plaintiffs' motion for summary judgment and any cross-motion for summary judgment. Defendants may file a reply in support of their cross-motion for summary judgment of no more than twenty-five (25) pages in length within **fifteen (15) days** of the date upon which Plaintiffs file their combined reply in support of their motion for summary judgment and opposition to Defendants' cross-motion for summary judgment.

11. The parties respectfully request that the Court order oral argument on the parties' cross-motions once the Plaintiff's motion has been filed.

12. The parties agree to meet and confer to discuss further activity in this case following the Court's disposition of the parties' cross-motions for summary judgment.

SIGNED AND ENTERED this 10th day of July, 2008

/s/
SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX C — SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF, FILED AUGUST 13, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(Austin Division)

ABIGAIL NOEL FISHER; and
RACHEL MULTER MICHALEWICZ

Plaintiffs,

v.

UNIVERSITY OF TEXAS AT AUSTIN; MARK G. YUDOF, CHANCELLOR OF THE UNIVERSITY OF TEXAS SYSTEM IN HIS OFFICIAL CAPACITY; DAVID B. PRYOR, EXECUTIVE VICE CHANCELLOR FOR ACADEMIC AFFAIRS IN HIS OFFICIAL CAPACITY; WILLIAM POWERS, JR., PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN IN HIS OFFICIAL CAPACITY; BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM; JOHN W. BARNHILL, JR., H. SCOTT CAVEN, JR., JAMES R. HUFFINES, JANIECE LONGORIA, COLLEEN MCHUGH, ROBERT B. ROWLING, JAMES D. DANNENBAUM, PAUL FOSTER, PRINTICE L. GARY, AS MEMBERS OF THE BOARD OF REGENTS IN THEIR OFFICIAL CAPACITIES; BRUCE WALKER, VICE PROVOST AND DIRECTOR OF UNDERGRADUATE ADMISSIONS IN HIS OFFICIAL CAPACITY

Defendants.

Civil Action No. 1:08-cv-00263-SS

SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF

SECOND AMENDED COMPLAINT

NATURE OF THE ACTION

1. This action is brought by Plaintiffs Abigail Noel Fisher and Rachel Multer Michalewicz ("Plaintiffs") to preliminarily and permanently enjoin Defendants the State of Texas, *et al.*, ("Defendants") from employing racially discriminatory policies and procedures in administering the undergraduate admissions program at the University of Texas at Austin ("UT Austin"). The admissions policies and procedures currently applied by Defendants discriminate against Plaintiffs on the basis of their race in violation of their right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*

2. Plaintiffs seek preliminary injunctive relief requiring Defendants to re-evaluate them for admission to the undergraduate program at UT Austin under race-neutral criteria and requiring Defendants to admit Plaintiffs to UT Austin's undergraduate program so long as each is qualified under race-neutral criteria.

3. Plaintiffs seek permanent relief in the form of: a declaratory judgment from the Court that Defendants' admissions policies and procedures violate the United States Constitution and federal civil rights statutes; injunctive relief prohibiting Defendants from using race as a factor in undergraduate student admissions decisions at UT Austin; injunctive relief requiring Defendants to re-evaluate Plaintiffs for admission to the undergraduate program at UT Austin under race-neutral criteria; and injunctive relief requiring Defendants to admit Plaintiffs to UT Austin's undergraduate program so long as each is qualified under race-neutral criteria.

4. Plaintiffs seek monetary damages in the form of refund of application fees and all associated expenses incurred by Plaintiffs in connection with applying for admission to UT Austin and attorneys' fees and costs under 42 U.S.C. § 1988 and any other applicable legal authority, as well as all other relief this Court finds appropriate and just.

JURISDICTION AND VENUE

5. This action arises under section 1 of the Fourteenth Amendment to the United States Constitution and under federal civil rights statutes 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.* This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

6. Venue is proper in the Western District of Texas under 28 U.S.C. § 1391 because the events giving rise to the claims detailed herein occurred in the Western District of Texas.

THE PARTIES

Plaintiffs

7. Plaintiff Abigail Noel Fisher is an 18-year-old Caucasian female who resides in Richmond, Texas.

8. Ms. Fisher is currently enrolled as a full-time high school student at Stephen F. Austin High School in Sugar Land, Texas.

9. At the time of her application to UT Austin, Ms. Fisher maintained a 5.1111 grade point average on a weighted 6.0 scale and/or a 3.5926 grade point average on a 4.0 scale at Stephen F. Austin High School.

10. At the time of her application to UT Austin, Ms. Fisher was ranked 82 out of 674 students in her graduating class. Thus, Ms. Fisher was ranked in approximately the top 12 percent of her class at Stephen F. Austin High School.

11. At the time of her application to UT Austin, Ms. Fisher had taken the Scholastic Aptitude Test ("SAT") twice. The SAT is administered by the College Board, a nonprofit educational association that liaises with high schools and colleges to facilitate the undergraduate application process. The test is composed of three sections—critical reading, mathematics, and writing—each scored on scale from 200 to 800 points. The critical reading section (formerly known as the "verbal" section) evaluates reading comprehension skills through a series

of paragraph-length excerpts and sentence-completion drills. The mathematics section includes topics covered in high school algebra, geometry, and pre-calculus curricula. The writing section, added to the SAT in 2005, includes multiple-choice questions that test grammar, usage, and word choice, and also requires students to compose a short, persuasive essay. UT Austin did not consider the writing section in its undergraduate admissions decision for the 2008 incoming freshman class.

12. On the first occasion that Ms. Fisher took the SAT, she scored a 540 on the critical reading portion of the exam and a 630 on the math portion of the exam for a total of 1170. On the second occasion, she scored a 500 on the critical reading portion of the exam and a 680 on the math portion of the exam for a total of 1180. For undergraduate applicants who take the SAT more than once, UT Austin considers the higher combined score from one test when making admissions decisions.

13. Plaintiff Rachel Multer Michalewicz is a 17-year-old Caucasian female who resides in Buda, Texas.

14. Ms. Michalewicz is currently enrolled as a full-time high school student at Jack C. Hays High School in Buda, Texas.

15. At the time of her application to UT Austin, Ms. Michalewicz maintained a 3.867 grade point average on a 4.0 scale at Jack C. Hays High School.

16. At the time of her application to UT Austin, Ms. Michalewicz was ranked 36 out of 355 students in her graduating class. Thus, Ms. Michalewicz was ranked in the top 10.14 percent of her class according to UT Austin. According to Jack C. Hays High School, Ms. Michalewicz is ranked in the Top 10 percent of her class. Ms. Michalewicz appealed the denial of admission. UT Austin rejected the appeal.

17. At the time of her application to UT Austin, Ms. Michalewicz had taken the Scholastic Aptitude Test ("SAT") once, scoring a 670 on the critical reading portion of the exam and a 620 on the math portion of the exam for a total of 1290.

Defendants

18. UT Austin is a public educational institution authorized by Article 7, section 10 of the Texas Constitution and is funded by the State of Texas and the United States Government.

19. John W. Barnhill, Jr., H. Scott Caven, Jr., James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, and Printice L. Gary are the nine members of the Board of Regents, the governing body of the University of Texas System. The Board of Regents is responsible for the central management and coordination of the University of Texas System's component institutions. The Board of Regents promulgates regulations that authorize the colleges, departments, and other programs in the University of

Texas System to develop and implement undergraduate admissions policies. The members of the Board of Regents are all named defendants in their official capacities only.

20. Mark G. Yudof is the Chancellor of the University of Texas System. As Chancellor, Yudof serves as the chief executive officer of the University of Texas System charged with instituting the policies and procedures of the Board of Regents. Yudof is responsible for all aspects of the University of Texas System's operations, including oversight and implementation of the admissions policy at UT Austin. Yudof is sued in his official capacity.

21. David B. Pryor is the Executive Vice Chancellor for Academic Affairs of the University of Texas System. According to the Rules and Regulations of the Board of Regents, Pryor is responsible for the review and approval of any proposal for admissions policies. He is sued in his official capacity.

22. Barry D. Burgdorf is the Vice Chancellor and General Counsel of the University of Texas System. According to the Rules and Regulations of the Board of Regents, Burgdorf is responsible for the review and approval of any proposal for admissions policies. He is sued in his official capacity.

23. William Powers, Jr., is the President of UT Austin. As President, Powers is responsible for the implementation and administration of undergraduate admissions at the UT Austin. He is sued in his official capacity.

24. Bruce Walker is Vice Provost and Director of Undergraduate Admissions at UT Austin. Walker administers UT Austin's undergraduate admissions office and implements the undergraduate admissions policies promulgated by the University System. Walker's name and signature are affixed to the respective letters from UT Austin to each Plaintiff stating that UT Austin denied each Plaintiff admission into UT Austin's undergraduate program for the incoming freshman class of 2008. *See* Letter from Bruce Walker to Abigail Fisher of March 25, 2008 (Exhibit A "Ex." A"); Letter from Bruce Walker to Rachel Michalewicz of March 24, 2008 (Ex. B). Walker is sued in his official capacity.

UT AUSTIN'S UNDERGRADUATE ADMISSIONS POLICIES

25. UT Austin is selective in its admissions process in that the number of applicants seeking admission into its undergraduate program each year exceeds the number of available slots.

26. UT Austin has modified its undergraduate admissions policies over time, generally in response to judicial decisions in the federal courts regarding public undergraduate and graduate schools' consideration of race as a factor in admissions decisions.

*UT Austin's Pre-*Hopwood *Admissions Policies*

27. In the years immediately preceding the decision by the United States Court of Appeals for the Fifth Circuit

in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), UT Austin employed race-based criteria in its undergraduate admissions program.

28. UT Austin formulated a system of predicting freshman grade point average based upon an applicant's standardized testing (SAT and/or ACT) scores and class rank.

29. During this time, UT Austin's undergraduate admissions program employed this predicted freshman grade point average in conjunction with race-based affirmative action to make admissions decisions *("Pre-Hopwood* Race-Based Plan").

30. According to UT Austin, relying exclusively on predicted freshman grade point average for admissions decisions "would have produced classes with unacceptably low diversity levels." *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (June 2003), at 2.

31. UT Austin employed an admissions plan relying on race-based affirmative action in order to increase the number of African-American and Hispanic students admitted to UT Austin.

32. Under the *Pre-Hopwood* Race-Based Plan, in 1996, 17,263 students applied for admission to UT Austin's incoming freshman class, 809 of whom were African-American students, and 2,492 of whom were Hispanic students. Thus, 4.7 percent of UT Austin's pool of

applicants for the incoming freshman class were African-American students, and 14.4 percent of UT Austin's pool of applicants for the incoming freshman class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1.

33. Under the *Pre-Hopwood* Race-Based Plan, in 1996, UT Austin admitted 11,456 students to its incoming freshman class, 501 of whom were African-American students and 1,761 of whom were Hispanic students. Thus, 4.4 percent of UT Austin's admitted class were African-American students, and 15.4 percent of UT Austin's admitted class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1.

34. Under the *Pre-Hopwood* Race-Based Plan, in 1996, 6430 students enrolled in UT Austin's incoming freshman class, 266 of whom were African-American students and 932 of whom were Hispanic students. Thus, 4.1 percent of UT Austin's enrolled freshman class were African-American students, and 14.5 percent of UT Austin's enrolled freshman class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1.

The Hopwood *Case*

35. In 1996, the United States Court of Appeals for the Fifth Circuit held that UT Austin was prohibited

from considering race as a criterion for admission to the University of Texas at Austin Law School. *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

36. Under the Fifth Circuit's *Hopwood* decision, it was unlawful for universities and graduate schools in Texas to use race-based criteria in their admissions decisions.

37. Following the Fifth Circuit's *Hopwood* decision, UT Austin ceased employing race as a factor in its undergraduate admissions decisions.

38. According to UT Austin, the last freshman class admitted under this race-based admissions program was for the Summer/Fall of 1996.

*UT Austin's Post-*Hopwood *Admissions Policies*

39. Beginning with the entering freshman class of 1997, UT Austin implemented a new admissions policy that did not take an applicant's race into account.

40. During this time, UT Austin evaluated undergraduate applicants according to their academic performance and their personal achievements.

41. For each applicant, UT Austin computed an Academic Index ("AI") and a Personal Achievement Index ("PAI").

42. UT Austin has stated in public documents that an applicant's AI is a figure that reflects the applicant's high school record, taking in to account the applicant's class

rank, the applicant's completion of a UT Austin-required high school curriculum, the extent to which the applicant exceeded the required curriculum, and the applicant's SAT/ACT score.

43. UT Austin has stated in public documents that an applicant's PAI is a figure that takes into account the applicant's scores on two essays, leadership, extracurricular activities, awards/honors, work experience, and service to school or community, as well as other special circumstances.

44. The other special circumstances that UT Austin considers are the socio-economic status of the applicant's family, whether the applicant lives in a single-parent home, the language spoken at home, the applicant's family responsibilities, the socio-economic status of school attended, and the average SAT/ACT of school attended in relation to student's own SAT/ACT.

45. Neither race nor ethnic origin were included among the special circumstances that were considered part of an applicant's PAI under UT's post-*Hopwood* admissions plan.

46. Under this admissions plan ("AI/PAI Plan"), in 1997, 14,982 students applied for admission to UT Austin's incoming freshman class, 639 of whom were African-American students, and 1,955 of whom were Hispanic students. Thus, 4.3 percent of UT Austin's pool of applicants for the incoming freshman class were African-American students, and 13.0 percent of UT Austin's pool of

applicants for the incoming freshman class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1.

47. Under the AI/PAI Plan, for the entering freshmen class of 1997, UT Austin admitted 12,289 students to its incoming freshman class, 419 of whom were African-American students and 1,592 of whom were Hispanic students. Thus, 3.4 percent of UT Austin's admitted freshman class of 1997 were African-American students, and 13.0 percent were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1.

48. Under the AI/PAI Plan, for the entering freshmen class of 1997, 7085 students enrolled in UT Austin's incoming freshman class, 190 of whom were African-American students and 892 of whom were Hispanic students. Thus, 2.7 percent of UT Austin's 1997 enrolled freshmen class were African-American students, and 12.6 percent of UT Austin's 1997 enrolled freshmen class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1.

The Top 10 Percent Law

49. In 1997, the Texas legislature passed House Bill 588, Tex. Educ. Code § 51.803 (1997). House Bill 588 is often referred to as HB 588, or the "Top 10 Percent Law."

50. Under the Top 10 Percent Law, Texas public high school students who graduate in the top 10 percent of their class are guaranteed admission to UT Austin.

51. The Top 10 Percent Law effectively creates a large pre-qualified applicant pool for UT Austin, including a large number of pre-qualified minority applicants.

52. The legislative history of the Top 10 Percent Law confirms that the goal of the law was to not only "ensure a highly qualified pool of students each year in the state's higher educational system" but also to promote diversity among the applicant pool in order to "ensure that a large, well qualified pool of minority students [is] admitted to Texas universities." HB 588, House Research Organization Digest at 4, 5 (Apr. 15, 1997).

53. Students admitted pursuant to the Top 10 Percent Law do not fill UT Austin's entire incoming freshman class.

54. Thus, UT Austin continued to use the AI/PAI Plan. UT Austin would admit as freshmen all students who qualified under the Top 10 Percent Law and then use the AI/PAI Admissions Plan to fill the remainder of its incoming freshman class.

55. From 1998 through 2004, UT Austin admitted applicants under the Top 10 Percent Law and then used the AI/PAI Plan to fill the remainder of each incoming freshman class (the "Top 10-AI/PAI Plan").

56. Neither race nor ethnic origin was considered in admissions to UT's incoming freshman class under the Top 10-AI/PAI Plan used for admissions from 1998 through 2004.

57. The Top 10-AI/PAI Plan was very successful in promoting diversity in UT Austin's undergraduate student body.

58. In 2000, UT Austin President Larry R. Faulkner stated that "the Top 10 percent law has enabled us to diversify enrollment at UT Austin with talented students who succeed. Our 1999 enrollment levels for African American and Hispanic freshmen have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies." *The "Top 10 Percent Law" is Working for Texas,* Dr. Larry Faulkner, President, The University of Texas at Austin (October 19, 2000), *available at* http://www.utexas.edu/student/admissions/research/faulknerstatement.html.

59. In an October 19, 2000 press release entitled *The "Top 10 Percent Law" is Working for Texas,* UT Austin President Larry R. Faulkner stated that "minority students have earned higher grade point averages last year [in 1999] than in 1996 and have higher retention rates. An impressive 94.9 percent of 1998 African American freshmen returned to enroll for their sophomore year 1999. For Hispanics, 85.8 percent returned for their second year. So, the law is helping to create a more representative student body and enroll students who perform well academically." *The "Top 10 Percent Law" is*

Working for Texas, Dr. Larry Faulkner, President, The University of Texas at Austin (October 19, 2000), *available at* http://www.utexas.edu/student/admissions/research/faulknerstatement.html.

60. In a January 16, 2003 press release, UT Austin stated that the Top 10 Percent Law "has effectively compensated for the loss of affirmative action." *The University of Texas at Austin's experience with the "Top 10 Percent" Law* (January 16, 2003), *available at* http://www.utexas.edu/news/2003/01/16/nr_toptenpercent/.

61. In a January 16, 2003 press release, UT Austin stated that "the first-year class included 272 African Americans, or 3.4 percent of the total of 7,936. It also included 1,138 Hispanics, or 14.3 percent of the total. The percentage of entering African American and Hispanics in the Fall of 1996, the year the 5th Circuit Court of Appeals' decision struck down the use of affirmative action in Texas, was 4 and 14, respectively." *The University of Texas at Austin's experience with the "Top 10 Percent" Law* (January 16, 2003), *available at* http://www.utexas.edu/news/2003/01/16/nr_toptenpercent/.

62. In a January 29, 2003 press release, UT Austin announced that "[d]iversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students—African Americans [and] Hispanics ... —to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university's enrollment process. A report by the university's Office of Institutional Research for

the 2002 Fall/Summer enrollment shows there were 266 African Americans [and] 932 Hispanics ... enrolled as first-time freshmen at the university in 1996. The numbers of African Americans and Hispanics dropped after the *Hopwood* ruling .... In 1997, the numbers for first-time freshmen were down to 190 African Americans [and] 892 Hispanics .... More recent enrollment figures show a more encouraging trend. The Summer/Fall 2002 semester report shows that first-time freshmen enrollment for [these] ethnic groups has increased to a level above the 1996 pre-Hopwood figures. Minority enrollment last fall included 272 African Americans, 1,137 Hispanics ...." *Enrollment of first-time freshman minority students now higher than before Hopwood court decision* (January 29, 2003), *available at* http://www.utexas.edu/news/2003/01/29/nr_diversity/.

63. In 2004, the last year under the Top 10-AI/PAI Plan, 23,008 students applied for admission to UT Austin's incoming freshman class, 1,456 of whom were African-American students, and 4,035 of whom were Hispanic students. Thus, 6.3 percent of UT Austin's pool of applicants for the incoming freshman class were African-American students, and 17.5 percent of UT Austin's pool of applicants for the incoming freshman class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1.

64. In 2004, the last year under the Top 10-AI/PAI Plan, UT Austin admitted 11,788 students to its incoming freshman class, 569 of whom were African-American

students and 1,911 of whom were Hispanic students. Thus, 4.8 percent of UT Austin's admitted class were African-American students, and 16.2 percent of UT Austin's admitted class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1.

65. In 2004, the last year under the Top 10-AI/PAI Plan, 6,796 students enrolled in UT Austin's incoming freshman class, 309 of whom were African-American students and 1,149 of whom were Hispanic students. Thus, 4.5 percent of UT Austin's enrolled class were African-American students, and 16.9 percent of UT Austin's enrolled class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1.

66. In 2004, the last year under the Top 10-AI/PAI Plan, out of the 569 African-American students admitted into the incoming freshman class, 428 were admitted under the Top 10 percent law and 141 under the AI/PAI criteria. Of the 428 African-American students admitted under the Top 10 percent law, 225 enrolled in the incoming freshman class and 203 of the automatically admitted African-American students did not. There were 84 African-American students admitted to the 2004 incoming freshman class under the AI/PAI criteria who enrolled in UT Austin. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1, Table 1-A, Table 2.

67. In 2004, the last year under the Top 10-AI/PAI Plan, out of the 1911 Hispanic students admitted into the incoming freshman class, 1,451 were admitted under the Top 10 percent law and 460 under the AI/PAI criteria. Of the 1,451 Hispanic students admitted under the Top 10 percent law, 887 enrolled in the incoming freshman class and 564 of the automatically admitted Hispanic students did not. There were 262 Hispanic students admitted to the 2004 incoming freshman class under the AI/PAI criteria who enrolled in UT Austin. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (December 2006), Table 1, Table 1-A, Table 2.

The Grutter *Decision*

68. The *Hopwood* case was abrogated on June 23, 2003 by the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

69. The Supreme Court reaffirmed in *Grutter* both that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race," 539 U.S. at 341, and that "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection," 539 U.S. at 327.

70. Government discrimination based upon race is the exception rather than the rule under the Fourteenth Amendment.

71. The Supreme Court held that courts must apply strict scrutiny to racially discriminatory university admissions programs in order to ensure that admissions committees are "pursing a goal important enough to warrant use of a highly suspect tool." *Grutter*, 539 U.S. at 326.

72. The Supreme Court explained that "racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands." *Grutter*, 539 U.S. at 342.

73. The Supreme Court held in *Grutter* that universities have a compelling interest in "student body diversity" such that, under limited circumstances, they may consider race or ethnicity as a factor in their admissions processes. *Grutter*, 539 U.S. at 328.

74. The Supreme Court further explained in *Grutter* that government is constrained in how it may pursue those ends, even where the end is a compelling state interest. The means chosen by the government must be narrowly tailored to fit its purpose. *Grutter*, 539 U.S. at 333.

75. The Supreme Court therefore held in *Grutter* that universities must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks" before turning to racial preferences. *Grutter*, 539 U.S. at 339.

*UT Austin's Post-*Grutter *Admissions Policies*

76. On June 23, 2003, the same day that the United States Supreme Court decided *Grutter*, UT Austin decided to resume employing race as a factor in undergraduate admissions decisions.

77. On June 23, 2003, Larry Faulkner, then-President of the UT Austin, publicly announced that race-based admissions criteria would quickly be re-introduced to the undergraduate admissions process at UT Austin and become effective for the upcoming 2004 admissions cycle. *See* Ron Nissimov, *UT Austin to Reintroduce Race-Based Criteria,* Houston Chronicle, June 24, 2003.

78. On June 23, 2003, UT Austin issued a press release entitled *The University of Texas at Austin reacts to the Supreme Court's affirmative action decisions ("UT Austin Reacts to Grutter"):* "Dr. Larry R. Faulkner, president of The University of Texas at Austin, said the rulings [in *Grutter]* sweep away the restrictions of the 1996 *Hopwood* decision, a decade long case that eliminated the consideration of race."

79. As stated in the *UT Austin Reacts to Grutter* press release: "The University of Texas at Austin will modify its admissions procedures to comply with the court's rulings in time for the Fall 2004 semester, Faulkner said. This will include implementing procedures at the undergraduate level that combine the benefits of the Top 10 Percent Law with affirmative action programs that can produce even greater diversity." *UT Austin Reacts to Grutter* (June 23, 2003).

80. On June 23, 2003, President Larry R. Faulkner stated at a news conference that "the Supreme Court's rulings today place the state of Texas and higher education institutions in the state on the same competitive basis as education institutions throughout the United States." *UT Austin Reacts to Grutter* (June 23, 2003).

81. At the same time, UT Austin decided to resume employing race as a factor in graduate and professional programs. President Faulkner explained that employing racial preferences in admissions decisions for graduate and professional programs is a "priority" because "we don't have a good substitute for affirmative action in those programs." *UT Austin Reacts to Grutter* (June 23, 2003).

82. On August 7, 2003, the Board of Regents adopted a resolution authorizing UT Austin to develop and implement policies and procedures for its undergraduate admissions program that take race into account.

83. Pursuant to the Board's authorization, beginning with the 2005-2006 academic year, UT Austin implemented race-based criteria as part of its undergraduate admissions program.

84. Since the 2005-2006 academic year, UT Austin has employed race as a factor in its undergraduate admissions decisions by including the applicant's race as a component of the applicant's PAI (the "race-adjusted AI/PAI criteria").

85. Since the 2005-2006 academic year, UT Austin has admitted students to its undergraduate program

consistent with the Top 10 Percent Law and has filled the remainder of its incoming freshman classes in accordance with the AI/PAI Plan as modified to account for race (the "Top 10-Race-Based Plan").

86. Although it is not clear how much weight the race-adjusted AI/PAI criteria gives to an applicant's race, it is clear that UT Austin grants to African-American and Hispanic students a substantial advantage in the admissions process that it does not grant to other students such as Plaintiffs.

87. The average SAT scores for students admitted under the race-adjusted AI/PAI criteria demonstrate that African-American and Hispanic students are given a substantial advantage on the basis of their race in the admissions process. The average SAT scores for non Top-10% students from Texas high schools who enrolled in the 2006 UT Austin incoming freshman class are as follows: Caucasian students–1,286; African-American students–1,086; Hispanic students–1,154. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Tables 6a, 6b, 6d.

88. In 2005, during the first year under the Top 10-Race-Based Plan, 23,925 students applied for admission to UT Austin's incoming freshman class, 1,552 of whom were African American students, and 4,457 of whom were Hispanic students. Thus, 6.5 percent of UT Austin's pool of applicants for the incoming freshman class were African-American students, and 18.6 percent of UT Austin's pool of applicants for the incoming freshman class were Hispanic

students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1.

89. In 2005, during the first year under the Top 10-Race-Based Plan, UT Austin admitted 12,207 students to its incoming freshman class, 617 of whom where African-American students and 2,183 of whom were Hispanic students. Thus, 5.1 percent of UT Austin's admitted class were African-American students, and 17.9 percent of UT Austin's admitted class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1.

90. In 2005, during the first year under the Top 10-Race-Based Plan, 6,912 students enrolled in UT Austin's incoming freshman class, 351 of whom were African-American students and 1,244 of whom were Hispanic students. Thus, 5.1 percent of UT Austin's enrolled class were African-American students, and 18.0 percent of UT Austin's enrolled class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1.

91. In 2005, under the Top 10-Race-Based Plan, out of the 617 African-American students admitted into the incoming freshman class, 441 were admitted under the Top 10 percent law and 176 under the race-adjusted AI/PAI criteria. Of the 441 African-American students automatically admitted under the Top 10 Percent Law,

252 enrolled in the incoming freshman class and 189 of these automatically admitted African-American students did not. There were 99 African-American students admitted to the 2005 incoming freshman class under the race adjusted AI/PAI plan who enrolled at UT Austin. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1, Table 1-A, Table 2.

92. In 2005, under the Top 10-Race-Based Plan, out of the 2,183 Hispanic students admitted into the incoming freshman class, 1,656 were admitted under the Top 10 Percent Law and 527 under the race-adjusted AI/PAI criteria. Of the 1,656 Hispanic students automatically admitted under the Top 10 Percent Law, 966 enrolled in the incoming freshman class and 690 of these automatically admitted Hispanic students did not. There were 278 Hispanic students admitted to the 2005 incoming freshman class under the race-adjusted AI/PAI criteria who enrolled at UT Austin. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1, Table 1-A, Table 2.

93. In 2007, the most recent year for which there is data under the Top 10-Race- Based Plan, 27,237 students applied for admission to UT Austin's incoming freshman class, 1,952 of whom were African-American students, and 5,335 of whom were Hispanic students. Thus, 7.2 percent of UT Austin's pool of applicants for the incoming freshman class were African-American students, and 19.6 percent of UT Austin's pool of applicants for the incoming

freshman class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1.

94. In 2007, the most recent year for which there is data under the Top 10-Race-Based Plan, UT Austin admitted 13,800 students to its incoming freshman class, 747 of whom where African-American students and 2,632 of whom were Hispanic students. Thus, 5.4 percent of UT Austin's admitted class were African-American students, and 19.1 percent of UT Austin's admitted class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1.

95. In 2007, the most recent year for which there is data under the Top 10-Race-Based Plan, 7,485 students enrolled in UT Austin's incoming freshman class, 431 of whom where African-American students and 1,472 of whom were Hispanic students. Thus, 5.8 percent of UT Austin's enrolled class were African-American students, and 19.7 percent of UT Austin's enrolled class were Hispanic students. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1.

96. In 2007, under the Top 10-Race-Based Plan, out of the 747 African-American students admitted into the incoming freshman class, 485 were admitted under the Top 10 Percent Law and 262 under the race-adjusted AI/PAI race-based criteria. Of the 485 African-American

students admitted under the Top 10 percent law, 284 enrolled in the incoming freshman class and 201 of the automatically admitted African-American students did not. There were 147 African-American students admitted to the 2007 incoming freshman class under the race-adjusted AI/PAI criteria who enrolled at UT Austin. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1, Table 1-A, Table2.

97. In 2007, under the Top 10-Race-Based Plan, out of the 2,632 Hispanic students automatically admitted into the incoming freshman class, 1,974 were admitted under the Top 10 Percent Law and 658 under the race-adjusted AI/PAI criteria. Of the 1,974 Hispanic students automatically admitted under the Top 10 Percent Law, 1,109 enrolled in the incoming freshman class and 865 of these automatically admitted Hispanic students did not. There were 363 Hispanic students admitted to the 2007 incoming freshman class under the race-adjusted AI/PAI criteria who enrolled at UT Austin. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin* (October 2007), Table 1, Table 1-A, Table 2.

98. Under *Grutter*, UT Austin's race-based admissions policies are not narrowly tailored as a matter of law because UT Austin failed to consider and take advantage of alternative race-neutral means of achieving diversity prior to implementing their racially discriminatory policies.

99. Institutions cannot use race-conscious admissions policies if they can achieve racial diversity through the use of race-neutral alternatives.

100. UT Austin failed to consider and take advantage of the obvious and proven alternative of continued utilization of the Top 10-AI/PAI Plan, which had demonstrated success in promoting diversity, a fact UT Austin has acknowledged and even lauded. In each year since the enactment of the Top 10 Percent Law, UT Austin has failed to attract numerous automatically admitted minority students to enroll. In 2007, there were 201 African-American students and 865 Hispanic students who were automatically admitted to UT Austin under the Top 10 Percent Law who chose not to enroll at UT Austin.

101. UT Austin also failed to consider and take advantage of numerous other available race-neutral alternatives, including but not limited to options such as increased minority recruitment and outreach efforts, focus on socio-economically disadvantaged students through increased availability and funding for financial aid and scholarships, financial and resource investment in low-performing elementary and secondary schools, and partnerships with private and not-for-profit institutions, such as the College Board and College Summit.

102. UT Austin's precipitous return to race-based admissions criteria ignored the success UT Austin achieved with regard to student body diversity under the Top 10 Percent Law, failed to consider the use of other race-neutral options, and therefore, does not meet

the narrow tailoring requirement of the Fourteenth Amendment.

103. UT Austin's use of racial preferences in addition to its Top 10 Percent Law is not narrowly tailored. It has had a pervasive negative effect on non-minority applicants, while producing only marginal increases in minority admissions and enrollment to UT Austin.

PLAINTIFFS' APPLICATIONS TO UT AUSTIN

Abigail Noel Fisher

104. On or about January 27, 2008, Ms. Fisher applied to the undergraduate program at UT Austin, seeking to be admitted to the 2008 entering freshmen class. Upon submitting her application, Ms. Fisher paid a $50.00 application fee and subsequently paid a $50.00 housing deposit.

105. At the time of her application to UT Austin, Ms. Fisher had a 5.1111 grade point average on a weighted 6.0 scale and/or a 3.5926 grade point average on a 4.0 scale at Stephen F. Austin High School.

106. At the time of her application to UT Austin, Ms. Fisher's class rank was 82 out of 674 students in her graduating class. Ms. Fisher was ranked in approximately the top 12 percent of her class at Stephen F. Austin High School.

107. Ms. Fisher received recognition for academic excellence at Stephen F. Austin High School for having

scored above 80 in all of her classes during her freshman, junior and senior years at Stephen F. Austin High School.

108. Ms. Fisher took the SAT and scored a 500 on the critical reading portion of the exam and a 680 on the math portion of the exam for a total of 1180. Ms. Fisher's SAT scores are competitive with the historical SAT scores of students who enroll at UT Austin's undergraduate program.

109. The 25/75 percentile SAT scores for students who enrolled in UT Austin's 2006 incoming freshman class are 1120-1370. *See* US News & World Report http://colleges.usnews.rankingsandreviews.com/usnews/edu/college/directory/brief/drglance_3658_brief.php.

110. Ms. Fisher engaged in a number of extracurricular activities during her high school career. Ms. Fisher is a member and co-president of the Stephen F. Austin High School orchestra. Indeed, Ms. Fisher is an accomplished cellist, having been a member of not only the Stephen F. Austin High School orchestra, but also city and regional youth orchestras. Ms. Fisher also competes in math competitions, and she has competed in co-educational sports, including soccer and bowling. In addition, Ms. Fisher does volunteer work and community service ranging from Habitat for Humanity to playing holiday music in a local nursing home.

111. Ms. Fisher's application to UT Austin's undergraduate program reflects that she has expressed an interest in studying finance.

112. Because Ms. Fisher's class rank at Stephen F. Austin High School fell outside of the top 10 percent, her application for admission was considered under the race-adjusted AI/PAI criteria.

113. On or about March 25, 2008, Ms. Fisher received a rejection letter from UT Austin signed by Defendant Bruce Walker, Vice Provost and Director of Admissions, explaining that her application for admission to UT Austin's undergraduate program had been rejected. *See* Ex. A.

114. UT Austin offered Ms. Fisher admission to UT Austin's Coordinated Admission Program ("CAP"). Students who enroll in CAP may enroll in a participating University of Texas System campus; students who fulfill the requirements of CAP may then enroll at UT Austin after their freshman year, but are guaranteed admission into only the College of Liberal Arts or the College of Natural Sciences. The requirements of CAP include the completion of at least 30 transferable semester credit hours and a minimum 3.2 GPA on all hours attempted while enrolled in CAP. *See* Ex. A.

115. Students who wish to enroll in CAP must complete an online acceptance agreement on UT Austin's website by May 1, 2008.

116. Under the procedures for admission at UT, students who are admitted to UT Austin's 2008 incoming freshman class must make payment to UT Austin in the amount of $200 in order to secure a place in the incoming

freshman class. This $200 enrollment deposit becomes nonrefundable after May 1, 2008.

117. Ms. Fisher has applied and been admitted to the undergraduate program at Louisiana State University ("LSU"). On the basis of her academic and personal achievements, Ms. Fisher has received a Tigers Scholar Award, entitling her to a partial scholarship in the amount of $2,075 to LSU. The deadline to accept her offer of admission and the Tigers Scholar Award is May 1, 2008. If Ms. Fisher elects to enroll at LSU, all tuition and fees for the 2008 Fall semester are due by August 7, 2008.

118. Ms. Fisher has applied and been admitted to the undergraduate program at Baylor University ("Baylor"). On the basis of her academic and personal achievements, Baylor awarded Ms. Fisher a partial scholarship in the amount of $3,500. In order to secure a place in the 2008 incoming freshman class at Baylor, Ms. Fisher must make an enrollment deposit in the amount of $300 by May 1, 2008. If Ms. Fisher elects to enroll at Baylor, all tuition and fees for the 2008 Fall semester are due by July 31, 2008.

119. Ms. Fisher has been injured by UT Austin's use of racial preferences because she was not considered on an equal basis with African-American and Hispanic applicants who applied for admission to the same incoming freshman class at UT Austin.

120. On information and belief, given Ms. Fisher's record of achievement, it is likely that her application

would have been accepted and she would have been admitted into UT Austin's undergraduate program but for UT Austin's use of race-based criteria in its admissions decisions.

121. As an applicant ineligible for the race-based admissions preference employed by UT Austin, Ms. Fisher was injured by the University's race-based criteria when she was considered for admission under the Top 10-Race-Based Plan and ultimately refused admission to the UT Austin's undergraduate program on the basis of her race.

122. Unless enjoined by this Court, Defendants will continue to implement race-based admissions policies and procedures which prevent future non-minority applicants from having their applications considered on a race-neutral basis and, with respect to Ms. Fisher, from gaining admission to UT Austin in violation of her rights under the United States Constitution and federal law.

123. Without a remedy from this Court, Ms. Fisher will have been denied the opportunity to compete for admission to UT Austin's undergraduate program on an equal basis with African-American and Hispanic applicants because of Defendants' racially discriminatory admissions policies.

124. Without a remedy from this Court, Ms. Fisher will have been deprived of the opportunity to attend the UT Austin, an injury that cannot be redressed by money damages.

Appendix C

Rachel Multer Michalewicz

125. On or about November 12, 2007, Ms. Michalewicz applied to the undergraduate program at UT Austin, seeking to be admitted to the 2008 entering freshmen class. Upon submitting her application, Ms. Michalewicz paid a $50.00 application fee and subsequently paid a $50.00 housing deposit.

126. At the time of her application to UT Austin, Ms. Michalewicz had a 3.867 grade point average on a 4.0 scale at Jack C. Hays High School.

127. At the time of her application to UT Austin, Ms. Michalewicz's class rank was 36 out of 355 students in her graduating class. Ms. Michalewicz was ranked in the top 10.14 percent of her class at Jack C. Hays High School according to UT Austin.

128. Ms. Michalewicz received recognition as an Advanced Placement Scholar by the College Board for receiving a grade of 3 or higher on three Advanced Placement exams.

129. Ms. Michalewicz took the SAT and scored a 670 on the critical reading portion of the exam and a 620 on the math portion of the exam for a total of 1290. Ms. Michalewicz's SAT scores are competitive with the historical SAT scores of students who enroll at UT Austin's undergraduate program.

130. Ms. Michalewicz engaged in a number of extracurricular activities during her high school career. Ms.

Michalewicz is a member of the Jack C. Hays High School Marching Band, Jazz Band/Concert Band, and the Math Club. Ms. Michalewicz participated in Junior ROTC during her freshman and sophomore years at Jack C. Hays high school. Ms. Michalewicz also volunteered with the St. Vincent DePaul Food Bank and participated in Cast Event for Kids, a fishing event for handicapped children. Ms. Michalewicz also worked 20 hours per week at HEB Grocery Store in Kyle, Texas.

131. Ms. Michalewicz's application to UT Austin's undergraduate program reflects that she has expressed an interest in studying Asian Cultures and Languages.

132. Because Ms. Michalewicz's class rank at Jack C. Hays High School fell outside of the top 10 percent according to UT Austin, her application for admission was considered under the race-adjusted AI/PAI criteria.

133. On or about March 24, 2008, Ms. Michalewicz received a rejection letter from UT Austin signed by Defendant Bruce Walker, Vice Provost and Director of Admissions, explaining that her application for admission to UT Austin's undergraduate program had been rejected. UT Austin offered Ms. Michalewicz admission to the CAP program. *See* Ex. B.

134. Ms. Michalewicz appealed her denial of admission on March 26, 2008. Ex. C. Ms. Michalewicz informed UT Austin that Jack C. Hays High School considered her in the Top 10 percent of her class. Ex. D. Ms. Michalewicz received an informal response from UT Austin explaining that UT Austin disagreed with, and was therefore

rejecting, the method of calculating class rank employed by Jack C. Hays High School. According to UT Austin, Ms. Michalewicz falls within the top 11% of her high school class. Subsequently, Ms. Michalewicz's appeal was formally rejected by UT Austin.

135. Ms. Michalewicz has applied and been admitted to the undergraduate program at Texas State University-San Marcos ("Texas State"). If Ms. Michalewicz elects to enroll at Texas State, all non-refundable tuition and fees for the 2008 Fall semester are due by August 26, 2008.

136. Ms. Michalewicz has been injured by UT Austin's use of racial preferences because she was not considered on an equal basis with African-American and Hispanic applicants who applied for admission to the same incoming freshman class at UT Austin.

137. On information and belief, given Ms. Michalewicz's record of achievement, it is likely that her application would have been accepted and she would have been admitted into UT Austin's undergraduate program but for UT Austin's use of race-based criteria in its admissions decisions.

138. As an applicant ineligible for the race-based admissions preference employed by UT Austin, Ms. Michalewicz was injured by the University's race-based criteria when she was considered for admission under the Top 10-Race-Based Plan and ultimately refused admission to the UT Austin's undergraduate program on the basis of her race.

139. Unless enjoined by this Court, Defendants will continue to implement race-based admissions policies and procedures which will prevent future non-minority applicants from having their applications considered on a race-neutral basis and, with respect to Ms. Michalewicz, from gaining admission to UT Austin in violation of her rights under the United States Constitution and federal law.

140. Without a remedy from this Court, Ms. Michalewicz will have been denied the opportunity to compete for admission to UT Austin's undergraduate program on an equal basis with African-American and Hispanic applicants because of Defendants' racially discriminatory admissions policies.

141. Without a remedy from this Court, Ms. Michalewicz will have been deprived of the opportunity to attend the UT Austin, an injury that cannot be redressed by money damages.

PLAINTIFFS' CLAIMS

Count I—Violation of the Fourteenth Amendment to the United States Constitution

142. Plaintiffs incorporate the allegations and averments contained in paragraphs 1-141 as if fully set forth herein.

143. The Fourteenth Amendment to the United States Constitution forbids the States from "deny[ing] to any

person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

144. In order to survive constitutional scrutiny, racial classifications must be narrowly tailored to further compelling government interests.

145. To the extent that UT Austin articulates an interest in promoting "student body diversity," Plaintiffs do not challenge this interest.

146. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives that will achieve" the compelling government interest.

147. When UT Austin elected to resume employing racial preferences in its undergraduate admissions decisions following *Grutter*, it failed to consider and take advantage of numerous obvious and proven race-neutral means to achieve diversity.

148. UT Austin failed to consider any race-neutral alternatives. Rather, it reflexively resumed employing racial preferences immediately following the Supreme Court's decision in *Grutter*.

149. UT Austin failed to consider and fully take advantage of the Top 10 Percent Law, which UT Austin previously had lauded as successfully promoting diversity, and other race-neutral alternatives to meets its diversity interest.

150. UT Austin also failed to consider and fully take advantage of the existing race-neutral AI/PAI criteria that successfully produced a diverse student body.

151. UT Austin's use of racial preferences in addition to its Top 10 Percent Law has had a pervasive negative effect on non-minority applicants, while producing only marginal increases in minority admissions and enrollment to UT Austin.

152. Because UT Austin failed to consider race-neutral alternatives before employing racial preferences in its undergraduate admissions decisions, UT Austin has violated the Fourteenth Amendment.

153. Because UT Austin could have achieved the same or substantially similar levels of diversity through race-neutral means, UT Austin's admissions policies are not narrowly tailored and, therefore, violate the Fourteenth Amendment.

154. Plaintiffs were deprived of their rights under the Fourteenth Amendment because UT Austin failed to consider their applications for undergraduate admission on an equal basis with the applications of the African-American and Hispanic students.

155. Plaintiffs were injured because UT Austin failed to consider their applications for undergraduate admission on an equal basis with the applications of the African-American and Hispanic students.

156. Plaintiffs were injured by UT Austin's use of racial preferences because each was rejected for admission to UT Austin's undergraduate program on account of their race.

157. Plaintiffs are entitled to both preliminary and permanent injunctive relief against Defendants because there is no plain, adequate, or speedy remedy at law to prevent Defendants from continuing to discriminate on the basis of race in their admissions policies and procedures and because the harm Plaintiffs have suffered and will otherwise continue to suffer is irreparable. Plaintiffs are also entitled to monetary damages incurred when they submitted applications for admission to UT Austin's 2008 freshman class that were not considered on an equal basis with the applications of African-American and Hispanic applicants.

Count II-Violation of 42 U.S.C. §§ 1981 & 1983

158. Plaintiffs incorporate the allegations and averments contained in paragraphs 1-157 as if fully set forth herein.

159. Defendants acted under color of law in developing and implementing race-based policies and procedures that led UT Austin to deny Plaintiffs equal protection of the laws and to discriminate against them in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983.

160. Plaintiffs were deprived of their rights under the Fourteenth Amendment because UT Austin failed to

consider their applications for undergraduate admission on an equal basis with the applications of African-American and Hispanic students.

161. Plaintiffs are entitled to both preliminary and permanent injunctive relief against Defendants because there is no plain, adequate, or speedy remedy at law to prevent Defendants from continuing to discriminate on the basis of race in their admissions policies and procedures and because the harm Plaintiffs have suffered and will otherwise continue to suffer is irreparable. Plaintiffs are also entitled to monetary damages incurred when they submitted applications for admission to UT Austin's 2008 freshman class that were not considered on an equal basis with the applications of African-American and Hispanic applicants.

Count III—Violation of 42 U.S.C. § 2000d et seq.

162. Plaintiffs incorporate the allegations and averments contained in paragraphs 1-161 as if fully set forth herein.

163. UT Austin, a recipient of federal funds, discriminated against Plaintiffs on the basis of their race, color, or ethnicity in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

164. Plaintiffs are entitled to both preliminary and permanent injunctive relief against Defendants because there is no plain, adequate, or speedy remedy at law to prevent Defendants from continuing to discriminate on the basis of race in their admissions policies and procedures

and because the harm Plaintiffs have suffered and will otherwise continue to suffer is irreparable. Plaintiffs are also entitled to monetary damages incurred when they submitted applications for admission to UT Austin's 2008 freshman class that were not considered on an equal basis with the applications of African-American and Hispanic applicants.

RELIEF SOUGHT

165. Wherefore, Plaintiffs pray for the following relief as to all counts:

(a) A preliminary injunction requiring Defendants to re-evaluate Plaintiffs for admission to the undergraduate program at UT Austin under race-neutral means in accordance with the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and federal civil rights statutes 42 U.S.C. §§ 1981 and 1983;

(b) A preliminary injunction requiring Defendants to admit Plaintiffs to UT Austin's undergraduate program so long as each is qualified under race-neutral criteria;

(c) A declaratory judgment from the Court that Defendants' admissions policies and procedures violate the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and federal civil rights statutes 42 U.S.C. §§ 1981 and 1983;

(d) A permanent injunction prohibiting Defendants from using race as a factor in future undergraduate student admissions decisions at UT Austin;

(e) A permanent injunction requiring Defendants to re-evaluate Plaintiffs for admission to the undergraduate program at UT Austin under race-neutral criteria;

(f) A permanent injunction requiring Defendants to admit Plaintiffs to UT Austin's undergraduate program so long as each is qualified under race-neutral criteria;

(g) Monetary damages in the form of refund of application fees and all associated expenses incurred by Plaintiffs in connection with applying for admission to UT Austin;

(h) Attorneys fees and costs under 42 U.S.C. § 1988 and any other applicable legal authority; and

(i) All other relief this Court finds appropriate and just.

Respectfully submitted,

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Counsel for Plaintiffs

Dated: August 13, 2008

APPENDIX D — ANSWER OF DEFENDANTS TO PLAINTIFFS' SECOND AMENDED COMPLAINT, FILED AUGUST 22, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. 1:08-CV-00263-SS

ABIGAIL NOEL FISHER and
RACHEL MULTER MICHALEWICZ,

Plaintiffs,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.

Defendants.

ANSWER OF DEFENDANTS UNIVERSITY OF TEXAS AT AUSTIN, KENNETH I. SHINE, DAVID B. PRIOR, WILLIAM POWERS, JR., BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, JOHN W. BARNHILL, JR., H. SCOTT CAVEN, JR. JAMES R. HUFFINES, JANIECE LONGORIA, COLLEEN McHUGH, ROBERT B. ROWLING, JAMES D. DANNENBAUM, PAUL FOSTER, PRETICE L. GARY, AND BRUCE WALKER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

TO THE HONORABLE SAM SPARKS:

Defendants University of Texas at Austin ("UT Austin"); Kenneth I. Shine;[1] David B. Prior; William Powers, Jr.; Board of Regents of the University of Texas System, John W. Barnhill, Jr., H. Scott Caven, Jr., James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Printice L. Gary; and Bruce Walker (all individuals are sued in their official capacities only) (collectively, "Defendants") file their Answer to Plaintiffs' Second Amended Complaint and respectfully show the Court as follows:

ANSWER

Pursuant to Federal Rule of Civil Procedure 8(b), the Defendants deny each and every allegation contained in Plaintiffs Second Amended Complaint except for those expressly admitted herein. These numbered paragraphs correspond to the paragraphs within the body of Plaintiff's Original Petition:

NATURE OF THE ACTION

1. Defendants state that there is no need to admit or deny the allegations of this paragraph, except to the extent that Defendants deny the undergraduate admissions program at UT Austin illegally discriminates against Plaintiffs and violates their constitutional rights or any federal civil rights statutes.

---

[1] Dr. Shine was substituted for Dr. Yudof by the Court's order of August 13, 2008.

2. Defendants state that there is no need to admit or deny the allegations of this paragraph.

3. Defendants state that there is no need to admit or deny the allegations of this paragraph.

4. Defendants state that there is no need to admit or deny the allegations of this paragraph.

JURISDICTION AND VENUE

5. Admit.

6. Admit.

THE PARTIES

Plaintiffs

7. Admit to the extent that Defendants have knowledge based on Ms. Fisher's application to UT Austin.

8. Admit to the extent that Defendants have knowledge based on Ms. Fisher's application to UT Austin.

9. Deny. Defendants aver that, based Ms. Fisher's high school records that are part of her admissions file, at the time of her application, Ms. Fisher maintained a 5.1020 grade point average on a weighted 6.0 scaled and/or a 3.5714 grade point average on a 4.0 scale at Stephen F. Austin High School.

10. Defendants deny the first sentence and, based on Ms. Fisher's high school records that are part of her UT Austin admissions file, aver that, at the time of her application, Ms. Fisher was ranked 81 out of 680 students in her graduating class. Defendants admit the second sentence.

11. Admit.

12. Admit.

13. Defendants deny and aver that Ms. Michalewicz's high school records that are part of her UT Austin admissions file show that Ms. Michalewicz is currently 18 years old.

14. Admit to the extent that Defendants have knowledge based on Ms. Michalewicz's application to UT Austin.

15. Admit.

16. Admit.

17. Admit.

Defendants

18. Admit.

19. Admit.

20. Defendants deny that Mark Yudof is the current Chancellor of the University of Texas System (the "UT

System"), aver that Kenneth I. Shine, M.D., is the Interim Chancellor of the UT System, and admit to the first, second and fourth sentences. Defendants admit the third sentence to the extent that the Chancellor is responsible for all aspects ofUT System operations and that the then-current Chancellor reviewed and approved UT Austin's admissions policy; however, to the extent that the word "implement" means administer, supervise, or something similar, Defendants deny that the Chancellor had such duties.

21. Admit.

22. Defendants state that no response is required to this paragraph because Barry Burgdorf was dismissed from this action by the Court's order dated May 19, 2008.

23. Admit.

24. Defendants admit the first sentence, except aver that Bruce Walker is Vice Provost and Director of Admissions at UT Austin. Defendants admit the second, third and fourth sentences.

UT AUSTIN'S UNDERGRADUATE ADMISSIONS PROCESS

25. Admit.

26. Defendants admit in part; deny in part. Defendants aver that UT Austin has modified its undergraduate admissions policies over time in response to judicial decisions in the federal courts regarding the

use of race as a factor in admissions decisions. Defendants further aver that admission policies, however, have also been impacted by legislation, such as House Bill 588, Section 51.803 of the Texas Education Code (with the accompanying administrative regulations promulgated by the Texas Higher Education Coordinating Board, the "Top 10 Percent Law"), the desire to recruit and retain students, and the need to manage the size of student enrollment.

UT Austin's Pre-Hopwood Admissions Policies

27. Defendants admit in part; deny in part. Defendants aver that UT Austin did not employ solely race-based criteria; rather, race, along with other factors such as class rank, test scores, and curriculum, were used in making admission decisions.

28. Admit.

29. Admit.

30. Defendants admit that the quotation in the sentence is correct and to the extent that *exclusive* reliance on predicted freshman grade point average for admissions decisions "would have produced classes with unacceptably low diversity levels."

31. Admit.

32. Defendants admit the first sentence, except for Plaintiffs' characterization of UT Austin's Pre-*Hopwood*

admissions policies as "Race-Based Plan." Defendants admit the second sentence.

33. Defendants admit the first sentence, except for Plaintiffs' characterization of UT Austin's Pre-*Hopwood* admissions policies as "Race-Based Plan." Defendants admit the second sentence.

34. Defendants admit the first sentence, except for Plaintiffs' characterization of UT Austin's Pre-*Hopwood* admissions policies as "Race-Based Plan." Defendants admit the second sentence.

The* Hopwood *Case

35. Defendants state that there is no need to admit or deny the allegations of this paragraph.

36. Defendants state that there is no need to admit or deny the allegations of this paragraph.

37. Admit.

38. Defendants admit the allegations of this paragraph, except for Plaintiffs' characterization of UT Austin's admissions policies as "Race-Based Plan."

UT Austin's Post-* Hopwood *Admissions Policies

39. Admit.

40. Defendants admit to the extent that evaluation of undergraduate applicants included test scores and

essays, as well as academic performance and personal achievement.

41. Admit.

42. Defendants admit, except aver that an applicant's AI takes into account whether the applicant exceeded UT Austin-required high school curriculum.

43. Admit.

44. Admit.

45. Admit.

46. Admit.

47. Admit.

48. Admit.

The Top 10% Law

49. Admit.

50. Deny. Defendants aver that the Top 10 Percent Law, which must be read in conjunction with administrative regulations promulgated by the Texas Higher Education Coordinating Board and other applicable policies, provides additional admission requirements for students ranked in the top ten percent of their high school class.

51. Admit.

52. Admit.

53. Admit.

54. Defendants admit, except aver that the second sentence fails to take into account certain variances due to scholarship programs, admissions processes for academically extraordinary students, and certain portfolio or audition requirements that may exist for certain programs.

55. Defendants admit, except aver that the allegation fails to take into account certain variances due to scholarship programs, admissions processes for academically extraordinary students, and certain portfolio or audition requirements that may exist for certain programs.

56. Admit.

57. Deny.

58 Admit that former UT Austin President Larry Faulkner is quoted correctly, though not in context, and aver that the demographics have changed since 1996.

59. Admit that former UT Austin President Larry Faulkner is quoted correctly, and aver that the statistics quoted include the program's individualized and nuanced consideration of applicants' academic and personal achievements.

60. Defendants deny and aver that the sentence from which the quote is taken states "The University of Texas at Austin has effectively compensated for the loss of affirmative action, partly by increasing recruiting and financial aid for minority students."

61. Admit.

62. Defendants admit in part, deny in part. Defendants aver that Plaintiffs' quotations are accurate as far as they go; however, they are misleading in that four sentences are edited and incomplete, leading to a misunderstanding of the article. The entire paragraphs selectively quoted read:

> Diversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students—African Americans, Hispanics and Asian Americans—to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university's enrollment process.
>
> A report by the university's Office of Institutional Research for the 2002 fall/summer enrollment shows there were 266 African Americans, 932 Hispanics and 942 Asian Americans enrolled as first-time freshmen at the university in 1996. The numbers of African Americans and Hispanics dropped after the Hopwood ruling, although the figures for Asian Americans increased. In 1997, the numbers for first-time

> freshmen were down to 190 African Americans, 892 Hispanics and 1,130 Asian Americans.
>
> More recent enrollment figures show a more encouraging trend. The summer/fall 2002 semester report shows that first-time freshmen enrollment for all three ethnic groups has increased to a level above the 1996 pre-Hopwood figures. Minority enrollment last fall included 272 African Americans, 1,137 Hispanics and 1,452 Asian Americans.

63. Admit.

64. Admit.

65. Admit.

66. Admit.

67. Admit.

The* Grutter *Decision

68. Defendants state that there is no need to admit or deny the allegations of this paragraph.

69. Defendants state that there is no need to admit or deny the allegations of this paragraph.

70. Defendants state that there is no need to admit or deny the allegations of this paragraph.

71. Defendants state that there is no need to admit or deny the allegations of this paragraph.

72. Defendants state that there is no need to admit or deny the allegations of this paragraph.

73. Defendants state that there is no need to admit or deny the allegations of this paragraph.

74. Defendants state that there is no need to admit or deny the allegations of this paragraph.

75. Defendants state that there is no need to admit or deny the allegations of this paragraph.

UT Austin's Post-Grutter *Admissions Policies*

76. Deny.

77. Defendants are unable to admit or deny as they are not in possession of a copy of the article referenced in this paragraph.

78. Defendants admit that the quote is accurate, but aver that it is edited and, thus, incomplete.

79. Defendants admit that the quote is accurate and aver that it is consistent with the Supreme Court's mandate in *Grutter*.

80. Defendants admit that the quote is accurate and aver that it is consistent with the Supreme Court's mandate in *Grutter*.

81. Defendants admit that the quote is accurate and aver that it is consistent with the Supreme Court's mandate in *Grutter*.

82. Defendants admit in part, deny in part. Defendants aver that the Board of Regents passed a resolution on August 6, 2003, that, among other things, authorized each UT System institution to "develop and propose plans regarding whether to consider an applicant's race and ethnicity as part of the component's admissions or financial assistance policies in accordance with the standards enunciated in the recent Supreme Court cases of *Grutter v. Bollinger* and *Gratz v. Bollinger*." http://www.utsystem.edu/BORMinutes/2000-current/8-03meeting969.pdf, at pp. 4-5.

83. Defendants admit except as to the use of the term "race-based criteria."

84. Defendants admit except as to the use of the term "race-adjusted AI/PAI criteria."

85. Defendants admit except as to the use ofthe term "Top 10-Race-Based Plan."

86. Deny. Defendants aver that race may or may not play a role in the applications of candidates of all races as endorsed by the Supreme Court in *Grutter*.

87. Defendants deny the first sentence and admit the second.

88. Defendants admit except as to the use of the term "Top 10-Race-Based Plan."

89. Defendants admit except as to the use of the term "Top 10-Race-Based Plan."

90. Defendants admit except as to the use of the term "Top 10-Race-Based Plan."

91. Defendants admit except as to the use of the term "Top 10-Race-Based Plan."

92. Defendants admit except as to the use of the term "Top 10-Race-Based-Plan" and "race-adjusted AI/PAI criteria."

93. Defendants admit except as to the use of the term "Top 10-Race-Based Plan."

94. Defendants admit except as to the use of the term "Top 10-Race-Based Plan."

95. Defendants admit except as to the use of the term "Top 10-Race-Based Plan."

96. Defendants admit except as to the use of the term "Top 10-Race-Based Plan" and "race-adjusted AI/PAI criteria."

97. Defendants admit except as to the use of the term "Top 10-Race-Based Plan" and "race-adjusted AI/PAI criteria."

98. Deny.

99. Defendants state that there is no need to admit or deny the allegations of this paragraph.

100. Defendants deny the first sentence, admit the second sentence to the extent that some minorities who were admitted did not enroll, and admit the third sentence.

101. Deny.

102. Deny.

103. Deny.

PLAINTIFFS' APPLICATIONS TO UT AUSTIN

Abigail Noelle Fisher

104. Admit.

105. Defendants deny and aver that, based on her high school records that are part of her admissions file, at the time of her application, Ms. Fisher maintained a 5.1020 grade point average on a weighted 6.0 scaled and/or a 3.5714 grade point average on a 4.0 scale at Stephen F. Austin High School.

106. Defendants deny the first sentence and aver that, based on her high school records that are part of her admissions file, at the time of her application, Ms. Fisher was ranked 81 out of 680 students in her graduating class. Defendants admit the second sentence.

107. Defendants admit to the extent that Defendants have knowledge based on Ms. Fisher's application to UT Austin.

108. Admit.

109. Defendants are unable to admit or deny as they are not in possession of a copy of the article referenced in this paragraph and the web address provided does not publicly provide the information.

110. Defendants admit to the extent that Defendants have knowledge based on Ms. Fisher's application to UT Austin.

111. Defendants admit to the extent that Ms. Fisher's application reflects that she applied to the College of Business.

112. Defendants admit that Ms. Fisher's class rank fell outside the top 10 percent of her high school class and that her application for admission was holistically reviewed consistent with the UT Austin's admissions policy.

113. Admit.

114. Admit.

115. Admit.

116. Admit.

117. Defendants are without knowledge that would allow them to admit or deny the allegations contained in this paragraph.

118. Defendants are without knowledge that would allow them to admit or deny the allegations contained in this paragraph.

119. Deny.

120. Deny.

121. Deny.

122. Deny.

123. Deny.

124. Deny.

Rachel Multer Michalewicz

125. Admit.

126. Admit.

127. Admit.

128. Defendants admit to the extent that Defendants have knowledge based on Ms. Michalewicz's application to UT Austin.

129. Admit.

130. Defendants admit to the extent that Defendants have knowledge based on Ms. Michalewicz's application to UT Austin.

131. Admit.

132. Defendants admit that Ms. Michalewicz's class rank fell outside the top 10 percent of her high school class and that her application for admission was holistically reviewed consistent with the UT Austin's admissions policy.

133. Admit.

134. Admit.

135. Defendants are without knowledge that would allow them to admit or deny the allegations contained in this paragraph.

136. Deny.

137. Deny.

138. Deny.

139. Deny.

140. Deny.

141. Deny.

PLAINTIFFS' CLAIMS

Count I-Violation of the Fourteenth Amendment to the United States Constitution

142. Defendants incorporate their responses to paragraphs 1 through 141 of the Amended Complaint as if fully set forth herein.

143. Defendants state that this paragraph contains conclusions of law to which no response is required.

144. Defendants state that this paragraph contains conclusions of law to which no response is required.

145. Defendants state that this paragraph contains conclusions of law to which no response is required.

146. Defendants state that this paragraph contains conclusions of law to which no response is required.

147. Deny.

148. Deny.

149. Deny.

150. Deny.

151. Deny.

152. Deny.

153. Deny.

154. Deny.

155. Deny.

156. Deny.

157. Deny.

Count II-Violation of 42 U.S.C. §§ 1981 and 1983

158. Defendants incorporate their responses to paragraphs 1 through 157 of the Amended Complaint as if fully set forth herein.

159. Defendants state that this paragraph contains conclusions of law to which no response is required.

160. Deny.

161. Deny.

Count II-Violation of 42 U.S.C. §§ 1981 and 1983

162. Defendants incorporate their responses to paragraphs 1 through 162 of the Amended Complaint as if fully set forth herein.

163. Deny.

164. Deny.

RELIEF SOUGHT

165. Defendants state that this paragraph contains conclusions of law to which no response is required.

AFFIRMATIVE DEFENSES

1. UT Austin asserts that it is entitled to "Eleventh Amendment immunity" from claims brought under 42 U.S.C. §§ 1981 and 1983.

2. At all times relevant to this cause, Defendants' actions were reasonable and proper under the laws of the State of Texas and the United States.

PRAYER

Defendants pray that Plaintiffs take nothing by their suit.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

APPENDIX E — PLAINTIFFS' STATEMENT OF FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED JANUARY 23, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(Austin Division)

Civil Action No. 1:08-cv-00263-SS

ABIGAIL NOEL FISHER; and
RACHEL MULTER MICHALEWICZ

Plaintiffs,

v.

UNIVERSITY OF TEXAS AT AUSTIN; *et al.*

Defendants.

PLAINTIFFS' STATEMENT OF FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Abigail Noel Fisher and Rachel Multer Michalewicz, through their undersigned counsel, hereby submit this Statement of Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment pursuant to Federal Rule of Civil Procedure 56 and the Orders of this Court.

Appendix E

UT AUSTIN UNDERGRADUATE ADMISSIONS

1. UT Austin is selective in that each year the number of applicants seeking undergraduate admission exceeds the number of available spaces in the incoming freshman class.

(Compl. ¶ 25, Answer ¶ 25; Exhibit 6, Lavergne Dep. at 11; Exhibit 5, Ishop Dep. at 9.)

2. For the fall 2008 freshman class, UT Austin had 29,501 applicants, made 12,843 offers of admission, and enrolled 6,715 students.

(Exhibit 9, *Implementation and Results of the Texas Automatic Admission Law (HB 588) at the University of Texas at Austin*, Oct. 28, 2008, *available at* http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf at 6, Table 1.)

3. UT Austin has stated that it is the mission of UT Austin "to provide an opportunity for students in the State of Texas, outside of the State of Texas, and internationally to achieve an excellent education [] at the University of Texas at Austin. The [admissions] policies are both legislative and internal. Legislatively, [UT Austin is] mandated to admit top ten percent students in the State of Texas ... [In addition, UT Austin has] developed internally an admissions policy geared towards admitting a diverse class of students representative [of] all backgrounds and all walks to [its] freshman class."

(Ex. 5 at 9.)

4. UT Austin has been recognized as one of the nation's "top producers of undergraduates for Hispanics" by *Diverse Issues in Higher Education* magazine ("according to the May 31, 2007 edition of Diverse Issues in Higher Education magazine, . . . the university ranks 10th nationally among the magazine's Top 100 producers of undergraduates for Hispanics") and one of the nation's "Best Schools for Hispanics" by *Hispanic Business* magazine.

(Exhibit 11, The University of Texas at Austin – *Rankings and Kudos, available at* http://www.utexas.edu/welcome/rankings.html.)

5. Several of UT Austin's undergraduate academic programs have been ranked highly "[a]mong undergraduate academic programs in the top 100." For example, Engineering ranks fifth for Hispanics; Mathematics ranks third for Hispanics; Biological and biomedical sciences ranks fourth for Hispanics; Social sciences ranks seventh for Hispanics; Area ethnic, cultural and gender studies ranks seventh for Hispanics; Computer and information science and support services rank 37th for Hispanics; English ranks 11th for Hispanics; and Psychology ranks 27th for Hispanics.

(Ex. 11.)

6. "Although the university enrolled the most ethnically diverse freshman class in its history during fall 2007 - 19.7 percent Hispanic students, 19.7 percent Asian-American students and 5.8 percent African-American students - it

strives to continue building a diverse student body, faculty and staff that truly reflect Texas and the entire country."

(Exhibit 21, Vincent Dep. Attachment.)

I. History of UT Austin Undergraduate Admissions

7. Over time, UT Austin has modified its undergraduate admissions policies in response to various judicial decisions, namely *Hopwood v. Texas* and *Grutter v. Bollinger*, and in accordance with legislation, namely "The Top Ten Percent Law" - House Bill 588, Section 51.803 of the Texas Education Code (with the accompanying administrative regulations promulgated by the Texas Higher Education Coordinating Board).

A. UT Austin Admissions Pre-*Hopwood*

8. In the years immediately prior to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), UT Austin employed an admissions plan which combined use of an applicant's predicted freshman grade point average and race-based affirmative action.

(Compl. ¶ 29, Answer ¶ 29; Ex. 5 at 54.)

9. An applicant's predicted freshman grade point average was calculated based on his standardized test scores (SATs and/or ACTs) and class rank.

(Compl. ¶ 28, Answer ¶ 28; Ex. 5 at 53.)

10. UT Austin's race-based affirmative action policy was designed to increase the enrollment of African-American and Hispanic students.

(Compl. ¶ 31, Answer ¶ 31.)

11. According to UT Austin, exclusive reliance on predicted freshman grade point average (without the race-based affirmative action policy) for admissions decisions "would have produced classes with unacceptably low diversity levels."

(Exhibit 25, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin*, Dec. 6, 2007 at 2; Compl. ¶ 30, Answer ¶ 30.)

12. The last class admitted under the pre-*Hopwood* policy was the freshman class of the summer/fall of 1996.

(Compl. ¶ 38, Answer ¶ 38; Exhibit 8, Walker Dep. at 11.)

13. UT Austin maintained application, admission, and enrollment figures for 1996. (Ex. 25 at 4-5, Tables 1, 1a.)

Appendix E

Application Stage								
White				African-American				Total Students
Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	
		10584	61.3%			809	4.7%	17263
Hispanic				Asian-American				
Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	
		2492	14.4%			-		17263

Admission Stage								
White				African-American				Total Students
Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	
		7167	62.6%			501	4.4%	11456
Hispanic				Asian-American				
Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	
		1761	15.4%			-		11456

Enrollment Stage								
White				African-American				Total Students
Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	
1497	2662	4159	64.7%	91	175	266	4.1%	6430
Hispanic				Asian-American				
Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	
396	536	932	14.5%	430	512	942	14.7%	6430

B. The Hopwood Decision and Its Impact on UT Austin Admissions

14. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), held that the use of race as a factor in the admissions process of the University of Texas Law School was unlawful.

(*See also* Ex. 8 at 11-12.)

15. The Attorney General for the State of Texas interpreted *Hopwood* as prohibiting the consideration of race as a factor in undergraduate admissions at UT Austin.

(Exhibit 26, Texas Attorney General, Letter Opinion No. 97-001, Feb. 5, 1997.)

16. Consequently, UT Austin ceased using race as a factor in its undergraduate admissions and thereby terminated the race-based affirmative action policy.

(Compl. ¶ 37, Answer ¶ 37.)

C. UT Austin's Full File Review Process

17. Beginning with the entering freshman class of 1997, UT Austin has evaluated applicants based on a determination of two numerical scores which represent an applicant's personal achievement and academic performance.

(Compl. ¶ 40, Answer ¶ 40; Ex. 8 at 11-13; Ex. 5 at 52-53.)

18. The full file review process was intended, among other things, to boost minority enrollment.

(Ex. 8 at 13.)

19. UT Austin has characterized this as a "holistic" review process.

(Compl. ¶ 40, Answer ¶ 40; Ex. 8 at 11-13; Ex. 5 at 52-53.)

20. For each applicant, UT Austin computes an Academic Index (AI) and a Personal Achievement Index (PAI).

(Compl. ¶ 41, Answer ¶ 41.)

21. An applicant's AI is determined by using an equation which considers an applicant's (1) class rank; (2) completion of UT Austin required high school curriculum; (3) the extent to which the applicant exceeds UT Austin's required units; and (4) SAT/ACT score.

(Ex. 9 at 2.)

22. An applicant's PAI is determined by a review of the full application and is based on two scores: (1) essay scores; and (2) personal achievement score.

(Ex. 9 at 2-3.)

23. Essays and personal achievements are scored on a scale of one to six.

(Ex. 9 at 3.)

24. The equation for calculating an applicant's PAI is [(personal achievement score *4) + (mean essay score *3)]/7.

(Ex. 9 at 3.)

1. Essays

25. Each applicant must submit two essays.

(Exhibit 17, Ishop Aff. ¶ 4.)

26. Essays are scored on a scale of one to six by trained readers who consider the complexity of thought, substantiality of development, and facility with language demonstrated by the essay.

(Exhibit 4, Bremen Dep. at 10.)

27. The two required essays are also considered separately as part of the personal achievement score.

(Ex. 4 at 17-18.)

28. Applicants may also submit an optional third essay to address exceptional hardships, challenges, or opportunities that have shaped or impacted your abilities or academic credentials, personal responsibilities, exceptional achievements or talents, educational goals, or ways in which you might contribute to an institution committed to creating a diverse learning environment.

(Exhibit 13, The University of Texas at Austin – *Admission Essays, available at* http://bealonghorn.utexas.edu/admission/essays/index.html.)

29. Optional third essays are not included in the essay score for PAI calculations, but are only considered as part of the review of an applicant's entire file.

(Ex. 5 at 78.)

30. Most students do not complete the optional third essay.

(Ex. 5 at 81.)

2. Personal Achievement Score

31. An applicant's personal achievement score is based on a "holistic" review of an applicant's leadership qualities; extracurricular activities; awards/honors; work experience; service to school or community; and special circumstances.

(Ex. 9 at 2; Exhibit 10, *Inter-rater Reliability of Holistic Measures Used in the Freshman Admissions Process of The University of Texas at Austin Summer/Fall 2005,* Feb. 22, 2005, *available at* http://www.utexas.edu/student/admissions/research/Inter-raterReliability2005.pdf at 4.)

32. Prior to the fall 2005 application cycle, UT Austin considered the following "special circumstances" when evaluating an applicant's personal achievement: socio-

economic status of family; single parent home; language spoken at home; family responsibilities; socio-economic status of school attended; and average SAT/ACT score of school attended in relation to applicant's own SAT/ACT score.

(Ex. 9 at 2.)

33. Each factor considered in determining an applicant's personal achievement score is meaningful.

(Ex. 8 at 45.)

34. Each factor can make a difference to an applicant's personal achievement score.

(Ex. 8 at 53.)

35. Some applicants' scores are necessarily affected by individual factors.

(Ex. 5 at 67.)

36. In evaluating personal achievement, application file readers consider the breadth and depth of an applicant's factors.

(Ex. 5 at 18; Ex. 4 at 48.)

37. Starting with the fall 2005 application cycle, UT Austin added race as a special circumstance.

(Ex. 9 at 2.)

3. Training for Review of Essays and Applications

38. UT Austin requires yearly training, conducted by Dr. Brian Bremen (associate professor of English at UT Austin and consultant to the College Board and UT Austin's admissions office) for its essay readers and full file readers (who review an applicant's full file).

(Ex. 4 at 9, 12, 31; Ex. 17 ¶ 13.)

39. The essay and application file readers are trained in holistic scoring.

(Ex. 4 at 9, 12, 31.)

40. No reader may participate in the admissions process without attending Dr. Bremen's training session for that year.

(Exhibit 2, UT Austin's Response to Plaintiffs' Second Discovery Requests (Aug. 19, 2008), Response to Request for Admission 1.)

41. The goal of the training, which UT Austin classifies as "rigorous," is to develop consensus and uniformity in scoring.

(Ex. 5 at 82; Ex. 4 at 29.)

42. When UT Austin added race as a factor in admissions decisions, the manner in which UT Austin reviewed

applications did not change. Race was simply added as another component to UT Austin's full file review and it became "part of the discussions in the training."

(Ex. 5 at 21.)

a. Essay Readers

43. For each annual training, Dr. Bremen selects approximately thirty-six sample essays for each essay topic.

(Ex. 4 at 27.)

44. Essay readers are given a set of essays, with scores pre-marked so that they can learn the differences in scoring.

(Ex. 4 at 27-28.)

45. Essay readers are then given sample essay sets to score, and repeat this process until there is a high degree of consistency of scoring across different readers.

(Ex. 4 at 28.)

46. The goal of the training is to ensure that all readers assign either the same score to any particular essay, or vary by no more than one point above or below the essay's actual score.

(Ex. 4 at 25.)

47. Essay readers are also given a scoring guide that describes typical characteristics of essays with particular scores. For example, an essay scoring a 6 must demonstrate "clear and consistent competence," "effectively and insightfully address the writing task," be "well-organized and fully developed," and display "consistent facility in the use of language." An essay scoring a 1 "demonstrates incompetent writing," reflects "very poor organization" and "very thin development," and contains "expressions so awkward that meaning is somewhat obscured."

(Ex. 4 at 52-54; Ex. 10 at 4.)

48. Essay readers are given a training booklet of "Range Finders" consisting of sample essays that represent each score on the scoring scale to which they can refer during the reading process.

(Ex. 5 at 25.)

49. UT Austin conducts an "inter-rater reliability analysis" once every several years, to ensure consistency among readers.

(Ex. 4 at 13; Ex. 5 at 83; Ex. 10.)

50. The most recent inter-rater reliability analysis showed that essay readers scored within one point of each other between 88-90% of the time.

(Ex. 6 at 49.)

51. The senior readers are also trained on essay reading and thus are able to informally review and subtly monitor scoring.

(Ex. 5 at 85.)

b. Full File Readers

52. Full file readers review entire application files in order to determine applicants' personal achievement scores.

(Ex. 4 at 26-27.)

53. Full file readers review essays as a component of an applicant's file but the essays are not evaluated as a piece of writing.

(Ex. 4 at 16-17.)

54. In training Full file readers are given a sample set of files, with pre-marked scores, to exemplify each possible personal achievement score.

(Ex. 4 at 26-27.)

55. Full file readers review the sample set and conduct practice scoring rounds until there is consistency among the group.

Ex. 4 at 27-29; Ex. 5 at 83.)

56. Full file readers are given a training booklet of "Range Finders" consisting of sample application files that represent each score on the scoring scale to which they can refer during the reading process.

(Ex. 5 at 25.)

57. The most recent inter-rater reliability analysis showed that Full file readers scored within one point of each other between 88-90% of the time.

(Ex. 6 at 49.)

D. The Passage of the Top Ten Percent Law and Its Impact on UT Austin Admissions

58. In 1997, the Texas legislature passed House Bill 588, Tex. Educ. Code § 51.803 (1997). House Bill 588 is often referred to as "HB 588" or the "Top 10 Percent Law".

(Compl. ¶ 49, Answer ¶ 49; Ex. 6 at 14.)

59. Under the Top 10 Percent Law, Texas universities, including UT Austin, guarantee admission to public high school students who are in the top ten percent of their class, after six or seven semesters, and complete standard application requirements.

(Exhibit 32, House Bill 588, Tex. Educ. Code § 51.803 (1997); Exhibit 12, The University of Texas at Austin – *Types of Applicants, available at* http://bealonghorn.utexas.edu/freshmen/after-you-apply/applicant-types/index.html; Ex. 5 at 15.)

60. The Top 10 Percent Law applies to every public high school in Texas, as well as every private high school that ranks its students and makes those rankings available to university admissions officers.

(Ex. 32; Ex. 5 at 16.)

61. Students admitted pursuant to the Top 10 Percent Law do not fill UT Austin's entire freshman class.

(Compl. ¶ 53, Answer ¶ 53.)

62. The Top 10 Percent Law guarantees every Top 10 Percent applicant admission to UT Austin, but not necessarily to the applicant's preferred academic program at UT Austin.

(Ex. 5 at 14.)

63. At UT Austin, Top 10 Percent applicants who are not admitted to their first or second choice academic programs will be admitted to the Liberal Arts College as undeclared majors.

(Ex. 5 at 17.)

64. The Top 10 Percent Law effectively creates a large pre-qualified applicant pool for UT Austin, including a large number of pre-qualified minority applicants.

(Compl. ¶ 51, Answer ¶ 51.)

65. The legislative history of the Top 10 Percent Law indicates that the goal of the law was to not only "ensure a highly qualified pool of students each year in the state's higher educational system" but also to promote diversity among the applicant pool in order to "ensure that a large, well qualified pool of minority students [is] admitted to Texas universities."

(Exhibit 24, HB 588, House Research Organization Digest, Apr. 15, 1997; Compl. ¶ 52, Answer ¶ 52.)

66. UT Austin uses its AI/PAI full file review process to select additional applicants to fill the balance of the freshman class (with certain variances from the full file review process due to scholarship programs, extraordinary students, and certain portfolio or audition requirements for various programs).

(Compl. ¶ 54, Answer ¶ 54.)

67. HB 588 does not apply to the School of Architecture or the College of Fine Arts.

(Ex. 5 at 92.)

68. In an October 19, 2000 press UT Austin President Larry R. Faulkner stated that "the Top 10 percent law has enabled us to diversify enrollment at UT Austin with talented students who succeed. Our 1999 enrollment levels for African American and Hispanic freshmen have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies."

(Exhibit 28, *The "Top 10 Percent Law" is Working for Texas*, Dr. Larry Faulkner, President, The University of Texas at Austin, October 19, 2000; Compl. ¶ 58, Answer ¶ 58.)

69. In an October 19, 2000 press release UT Austin President Larry R. Faulkner stated that "minority students have earned higher grade point averages last year [in 1999] than in 1996 and have higher retention rates. An impressive 94.9 percent of 1998 African American freshmen returned to enroll for their sophomore year 1999. For Hispanics, 85.8 percent returned for their second year. So, the law is helping to create a more representative student body and enroll students who perform well academically."

(Ex. 28; Compl. ¶ 59, Answer ¶ 59.)

70. In a January 16, 2003 press release, UT Austin stated that "[t]he University of Texas at Austin has effectively compensated for the loss of affirmative action, partly by increasing recruiting and financial aid for minority students."

(Exhibit 29, *The University of Texas at Austin's experience with the "Top 10 Percent" Law*, January 16, 2003; Compl. ¶ 60, Answer ¶ 50.)

71. In a January 16, 2003 press release, UT Austin stated that "the first-year class included 272 African Americans, or 3.4 percent of the total of 7,936. It also included 1,138 Hispanics, or 14.3 percent of the total. The percentage of entering African American and Hispanics in the Fall of

1996, the year the 5th Circuit Court of Appeals' decision struck down the use of affirmative action in Texas, was 4 and 14, respectively."

(Ex. 29; Compl. ¶ 61, Answer ¶ 61.)

72. In a January 29, 2003 press release, UT Austin announced that "[d]iversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students—African Americans, Hispanics and Asian Americans—to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university's enrollment process. A report by the university's Office of Institutional Research for the 2002 fall/summer enrollment shows there were 266 African Americans, 932 Hispanics and 942 Asian Americans enrolled as first-time freshmen at the university in 1996. The numbers of African Americans and Hispanics dropped after the Hopwood ruling, although the figures for Asian Americans increased. In 1997, the numbers for first-time freshmen were down to 190 African Americans, 892 Hispanics and 1,130 Asian Americans. More recent enrollment figures show a more encouraging trend. The summer/fall 2002 semester report shows that first-time freshmen enrollment for all three ethnic groups has increased to a level above the 1996 pre-Hopwood figures. Minority enrollment last fall included 272 African Americans, 1,137 Hispanics and 1,452 Asian Americans. . . . ."

(Exhibit 30, *Enrollment of first-time freshman minority students now higher than before Hopwood court decision*, January 29, 2003; Compl. ¶ 62, Answer ¶ 62.)

E. The *Grutter* Decision and Its Impact on UT Austin Admissions

73. *Grutter v. Bollinger*, 539 U.S. 306 (2003), abrogated the *Hopwood* decision. *Grutter* upheld the University of Michigan's use of race as a factor in its law school admissions program.

74. In a June 23, 2003 press release, UT Austin stated that "Dr. Larry R. Faulkner, president of The University of Texas at Austin, said the rulings [in *Grutter*] sweep away the restrictions of the 1996 *Hopwood* decision, a decade long case that eliminated the consideration of race."

(Exhibit 31, T*he University of Texas at Austin reacts to the Supreme Court's affirmative action decisions*, The University of Texas at Austin, June 23, 2003; Compl. ¶ 78, Answer ¶ 78.)

75. In a June 23, 2003 press release, UT Austin President Larry R. Faulkner stated that "[t]he University of Texas at Austin will modify its admissions procedures to comply with the court's rulings in time for the Fall 2004 semester.... This will include implementing procedures at the undergraduate level that combine the benefits of the Top 10 Percent Law with affirmative action programs that can produce even greater diversity."

(Ex. 31; Compl. ¶ 79, Answer ¶ 79.)

76. On August 6, 2003, the Board of Regents of the University of Texas System adopted a resolution

authorizing each System campus to consider whether or not to alter their admissions policies in light of *Grutter*.

(Exhibit 18, Roeckle Aff.; Exhibit 19, Frederick Affidavit (Exhibit A, *The Minutes of the Board of Regents of the University of Texas System*, August 6-7, 2003 at 4-5).)

77. The resolution required "individualized and holistic review of applicant files in which race and ethnicity are among a broader array of qualifications and characteristics considered."

(Ex. 19 at 4-5.)

78. The resolution required that any admissions plan that considers race or ethnicity "must also provide for a periodic review of whether, and to what extent, the plan is still needed or needs revisions."

(Ex. 19 at 4-5.)

79. UT Austin maintained application, admission, and enrollment figures during 1997-2004.

(Ex. 25 at 4-5, Tables 1, 1a.)

Appendix E

Application Stage

	White				African-American				Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
1997			9134	61.0%			639	4.3%	14982
1998			10138	60.4%			660	3.9%	16797
1999	2753	8298	11051	58.4%	268	762	1030	5.4%	18930
2000	3182	9555	12737	59.1%	291	895	1186	5.5%	21539
2001	3213	8510	11723	55.9%	245	808	1053	5.0%	20986
2002	3527	9076	12603	56.8%	278	881	1159	5.2%	22179
2003	3996	9948	13944	56.9%	326	1025	1351	5.5%	24519
2004	3817	8600	12417	54.0%	428	1028	1456	6.3%	23008

	Hispanic				Asian-American				Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
1997			1955	13.0%					14982
1998			2338	13.9%			2491	14.8%	16797
1999	911	1920	2831	15.0%	998	1670	2668	14.1%	18930
2000	1020	2067	3087	14.3%	1034	1905	2939	13.6%	21539
2001	1012	2152	3164	15.1%	1081	2042	3123	14.9%	20986
2002	1177	2310	3487	15.7%	1211	2048	3259	14.7%	22179
2003	1424	2677	4101	16.7%	1250	2189	3439	14.0%	24519
2004	1451	2584	4035	17.5%	1257	2005	3262	14.2%	23008

Appendix E

Admission Stage

	White				African-American				Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
1997			7964	64.8%			419	3.4%	12289
1998			7659	64.0%			401	3.3%	11975
1999	2753	4668	7421	62.1%	268	249	517	4.3%	11949
2000	3182	4980	8162	61.6%	291	271	562	4.2%	13256
2001	3213	4574	7787	61.2%	245	200	445	3.5%	12733
2002	3527	4731	8258	61.3%	278	216	494	3.7%	13476
2003	3996	2856	6852	59.6%	326	122	448	3.9%	11504
2004	3817	2997	6814	57.8%	428	141	569	4.8%	11788

	Hispanic				Asian-American				Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
1997			1592	13.0%					12289
1998			1620	13.5%			1942	16.2%	11975
1999	911	794	1705	14.3%	998	972	1970	16.5%	11949
2000	1020	803	1823	13.8%	1034	1117	2151	16.2%	13256
2001	1012	803	1815	14.3%	1081	1117	2198	17.3%	12733
2002	1177	768	1945	14.4%	1211	1087	2298	17.1%	13476
2003	1424	371	1795	15.6%	1250	741	1991	17.3%	11504
2004	1451	460	1911	16.2%	1257	756	2013	17.1%	11788

Appendix E

Enrollment Stage									
	White				African-American				Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
1997	1408	3322	4730	66.8%	50	140	190	2.7%	7085
1998	1497	2902	4399	65.2%	69	130	199	3.0%	6744
1999	1620	2827	4447	63.2%	160	126	286	4.1%	7040
2000	1921	2880	4801	62.5%	156	140	296	3.9%	7686
2001	1942	2505	4447	60.6%	137	105	242	3.3%	7337
2002	2203	2679	4882	61.5%	156	116	272	3.4%	7935
2003	2378	1488	3866	59.1%	194	73	267	4.1%	6544
2004	2270	1631	3901	57.4%	225	84	309	4.5%	6796

	Hispanic				Asian-American				Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
1997	358	534	892	12.6%	505	625	1130	15.9%	7085
1998	414	477	891	13.2%	519	614	1133	16.8%	6744
1999	513	463	976	13.9%	609	612	1221	17.3%	7040
2000	591	420	1011	13.2%	653	672	1325	17.2%	7686
2001	575	449	1024	14.0%	718	695	1413	19.3%	7337
2002	703	434	1137	14.3%	800	652	1452	18.3%	7935
2003	858	210	1068	16.3%	781	372	1153	17.6%	6544
2004	887	262	1149	16.9%	776	442	1218	17.9%	6796

F. The Addition of Race as a Factor and Its Impact on UT Admissions

80. In August 2004, the UT System approved a revised admissions policy for UT Austin that included an applicant's race as a factor.

(Ex. 9 at 2.)

81. This change took effect starting with applications for the entering class of 2005.

(Compl. ¶ 83, Answer ¶ 83.)

82. Race was added to the "special circumstances" considered when evaluating a candidate's personal achievement score and calculating his PAI.

(Ex. 9 at 2; Ex. 17 ¶ 4.)

83. The addition of race as a factor in admissions was intended to increase racial diversity at UT Austin by increasing the enrollment of "under-represented" minorities.

(Ex. 8 at 23-24, 34, 57.)

84. UT Austin considers African-Americans and Hispanics under-represented minorities but does not consider Asian-Americans to be under-represented minorities.

(Tr. of Prelim. Inj. Hr'g (May 19, 2008) at 64 ¶ 16-17.)

85. UT Austin added race as a factor in its admissions decisions because it views race as an important credential that helps the University understand the applicant and evaluate his or her circumstances.

(Ex. 5 at 55, 59.)

86. The consideration of race helps UT Austin examine the student in "their totality," "everything that they represent, everything that they've done, everything that they can possibly bring to the table."

(Ex. 5 at 55.)

87. According to UT Austin, racial diversity captures a student's awareness of his own environment and the environment of others.

(Ex. 5 at 61.)

88. According to UT Austin, the consideration of race as a factor helps UT Austin put into perspective what a student has accomplished in his high school career.

(Ex. 5 at 62.)

89. An applicant's race is on the front page of their application file; file readers know the applicant's race when they review an applicant's file.

(Ex. 5 at 19; Ex. 4 at 36-37.)

90. At UT Austin race is viewed favorably in an applicant's file when it shows the context of an applicant's cultural awareness and racial experiences.

(Ex. 5 at 57; Ex. 4 at 30.)

91. The consideration of race may be beneficial to minorities or non-minorities.

(Ex. 5 at 56.)

92. The factor of race, just like any other factor, can "make a difference" to an applicant's personal achievement score.

(Ex. 8 at 52-53; Ex. 5 at 67.)

93. Using race in admissions helps UT Austin achieve racial diversity.

(Ex. 5 at 62.)

94. Characteristics other than race promote the kinds of diversity other than racial diversity.

(Ex. 8 at 60.)

95. The addition of race as a factor in admissions has increased enrollment of under-represented minorities.

(Ex. 6 at 36; Ex. 8 at 23-24, 34.)

96. UT Austin has not tracked or measured the impact of race as a factor in its admissions decisions. UT Austin is unable to determine how much the consideration of race in admissions has increased the enrollment of under-represented minorities.

(Ex. 8 at 39.)

97. UT Austin has not determined what level would constitute critical mass of the enrollment of under-represented minority students.

(Ex. 2, Response to Request for Admission 3.)

98. UT Austin has not established a goal, target, or other quantitative objective for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008.

(Ex. 2, Response to Request for Admission 2.)

99. UT Austin does not have a projected end date by which it intends to cease using race as a factor in undergraduate admissions decisions.

(Ex. 2, Response to Request for Admission 6.)

100. UT Austin tracks the academic performance of students by grade point average (GPA).

(Ex. 9 at 12, Table 6.)

Appendix E

Mean Freshman Year GPA								
	White		African-American		Hispanic		Asian-American	
	Top 10	Non-Top 10	Top 10	Non-Top 10	Top 10	Non-Top 10	Top 10	Non-Top 10
2003	3.32	3.06	2.79	2.55	2.96	2.87	3.41	3.17
2004	3.31	3.02	2.69	2.58	2.92	2.81	3.38	3.11
2005	3.28	3.08	2.66	2.50	2.94	2.80	3.33	3.11
2006	3.25	3.05	2.69	2.58	2.80	2.67	3.35	3.05
2007	3.25	2.95	2.65	2.42	2.70	2.47	3.22	2.94

101. The academic performance of students admitted pursuant to the Top Ten Percent Law is higher than the performance of students admitted outside of the Top Ten Percent Law.

(Ex. 6 at 22; Ex. 9 at 12-15, Tables 6, 6a, 6b, 6c, 6d.)

102. The mean SAT scores for African-American and Hispanic students from 2003 to 2007 were lower than the mean SAT scores for White and Asian-American students during that time.

(Ex. 9 at 12-15 Tables 6, 6a, 6b, 6c, 6d.)

Appendix E

Mean SAT Scores for Enrolled Freshmen

	White		African-American		Hispanic		Asian-American	
	Top 10	Non-Top 10	Top 10	Non-Top 10	Top 10	Non-Top 10	Top 10	Non-Top 10
2003	1262	1267	1063	1065	1100	1189	1278	1300
2004	1262	1267	1046	1116	1110	1189	1280	1304
2005	1268	1295	1059	1118	1122	1193	1288	1322
2006	1264	1286	1067	1086	1105	1154	1284	1310
2007	1275	1275	1078	1073	1115	1155	1277	1310

103. UT Austin maintained application, admission, and enrollment figures during 2005-2008.

(Ex. 9 at 6-8, Tables 1, 1a, 2.)

Application Stage

	White					African-American			Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
2005	3887	8665	12552	52.5%	441	1111	1552	6.5%	23925
2006	4297	10004	14301	52.4%	463	1452	1915	7.0%	27315
2007	4244	9415	13659	50.1%	485	1467	1952	7.2%	27237
2008	4440	9598	14038	47.6%	582	1652	2234	7.6%	29501

	Hispanic					Asian-American			Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
2005	1656	2801	4457	18.8%	1302	2181	3483	14.6%	23925
2006	1790	3358	5148	18.8%	1572	2433	4005	14.7%	27315
2007	1974	3361	5335	19.6%	1571	2588	4159	15.3%	27237
2008	2218	3863	6081	20.6%	1744	2600	4344	14.7%	29501

Appendix E

Admission Stage									
	White				African-American				Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
2005	3887	2858	6745	55.3%	441	176	617	5.1%	12207
2006	4297	2983	7280	54.7%	463	220	683	5.1%	13307
2007	4244	3066	7310	53.0%	485	262	747	5.4%	13800
2008	4440	2142	6582	51.2%	582	146	728	5.7%	12843

	Hispanic					Asian-American			Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
2005	1656	527	2183	17.9%	1302	774	2076	17.0%	12207
2006	1790	616	2406	18.1%	1572	743	2315	17.4%	13307
2007	1974	658	2632	19.1%	1571	927	2498	18.1%	13800
2008	2218	403	2621	20.4%	1744	565	2309	18.0%	12843

Enrollment Stage

	White				African-American				Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
2005	2288	1550	3838	55.5%	252	99	351	5.1%	6912
2006	2524	1504	4028	54.3%	268	119	387	5.2%	7417
2007	2359	1480	3839	51.3%	284	147	431	5.8%	7479
2008	2480	1033	3513	52.3%	305	70	375	5.6%	6715

	Hispanic				Asian-American				Total
	Top 10	Non-Top 10	Total	%	Top 10	Non-Top 10	Total	%	Students
2005	966	278	1244	18.0%	782	410	1192	17.2%	6912
2006	1049	337	1386	18.7%	929	397	1326	17.9%	7417
2007	1109	361	1470	19.7%	1005	469	1474	19.7%	7479
2008	1164	174	1338	19.9%	1025	224	1249	18.6%	6715

II. The Current Admissions Process at UT Austin

104. UT Austin divides applicants into three categories based on residential status: (1) Texas residents; (2) Non-residents; and (3) Foreign.

(Ex. 17 ¶ 7.)

105. Texas resident applicants who submit a completed freshman application by published deadlines are not denied admission to UT Austin.

(Ex. 9 at 3.)

106. Applicants who are offered fall admission to UT Austin are offered such as either: (1) automatic admission based on the Top Ten Percent Law; (2) automatic admission based on a high Academic Index (AI) score; or (3) admission based on Academic Index (AI) and Personal Achievement Index (PAI) scores.

(Ex. 17, ¶¶ 3-16.)

107. Remaining Texas resident applicants may also be offered admission through the Summer Program or the Coordinated Admissions Program (CAP) at UT Austin based on an additional review of their application once all of the fall decisions have been made.

(Ex. 17, ¶ 15.)

A. Top Ten Percent Law Admissions

108. The Top Ten Percent Law guarantees admission to UT Austin to students who rank in the top ten percent of their high school class after six or seven semesters.

(Ex. 32; Ex. 6 at 14; Ex. 12; Ex. 5 at 15.)

109. Top Ten Percent Law applicants are not, however, guaranteed admission to their first choice or second choice academic program.

(Ex. 5 at 15.)

110. UT Austin considers the academic programs which can fill 80% or more of their admissions spaces based on the preferences of applicants admitted pursuant to Top Ten Percent Law "impacted majors".

(Ex. 5 at 31-32; Ex. 17 ¶ 11.)

111. UT Austin caps the percentage of Top Ten Percent Law applicants who will be automatically admitted to impacted programs at 75% of the program's available admission spaces. (Ex. 5. at 32-33; Ex. 17 ¶ 11.) For example, the School of Business capped its automatic admissions at the top 4%. (Ex. 5 at 33.)

112. Top Ten Percent Law applicants who are not within the cap for impacted programs will be considered for and offered admission to their second choice academic program based on the applicant's AI and PAI scores (which result from the review of the applicants' full application)

as described below, or will be offered admission to UT Austin's Liberal Arts College as undeclared majors.

(Ex. 5 at 16-17.)

B. Automatic High Academic Index (AI) Admissions

113. Some number of non-Top Ten Percent Law applicants may be automatically admitted to a particular academic program based solely on their high AI score. (Ex. 17 ¶ 12.) UT Austin does not appear to maintain admission figures for the number of applicants admitted based on high AI scores.

C. Academic Index (AI)/Personal Achievement Index (PAI) Admissions

114. Non-Top Ten Percent Law applicants and those Top Ten Percent Law applicants who are not admitted to their first choice academic program receive AI and PAI scores based on their applications.

(Ex. 9 at 3.)

115. Applicants are placed on an admissions matrix for their preferred programs based on their AI/PAI scores where AI is on the X-axis and PAI is on the Y-axis.

(Ex. 9 at 3; Ex. 5 at 30; Exhibit 3, Sample Admission Matrices produced by Defendants' in response to Plaintiffs' Second Discovery Requests (Bates Nos. D-825, 847, 852, 870).)

116. For a given academic program, applicants are clustered into groups of applicants who share the same combined AI and PAI scores and plotted on the matrix for that academic program.

(Ex. 5 at 30-31; *see* Ex. 3.)

117. Associate Directors and/or Assistant Directors from each academic program work as "liaisons" during the AI/PAI admissions process.

(Ex. 5 at 30-31.)

118. The liaisons from the impacted programs are the first to look at their program's admissions matrix.

(Ex. 5 at 30-31.)

119. Based on the number of students admitted pursuant to the Top Ten Percent Law, the liaisons determine how many spaces remain in their academic programs.

(Ex. 5 at 73.)

120. The liaisons for the impacted programs draw lines on their admission matrices in a "stair-step" manner starting at the high-AI/low-PAI corner of the matrix.

(Ex. 5 at 42-43; *see* Ex. 3.)

121. When deciding where to draw the line, the liaisons aim to reward the most accomplished applicants based on their AI and PAI scores.

(Ex. 5 at 87.)

122. Every applicant who is represented on the matrix is either admitted or not admitted based on which side of the line he falls.

(Ex. 5 at 30-31.)

123. One-tenth of an AI point or one PAI point can be determinative as to whether an applicant is admitted or not admitted.

(Ex. 8 at 33.)

124. If an applicant is not admitted to his first choice academic program he will "cascade" into his second choice academic program to be considered on that matrix.

(Ex. 5 at 30-31.)

125. Once the lines have been drawn for the impacted programs, liaisons from the remaining academic programs go through the same stair-step line-drawing process for their programs.

(Ex. 5 at 30-32.)

126. Applicants who are not admitted to their second choice academic program will cascade into the Liberal Arts undeclared major matrix.

(Ex. 5 at 45.)

127. Liaisons have "full discretion" in the drawing of their lines on the program matrices.

(Ex. 5 at at 43.)

128. Texas residents not admitted to the fall freshman class may be considered for admission to either the UT Austin Summer Program or participate in the UT System Coordinated Admissions Program (CAP).

(Ex. 17 ¶ 15.)

129. UT Austin aims to enroll approximately 800 students in its Summer Program annually.

(Ex. 5 at 47.)

130. Because the Summer Program typically has an enrollment rate of approximately 50%, UT Austin offers admission to approximately 1600 students.

(Ex. 5 at 47.)

131. To determine who will be offered admission to the UT Austin Summer Program UT Austin selects to review the applications of approximately 3,000 students who remain on the Liberal Arts undeclared major matrix after fall admissions decisions are completed.

(Ex. 5 at 46-49.)

132. The students selected for consideration for the Summer Program are determined by the same stair-

step line drawing process as used on the other admission matrices.

(Ex. 5 at 46-49.)

133. A senior application file reader will give a second review of the entire file for those students selected for consideration.

(Ex. 5 at 26, 46-49.)

134. During the second review process, applicants' AI and PAI scores are not controlling.

(Ex. 5 at 46-49; Ex. 17 ¶ 22.)

135. The second review process is intended to be individualized.

(Ex. 5 at 28.)

136. In 2008, of the 3,028 applicants who were considered for the Summer Program, (Ex. 5 at 46-49), 1433 were offered admission, (Exhibit 1, Defendants' Response to Plaintiffs' Interrogatories 1 through 5 (May 18, 2008), Response to Interrogatory No. 4)

(*See also* Ex. 17 ¶ 20.)

137. UT Austin maintained figures about the 2008 fall and summer freshman classes.[1]

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[1] Some of the figures offered by Defendants in response to Interrogatory No. 4 vary slightly from the figures included in the HB 588 Report of Oct. 27, 2008.

			HB588 Auto Admit			% Admit by Race	
Semester Applied	F04 Admit Decision	Race	No	Yes	Grand Total	No	Yes
20086 Summer Freshman	ADMIT	Not Reported	4	1	5	0.3%	1.7%
		AMERICAN INDIAN	7		7	0.5%	
		ASIAN AMERICAN	211	8	219	14.7%	13.8%
		BLACK	80	5	85	5.6%	8.6%
		FOREIGN	32	2	34	2.2%	3.4%
		HISPANIC	236	16	252	16.5%	27.6%
		WHITE	863	26	889	60.2%	44.8%
	Admit Total		1433	58	1491		
20086 Total			**1433**	**58**	**1491**		
20089 Fall Semester	ADMIT	Not Reported	9	4	13	0.4%	0.0%
		AMERICAN INDIAN	12	30	42	0.6%	0.3%
		ASIAN AMERICAN	351	1732	2083	16.6%	18.8%
		BLACK	46	576	622	2.2%	6.2%
		FOREIGN	266	242	508	12.6%	2.6%
		HISPANIC	165	2205	2370	7.8%	23.9%
		WHITE	1262	4428	5690	59.8%	48.0%
	Admit Total		2111	9217	11328		
20089 Total			**2111**	**9217**	**11328**		
Grand Total			*3544*	*9275*	*12819*		

(Ex. 1, Response to Interrogatory No. 4.)

138. Texas residents not admitted to the Summer Program at this phase of the admissions cycle are admitted to the Coordinated Admissions Program (CAP).

(Ex. 5 at 46-49.)

139. Applicants who participate in the CAP may transfer to UT Austin after their freshman year if they complete 30 approved credit hours at a participating UT System campus and have maintained a GPA of at least 3.2 at that school.

(Ex. 17 ¶ 15.)

D. Minority Outreach and Recruitment Efforts

1. Scholarships

140. UT Austin established the Longhorn Opportunity Scholarship to benefit students who come from high schools in low income communities.

(Exhibit 7, Orr Dep. at 11-12; Exhibit 14, The University of Texas at Austin – Texas Scholarships – *Longhorn Opportunity Scholarship, available at* http://www.texasscholarships.org/types/osfs/los.html.)

141. The Longhorn Opportunity Scholarship was designed to, among other things, boost minority enrollment.

(Ex. 7 at 17.)

142. The 70 high schools which participate in the Longhorn Opportunity Scholarship were selected on the basis of socioeconomic status, population of first generation students, and percentage of students who sent test scores from the schools.

(Ex. 7 at 11-12; *see also* Exhibit 20, Orr Aff. ¶ 7.)

143. UT Austin established the President's Achievement Scholarship which is a need-based scholarship that is based on a student's family income, high school characteristics, and student's academic performance relative to others in the high school.

(Ex. 7 at 18; Exhibit 15, The University of Texas at Austin – Texas Scholarships – *President's Achievement Scholarship, available at* http://www.texasscholarships.org/types/osfs/pas.html; Ex. 20 ¶ 6.)

144. According to UT Austin, the President's Achievement Scholarship has the residual effect of promoting minority enrollment.

(Ex. 7 at 18.)

145. UT Austin established the First Generation Scholarship which is a need-based scholarship available to students who are the first in their family to attend college.

(Ex. 7 at 18-19; Exhibit 16, The University of Texas at Austin – Texas Scholarships – First Generation Scholarship *available at* http://www.texasscholarships.org/types/osfs/first_gen.html; Ex. 20 ¶ 9.)

146. According to UT Austin, the First Generation Scholarship helps promote minority enrollment.

(Ex. 7 at 18-19.)

147. According to UT Austin, there is a disproportionate representation of minorities who classify as low income and first generation in Texas and are therefore possible candidates for Longhorn Opportunity Scholarships, President's Achievement Scholarships, and First Generation Scholarships.

(Ex. 7 at 20.)

148. The Longhorn Opportunity Scholarship, President's Achievement Scholarship, and First Generation Scholarship all began in the late 90s.

(Ex. 7 at 17.)

149. These scholarships have helped increase minority enrollment at UT Austin.

(Ex. 8 at 29.)

150. Although the scholarships increase minority enrollment, UT Austin does not keep track of the precise impact of these scholarship initiatives on minority enrollment.

(Ex. 7 at 20.)

151. UT Austin established the Keep Texans in Texas scholarship to match scholarships from out-of-state schools for students from under-represented Texas high schools.

(Ex. 20 ¶ 8.)

2. Outreach Centers and Programs

152. Since 1996, UT Austin has established additional outreach centers throughout the state.

(Ex. 7 at 8, 12; Ex. 20 ¶ 12.)

153. The outreach centers offer information sessions on admissions, hold receptions, and serve as offices for counseling staff who attend college night programs and visit high schools in their regions.

(Ex. 7 at 13-14.)

154. UT Austin hosts various programs such as the "Longhorn Lock-In" event, "Longhorn for a Day" event, and the UT Scholars program to introduce high school students to the university.

(Ex. 20 ¶ 17-19.)

Respectfully submitted,

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Dated: January 23, 2009

APPENDIX F — EXHIBIT 5 TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, DEPOSITION OF KEDRA ISHOP, DATED OCTOBER 6, 2008

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. 1:08-cv-00263-SS

ABIGAIL NOEL FISHER; and
RACHEL MULTER MICHALEWICZ

Plaintiffs,

STATE OF TEXAS; UNIVERSITY OF
TEXAS AT AUSTIN; et al,

Defendants.

ORAL DEPOSITION OF KEDRA ISHOP
October 6, 2008

ORAL DEPOSITION of KEDRA ISHOP, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on October 6, 2008 . . .

* * *

[4] THE REPORTER: On the record, 2:10.

KEDRA ISHOP,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. McCARTHY:

Q. Hi.

A. Hello.

Q. My name is Thomas McCarthy, I'm the attorney for the plaintiffs. And can I ask you, are you appearing here today because of this notice of deposition?

A. Yes, I am.

Q. Okay. And --

MS. KNEELAND: And for the record, we've designated Dr. Ishop for several topics on the notice which I will not read because I assume you'll put it in the record. Topic 1, Topic 2, Topic 3, the portion of Topic 12 that has to do with consideration of the AI and PAI scores, and the search for documents responsive to Plaintiffs' discovery requests which is No. 17 --

MR. McCARTHY: Okay.

MS.KNEELAND: -- which means a lot of things.

Q. (By Mr.McCarthy) Dr. Ishop -- Am I saying that right?

A. Dr. Ishop.

[5] Q. I'm sorry. Dr. Ishop, have you ever been deposed before?

A. No, I have not.

Q. No, okay. Well then I'll tell you a little bit about how it goes. I'm going to ask you just a series of questions about your role and responsibilities at the University which relate to this case.

A. Okay.

Q. Just answer the questions to the best you can. If you don't know the answer, feel free to tell me you don't know the answer. If my question doesn't make sense, go ahead and ask me to rephrase it, restate it. If I ask you a question that's outside of the topics that Ms. Kneeland identified that you're not prepared to answer, you can go ahead and tell me that. I'll try to keep inside those topics that we agreed that I'd ask you about, but if I go outside of it by accident, just tell me you're not prepared to answer that. If you feel like you need to talk to Ms.Kneeland at some point, you're welcome to go ahead and talk to her. I only ask that if I -- that you answer my question first before you talk to Ms. Kneeland.

Does all that make sense?

A. Yes, it does.

Q. Okay. And also, if you need to take a break for any reason to go to the ladies' room or to get a drink, just [6] let us know, we can certainly take a break.

A. Okay.

Q. Okay?

A. Okay.

Q. Okay. I'll ask you a few sort of logistical questions as we get started.

A. Okay.

Q. First, are you taking any medications or have you ingested anything that might affect your ability to testify today?

A. No, I have not.

Q. Okay. Did you meet with anyone to prepare for this deposition?

A. Yes.

Q. Okay. With whom?

A. With my attorneys.

Q. Who?

A. My attorneys, Ms. Kneeland and Mr. Barnes.

Q. Okay. How many times did you meet with them?

A. Twice last week in preparation for the deposition.

Q. Okay. Did you review any documents in preparation for the deposition?

A. Yes.

Q. Could you tell me about what documents you reviewed in preparation for the --

[7] **A. We looked at one of our 4104 reports, which is one of the documents that we submit -- that we use in our review of the applications for students in review of the matrix.**

Q. Okay. And you said that's a 4104 report?

A. Yes.

Q. Okay. And was this document previously produced to us?

A. Yes, it was provided to you --

Q. Okay.

A. -- as well.

Q. Did you review any other documents in preparation for this deposition?

A. No.

Q. Okay. What is your job title here at the University?

A. Associate director of admissions.

Q. Okay. And what do you do in that role?

A. I am responsible for admissions policy, I direct and lead our communications team which puts out all of our publications, brochures –

(Reporter interrupts)

A. -- which is responsible for our brochures and publications, manuals, the things that we provide to our prospective students. I also am in charge of the admission of the freshman class.

[8] Q. Okay. Have you held any other positions here at the University of Texas?

A. I have within the Office of Admissions. I've been assistant director at two of our regional offices, as well as admission counselor. Prior to that I was a student employee.

Q. And what is your educational background?

A. I have a bachelor's, master's, and doctorate from the University of Texas.

Q. Okay. Do you have any expertise or training outside of the University of Texas on the matters that you work on right now?

A. I have never worked for another institution. I have served on admissions boards and committees and such with the College Board, with the IB National Committee, have presented in forum -- national forums, national conferences, presented to students for many, many years as well.

Q. Okay. Are you able to fully testify as a representative of the University of Austin today?

A. Yes, I am.

Q. Okay.

MS. KNEELAND: Let's be clear, it's the University of Texas at Austin. It's not the University of Austin.

MR. McCARTHY: Yeah, sorry. Did I say [9] University of Austin?

MS. KNEELAND: Yes.

MR. McCARTHY: Sorry about that. University of Texas at Austin.

THE WITNESS: I understand.

Q. (By Mr.McCarthy) Generally stated, what is the University's admissions policy with regard to undergraduate admissions?

A. The admissions policy is that we are missioned to provide an opportunity for students in the State of Texas, outside of the State of Texas, and internationally to achieve an excellent education here at the University of Texas at Austin. The policies are both legislative and internal. Legislatively we are mandated to admit top ten percent students in the State of Texas, as well we have developed internally an admissions policy geared towards admitting a diverse class of students representative from all backgrounds, all walks, to our freshman class.

Q. Okay. And does the University consider itself selective?

A. We are selective by nature of the number of spaces that we have relative to the number of applications that we receive.

Q. In a typical year, how many applications does the University receive for the incoming freshman class?

[10] **A. Last year for the class that just enrolled for August, we received just under 30,000 applications.**

Q. And how many spaces are usually available for incoming freshman class?

A. We offer about -- just under 13,000 spaces.

Q. About how many of those 13,000 spaces were filled by students pursuant to HB 588?

A. Just over 9,000 of those spaces.

Q. So is it accurate to say the remaining approximate 21,000 applications are competing for approximately 4,000 spots?

A. Yes, that's approximate. At UT Austin we admit a class for both the summer and the fall. So when we talk about enrolling our class, we are always talking about our summer and our fall enrollment.

Q. Okay. And does the approximately 30,000 application number, does that relate to summer and fall?

A. Those students -- The students typically are applying for the fall semester, but it's our policy that we may admit some student to the summer session, whether or not they applied to that session.

Q. Okay. And this 13,000 number of the -- which is the number admitted. Is that correct?

A. That's correct.

Q. So this -- the -- of the 13,000 students admitted [11] this year, that -- that's to fall and summer classes?

A. That's correct.

Q. Okay. And does the University employ a system for making undergraduate admissions decisions that focuses on an applicant's academic performance and their personal achievement performance?

A. What do you mean by a system?

Q. Well, does the University consider both an applicant's academic performance and their personal achievement --

A. Yes.

Q. -- in making admissions decisions?

A. Yes.

Q. Okay. Could you explain how that works generally?

A. Yes.

MS. KNEELAND: Objection; form, a bit overbroad, but she can answer it.

A. It will just take a little bit. The admissions process, when we describe it, we often describe it as twofold; there's an academic component and there's a personal

achievement component. And when we're talking with students and families, we share with them that both are equally and as important as the other because per our mission, we believe in admitting students who can contribute to our campus and contribute to the variety of activities [12] as well as participate in the classroom. On the academic component, we examine primarily three things: A students class rank, which is representative of their GPA; we also consider their standardized test score, SAT or ACT, in the case of this class the plaintiffs were a part of, the higher score that's submitted for them from a single test date; and we also have a component that we call units plus which is where we reward students who are taking more than our minimum requirements in two of three subject areas. That comprises the academic component of the -- those are numerical, objective. Those numbers are reported by testing agencies, by high schools, or on the high school transcript.

The other side of the application is -- of the admissions process encompasses all of the additional materials that students submit in their file. The Apply Texas Application contains essays that students submit. They're required to submit two. Most students submit Topics A and B, but there are other topics if they're applying to Art or Art History, School of Architecture. They also submit a resume or record of activities. They may do so completely on the application, there's a page of the application where they can input that information, it's broken down into four areas; or they may submit a resume of their choosing, they put together their own document and submit their resume.

Students essentially can tell us [13] anything they want to tell us in the resume, although the Apply Texas Application has points, extracurricular activities, honors, rewards, work experience. Many students will go outside of that and tell us whatever they feel they need to tell us.

The personal achievement portion of the file is an examination of the two essays individually, those essays are scored as a piece of writing; and a read of the entire file, what we call whole file review, full file review, which is a read of the entire application which is essentially seeing everything that a student submitted. We know their test score, we know their class rank, we know what courses they took, we know what they took their senior year, a read of the essays for information, and a read of the full file of the resume portion. Students may also submit letters of recommendation if they choose to do so and if they have, then that's read as part of that file. Some students choose to submit slides, pictures, samples of -- other samples of writing, art work, any number of things and if those things are submitted as part of their application, then they are reviewed as well.

Q. (By Mr. McCarthy) Okay. When did the University begin considering -- I'm sorry. When did the University begin making admissions decisions on this basis?

A. This --

[14] MS. KNEELAND: Objection; form.

Please go ahead.

A. This whole file review process began, I believe, in 1998.

Q. (By Mr. McCarthy) And currently the University is bound to admit students pursuant the HB 588. Correct?

A. That's correct.

Q. Okay. So the AI-PI -- I'm sorry, the AI-PAI whole file review happens with regard to the students outside of the top ten. Correct?

A. Not necessarily. The -- When students apply to the University of Texas, they select a first- and a second-choice major. We have a third-choice major of Liberal Arts Undeclared which is kind of a last effort for all students applying to try to get into the fall semester. Top ten percent -- top ten percent students, those admissible under HB 588, are guaranteed admission per law to the University of Texas. They're not guaranteed to their major of choice.

So there are some programs that have restricted entry, we call them impacted majors. For instance, the College of Business could not accommodate all top ten percenters that would want to apply to the School of Business and so we've limited the number of top ten percenters who can gain automatic entry into that program [15] and those who don't gain automatic entry then compete for admission along with all other non-top ten percenters. So all of those factors in their file -- their test score, class rank, essays, resume, letters of recommendation -- are read and reviewed for admission into those programs.

Q. Okay. So in other words, for a student who graduates in the top ten percent of their Texas public high school, they are automatically admitted to the University of Texas pursuant to HB 588.

A. For a student who is in the top ten percent at the time of their application -- and I make that distinction because they haven't graduated by the time that they're in our applicant pool --

Q. Okay.

A. -- if they are in the top ten percent as of the sixth semester of their high school year, which is the end of their junior year, and they apply prior to our application deadline, they're guaranteed admission to the University.

Q. Okay. Is it ever the case that a student's seventh semester grades will be considered?

A. Yes.

Q. Okay.

A. If those grades are submitted prior to the deadline -- Our deadline for the class of 2008 was [16] February 1st. And so for that deadline, which is now changing, the -- oftentimes students can submit seventh semester grades, what are typically called mid-year grades --

Q. Okay.

A. -- and that would be considered.

Q. But -- but students who are in the top ten percent of their senior high school classes at Texas public schools at the time of their application are automatically admitted pursuant to HB 588.

A. Those who are Texas -- who are graduating in Texas public schools, yes.

Q. Okay. And then those same students, however, are not necessarily admitted to the major of their choice. Correct?

A. That's correct.

Q. Okay. Once they're admitted, their AI and PAI are still considered with regard to their placement in a particular major.

A. Not quite. You said that once they're admitted, then their AI and PAI scores -- it's actually the reverse of that. We start the admissions process at their first-choice major. So in theory a student hasn't technically been admitted until we've admitted them to their major. We do have a process that we call intent to admit that we send to [17] every top ten percenter who completes their file prior to the deadline to say you will be admitted at least to Liberal Arts Undeclared and we do that so that they can move on with housing

and financial aid and some of the other processes that require them to be admitted before they can pursue, you know, some of those other means. But we start the process at the first-choice major. So the official admits occur from the top down, first choice, second choice, and as we move through the process.

Q. Okay. How is the personal achievement index determined for applicants that are outside the top ten?

MS. KNEELAND: Objection; form.

A. What do you mean by personal achievement index?

Q. (By Mr. McCarthy) It's my understanding that in addition to the academic index which measures objective things, like I think you said GPA -- or, I'm sorry --

A. Class rank.

Q. -- class rank and standardized test score, that there's also the personal achievement index which measures other factors.

A. Uh-huh.

Q. How is that personal achievement index determined?

A. The personal achievement index is a number that's the result of a full file review of a review of each essay individually that each -- the read of each essay

produces a [18] score on a scale of one to six and the read of the full file produces a score on a scale of one to six. Those three scores are combined to create the personal achievement index and then that number is used in the admissions -- in the admissions process.

Q. Okay. And what are the factors that make up that personal achievement score that's one of the components of the personal achievement index?

A. Of the personal achievement score, the full file review where the reader who is looking at the file and analyzing the file is looking at everything that's submitted by a student, it's a holistic read. In that holistic read the student's socioeconomic background, the activities they've been involved in, their leadership potential as well as leadership achieved, things they've already done, the opinion of others in regard to the student if they've submitted letters of recommendation, work experience, how the student spends their time outside of the classroom in volunteer activities. We emphasize both depth and breadth for students. We liken it to if you have only done one thing, perhaps you need to be an Olympic swimmer in order to have the type of depth that's required, but it's a review of all aspects of a student's life.

We look at everything within context to everything else. We look at how students spend their time [19] outside of the classroom relative the rigor of their academic environment, we place students -- the number of hours they work relative to the activities

they're involved in in high school. We examine the context of their family life and their family situation relative to everything else, everything they're doing at school and in the classroom. We know the school they're coming from, the size of the school, the type of community, we know their personal demographics as well and how those things relate to everything else that's in the file. Essentially everything that's submitted by the student is part of that review and as -- as you -- as the file is read, then the reader takes in all of that information in order to determine the personal achievement score that you're talking about.

Q. Okay. Am I correct that race is a factor that's considered as part of the personal achievement score?

A. That's correct, that's one of the demographics.

Q. And can you explain to me how race is considered in that process?

A. Race is contextual, just like every other part of the applicant's file. We are certainly aware of the applicant's race. It's on the front page of the application that's being read, but that information is used in context with everything else that's part of the applicant's file.

There's no factor on -- in the personal achievement read [20] that stands alone. Everything is dependent upon all other parts of the file to determine how you -- how you arrive at the personal achievement score.

Q. Could you give me an example where race would have some impact on an applicant's personal achievement score?

A. To be honest, not really. When we read files and when we're trained to read files, we read them in the context of the applicant pool. We sit--when we begin our training with Dr. Bremen and we sit -- the senior staff of full file reads sit with the first several thousand files that come in for that applicant's year and we read through -- we spend a day reading through files to determine our -- what these -- what the scores will be -- examples of what those scores will be. In order to -- it's impossible to say -- to give you an example. of a particular student because it's all contextual. We don't believe in fictitious students. You know, when we're talking with students and they ask us kind of that same question, what do I need to do, you know, to get in or who do I need to be, it depends on everything that's part of the file and we don't know until we look at the file to be able to kind of give that -- to determine what that score is.

Q. Okay. Now, when was it that the University added race as a factor to admissions decisions?

A. I believe that class -- the first class that it [21] was used for was the class of 2005.

Q. How did that change the way in which admissions officials who read applications consider those applications?

MS. KNEELAND: Objection; form.

A. It added another component to the file I think is the simplest answer. It's as though similarly you might -- we might require letters of recommendation, which we currently don't. It added another piece of information to the file that could be considered in a holistic read.

Q. (By Mr. McCarthy) And are you one of the admissions officials who's a reader of applications?

A. I am.

Q. And did you -- did the University's -- I'm sorry. Did the admissions office -- Does the admissions office train readers in the holistic review of the applications?

A. Yes, we do.

Q. And did the manner in which readers review these applications change when race was added as a factor?

A. The manner in which we review applications, no, because we were already reviewing applications holistically and so we didn't have to change the nature of our file review. We simply added another component to that review and that was part of the discussions in the training and part of the items that we talked about in the course of our training.

[22] Q. I'm going to show you what's been marked as Deposition Exhibit 1. This is what's commonly referred to as a Top Ten Report of the HB 588 Report and this is Report No. 10. Are you familiar with that?

A. I am.

Q. Can you turn to the second page of that report?

A. Uh-huh.

Q. The second page of the report lists a number of factors that are considered part of the personal achievement score?

A. Uh-huh.

Q. Could you read those factors?

A. Sure. Scores on two essays, leadership, extracurricular activities, awards and honors, work experience, service to school or community, special circumstances which includes socioeconomic status of family, single-parent home, language spoken at home, family responsibilities, socioeconomic status of school attended, average SAT/ACT of school attended in relation to student's own SAT or ACT, and race, addition approved by the UT Board of Regents in 2003.

Q. And am I correct in stating that each of those factors and special circumstances is considered holistically?

A. Yes, they're all part of the holistic review.

[23] Q. Okay. Do any of those factors or special circumstances ever receive any sort of numerical value?

A. No. Aside from the score on the two essays, they each receive a score.

Q. Okay.

A. But beyond that, no.

Q. So other than the essays which receive individual scores, are any of those factors or special circumstances given a numerical value at any time?

A. No, the only part of this that receives a numerical value outside of the full file review would be the socioeconomic status of school attended and the average SAT or ACT of school attended in relation to student's own SAT and ACT. We call that adversity index. There's a calculation that's done to create a student's adversity index and those are two of the components of that.

Q. How is that adversity index computed?

A. To be honest, Mr. Gary Lavergne could better answer that question, could give you the formula for that, I can't.

Q. Okay. And, I'm sorry, which of those factors or special circumstances go into that adversity index?

A. Socioeconomic status of school attended and average SAT/ACT of school attended in relation to student's own SAT/ACT, I believe it's those two.

[24] Q. So other than the essays which are given their own individual scores and the adversity index, none of those factors or special circumstances are given a numerical value at anytime?

A. No, they're not.

Q. Okay. When application files are reviewed, is the same application file reviewed by multiple readers?

A. Not in the fall in the normal course of the application. We have a two-part read process. There's the read that produces the essay scores and the personal achievement score to get the personal achievement index, that read is conducted by one person. There's a second read for the summer freshman class where there's another read at the file that doesn't produce a score at all.

Q. Because personal achievement scores are determined in a holistic manner, does the score ultimately given to an applicant depend in some part on who the reader is that evaluates that application?

A. I believe our process trains that to not be the case. The full file review, which is a holistic nature of the full file, is conducted by our most senior readers, admission personnel that have been working here or elsewhere for many, many, many years and have read a lot of files. We separated the two parts of the process,

the essays which are mostly read by our admission counselors and those that we [25] hire to read files from the full file review to be reserved for the -- to be read by our most senior readers. Our training is rigorous and the entire point of that training is to remove individual readers from their individual thoughts about files and quality and to bring the admissions office to a consensus that we establish and we do that by creating our range finders that remind us and give examples of what we, as a group of admissions personnel, decided were representative scores in the personal -- for the personal achievement score.

Q. Okay. When a senior reader does this second read of a me for purposes of the summer class --

A. Uh-huh.

Q. -- are they bound at all by the prior readers' determinations?

MS. KNEELAND: Objection; form.

You can answer.

A. No, they're not. At the summer -- At the level of the summer freshman class, the reader is making an admission decision, not scoring the file.

Q. (By Mr. McCarthy) Is that reader aware of the scores given to the file previously?

A. Yes, they are. They're on the cover sheet.

Q. Do the senior readers consider those scores at all?

[26] **A. It's part of the review of the file. I mean, in reading a file, we read everything that's on the file, especially at that level. That, we know, is really the last opportunity a student has to be admitted to the University of Texas so everything is read and considered at that point. But they're not bound by the scores, it's not a comparison of scores. That's not the intent of the summer freshman class, to agree or disagree with those scores, but simply to read the file and make a decision on the file.**

Q. Why is it that the senior readers can disregard those scores at that stage?

MS. KNEELAND: Objection; form

A. The senior readers are the same level of reader that read the file in the first place and better trained -- or more experienced at reading than those who read the essays. The person reading for summer freshman class was trained to read essays, as well as trained to read the entire file. It's not the intent at that point to spend our time agreeing or disagreeing with scores, but instead to read the file which contained -- usually contains exactly the same material that the original file contained and to make a decision on it. So it's not a question for us to disagree with the score or to question the score. We make note of it and move on through the file.

Q. (By Mr. McCarthy) Now am I correct in [27] understanding that -- Let me start that question again.

Am I correct that the point of the training of readers is to promote uniformity --

A. Uh-huh.

Q. -- among the evaluation?

A. That's right.

Q. So why is it that on this second-level read that score doesn't necessarily matter?

MS. KNEELAND: Objection; form.

A. We have a two-part process. The reading of the files -- the reading of the essays and the reading of the full file is -- is used to make admission decisions for the fall semester. That's where the scores on those files translate, put the student onto the matrix, and we make admission decisions from that matrix. The summer freshman class read, beyond establishing who is read for summer freshman class, there's no decision made on the matrix. So at this point students essentially start over and their file starts over. So we're aware of the scores that they had as they went through the process, but it's, in effect, irrelevant to what we're doing at the summer freshman class level. Summer freshman class level we're reading the file and making an admission decision on the file. We're not scoring the essays, we're

not scoring the -- we're not doing any of that scoring in our heads. We're using the [28] experience of the reader at that level to make a decision to take or not take that student for the summer freshman class.

Q. (By Mr. McCarthy) Does the admissions office have a different objective with regard to the summer freshman class than they do for the fall freshman class?

A. Beyond admitting -- bringing in the summer freshman class, the objective is the same, to still bring in high-quality students, to still bring in to represent the vast diversity that we're looking for in our class, but we have a different method for achieving that end than we do for the fall semester.

Q. Why is it that the University -- Why is it that the admissions office has a different method to achieve this same objective?

A. Because we don't -- When we get to the summer freshman class, we are giving the best students who were not able to gain admission to the fall semester another opportunity to gain admission for the summer and we use a method that takes the individual student and only the individual student to make that decision. When we're examining students in the fall semester, we've read their file holistically and individually and then we've given it a score and put it on a matrix and we have a procedure that's then comparing groups of students to groups of students who have like scores and like AIs, but we believe that the [29] summer class

-- because this is our last opportunity for students, that we want to look at an individual student and say, yes, we're going to admit you or, no, unfortunately we can't admit you and you can go to the Coordinated Admissions Program.

Q. So is the difference between the fall review and the summer review that the admissions office focuses more on the individual for the summer -- I mean, for the summer class?

A. The summer -- the summer class, the admission decision is as individualized as we believe we can make it --

Q. Okay.

A. -- which is different from the fall.

Q. Now with regard to the fall class, the applicants are placed on a matrix and compared with other applicants?

A. That's right.

Q. And how does the admissions office determine which students will be admitted to the fall class and which will not be admitted to the fall class?

A. We start the process -- Again, I mentioned earlier we talk about starting top down, which means we start at a student's first-choice major. After all the applications are received, deadline being February 1st,

another ten days or so to process all of the documents and so usually by [30] mid-February we have our complete applicant pool and usually by the third week or so in February all files have been read and scored. So at this point every file that's complete by the deadline, that's been read and scored has an AI and PAI and those students, applicants, then sit on their first-choice matrix for all the colleges and schools

All through this process, from the minute we open the application, we've been admitting top ten percenters on a rolling basis who qualified for automatic admission in their major so we've already let go thousands of students who are admissible. So we're left at this point in late February -- mid to late February with students in their first-choice major on the first-choice matrix and we start the process there. And we typically start with three liaisons and liaisons are the associate directors or assistant directors who liaise between the admissions office and the school or majors they represent. We typically start with Business, Communications, and Engineering, those are our three most impacted programs. So three associate directors -- and I'm one of those -- we begin the admission process by the three of us examining our matrix, determining the number of spaces that we have available outside -- that we've admitted so many for top ten percent already and we know what our top is and we start to look at our matrix and look at the number of students [31] that are sitting in the cells, compare that to the amount of space that we have, and we start essentially drawing our lines and moving those lines to the point that we can achieve the number that we're trying to achieve for admission into that class.

There are multiple other variables that are part of that. When we decide to admit a cell -- and a cell is represented by the intersection of the personal achievement and the academic index -- personal achievement index and academic index, we commit to admit everyone who is in that cell, we don't pick it apart. And so the three of us at that level with kind of those three most impacted majors have to be aware of who might be coming to a second choice because we don't give priority to first choice or second choice, students can move through the process. So we have to be aware of the cut, the line that needs to be made for -- that's going to be made in Communications and how that might affect Business and the line that's going to be made in Business and how that might impact Communications, how either of those might impact Engineering, how the Engineering majors, because they're admitted individually, might impact each other.

And so we typically sit in a room much smaller than this, but at a table together to start that process because we know that we'll be trading students, but [32] we begin it there with those three most impacted programs. And as we make progress with those majors, then we bring in the other schools and colleges and their liaisons to start moving through the rest of the process.

Q. Now when you say "most impacted schools," what do you mean by most impacted?

A. Those are our schools -- earlier when you asked if all top ten percenters were admitted to their major and I said not necessarily, if a school has exceeded their -- the number of spaces they have available for incoming freshman, exceeded 80 percent of their space, that dean is able to ask our director of admissions to limit the number of top ten students percenters who are admissible to no more 75 percent of the class. And several of our programs have done so: The School of Business, College of Communications, the entire School of Engineering which is eight different majors, Kinesiology and Nursing are the programs that are impacted. So we limit the number of top ten percenters who can be admitted automatically to those schools. For instance, Business, only top -- I believe it's four percent gain automatic admission, Engineering ranges from 2 percent to 9 percent, and each of the majors has a cutoff that's established and essentially announced. When we talk to students we tell them what that cutoff is. Once we establish it for the year, we don't deviate from it. So if [33] we say it's going to be four percent for Business, then we commit to four percent for Business.

So that's what I mean by impacted schools, those programs that have enrollment limitations for top ten percent applicants.

Q. So if the -- if the business school has a limitation of four percent, then that means that only the top four percent of applicants admitted pursuant to HB 588 who sought business as their first major will get in to that?

A. Who -- Well, who sought business as either major because we may get to them as second choice.

Q. Okay.

A. It means that they will be admitted automatically without full review. If they meet the four percent threshold for Business and they apply to Business, they'll be admitted without going through the full review process per our house --

Q. And how--

(Reporter interrupts)

A. -- per our review read of House Bill 588.

Q. (By Mr. McCarthy) How is it determined whether students -- How is it determined whether applicants will fall within that four percent?

A. It's established by their class rank. The class [34] rank that's reported by the high school is how we make that determination. What we do on our side to determine the percentage for each of those majors is to look at the previous year's class after the twelfth class day, see how much of that -- how -- at what level of top ten percent filled 75 percent of the class. So we go back and find the -- start counting the top ten percenters -- one percent, two percent, three percent -- until we reach the 75 percent mark and we use that, or as close to it as we might be, for the class that's coming in the following year.

Q. Okay. So in other words, if four percent is the number for the business school, does that mean that in the prior year 75 percent of the freshmen in the business school were the top four percent of their graduating high school class?

A. Approximately, because it may be that the 75 percent mark was at -- or let me rephrase that. Maybe the top four percent of the class was at the 69 percent mark, but the top five percent of the class was at the 78 -- 76 percent mark, so we have to find the closest to it while being as conservative as we can be.

Q. Okay. So if the number is -- Just to make sure I understand, if the number is four percent for the business school, then that means that only students that get admitted to the University pursuant to House Bill 588 and are within [35] the top four percent of their high school class gets into the business school automatically?

A. Automatically, that's correct.

Q. Okay. But then other students who either get admitted to the University via House Bill 588 or even outside of the top ten might still be admitted to the business school.

A. Those students who are five through ten percent, as well as 11 percent on down, will all compete for -- can all compete for admission into Business.

Q. Okay. When the admissions office considers applicants by major like this, does it start with these most heavily impacted schools first?

A. Not every -- before -- To answer your question, not every school admits by major. The School of Business, for instance, admits at the school level. We admit to the -- directly to the School of Business. Engineering admits per major, Communications admits on a single credential for all communications majors. So it varies from school -- from school to school. Some admit by major, some admit by -- at the college level.

Q. Okay. To help -- to help me understand exactly how this works, can you give me an example of an applicant with a particular first choice and second choice and how they might he evaluated at one major and then another?

[36] **A. Okay. A file has been read and scored, the student has a PAI and an AI. So let's say this particular student is top six percent, first-choice Business, second-choice Communications. The automatic admission -- the automatic admission cutoff pursuant to House Bill 588 for Business was four percent, so this student doesn't meet the threshold for automatic admission into Business. Business is still their first choice and that -- so that's where we'll consider them. So this student will be evaluated along with all other applicants who are non-top four percent on the basis of their AI and PAI. So the liaison for Business, as she's making her lines and establishing the cutoffs -- the AI-PAI cutoffs for the School of Business, this particular student will**

fall within those cuts or outside of those cuts. Still a top ten percenter, but theoretically, depending on the full -- the full read of their file, they may not fall inside of the cuts made for Business because it's only twenty-five percent of the spaces and for that matter it's only 15 percent of the Texan spaces because we admitted 90 percent of the -- for the class Texan.

So if the student does not fall -- if the student falls within the cuts, then they get admitted to Business, but they're admitted per review, not per House Bill 588. If the student's outside of the cut, then [37] that student cascades to their second-choice major, in this case Communications. Student's top six percent Communications, then that student would be automatically admitted to Communications because that's their cutoff for automatic admission, six percent. So the student was fully reviewed and considered for their first-choice major for Business, both top ten percent as well as per review, did not gain admission, went to their second choice and meets the threshold -- top ten percent threshold for admission into Communications.

Q. Okay. How are the cutoff lines drawn for particular majors? Maybe this will help --

A. It will.

Q. -- with an exhibit.

MR. McCARTHY: Can I have this marked as Deposition Exhibit 7?

(Deposition Exhibit No. 7 marked for identification)

Q. (By Mr. McCarthy) And this is marked as Deposition Exhibit No. 7 and this has a Bates number on it of D-837.

A. Okay.

Q. Are you familiar with this document?

A. I am.

Q. Okay. Can you tell me what it is?

A. Yes. This is an example of one of our matrixes. [38] This particular matrix is for the School of Nursing, non-residents -- non-Texas residents.

Q. Okay. And how does -- I should say this. Who, in the admissions office, is responsible for the drawing of the cutoff line?

A. The liaison for the college or school being represented is responsible for that, an associate or assistant director.

Q. Okay. And how does that individual determine where to draw this cutoff line?

A. They make the determination based on the number of students in the cells compared to the number -- the amount of space they have available for that particular major, college, or school.

Q. And how do they determine how much space they have available in their major?

A. That information is provided by me. At the beginning of the process we receive notification of the size of our class, whether or not we're going to hold the class steady -- hold the class steady at whatever the number is -- 7400 has been the typical number -- or 72 to 7400. The -- we work with the schools -- colleges and -- school colleges and deans about the class size they desire to bring in. Typically those two are the same because we establish university class size and then we work with the schools. [39] Sometimes they want to grow a little bit or shrink a little bit and we discuss that with the liaison, the director of admissions, and the dean at the beginning of the year. From those numbers -- those overall class numbers and from the numbers that are provided by each of the liaisons represented from their deans, I take all of those figures and separate out the number of enrolled students that we want to have for Texans, non-residents, and international students and we make those distinctions because each -- the three of those have different yield rates. We're committed to being an international institution and so we have an international class, we have a domestic non-resident portion of the class. Those two numbers make up about ten percent of our population, typically

seven percent non-resident, three percent foreign, and then we have the remaining 90 percent of the spaces that are -- will be allotted for Texas residents.

The -- we -- I make determinations for the number of offers that need to be made based on the previous year through -- and the previous three years -- three-year average yield rate for the major or school that we're making the admission decisions for. So I'll utilize our yield tables that tell us -- we have years of yield data that tell us how many -- what the yield rate has been for a particular class and I'll make a comparison of the one-year yield rate, [40] which is the previous year, as well as the three-year average, to apply that yield rate to the number of students we want to matriculate to determine how many offers we need to make and I do that at the college level and at the major level. And so those numbers are then provided to the liaisons. They're ticking off from the beginning from -- from the number of those spaces the top ten percenters, because those students have committed once we've established the cutoff very early in the process. And so from their target number for the number of spaces they have, they're every day -- three times a day by this time of year ticking off the number of top ten percenters that have been admitted. And at the end of that process, they're left with the amount of space they have for residents, non-residents, and we send to the -- our graduate international admissions office -- they're responsible for admission of international students, so they get those figures from me and that's how I produce them.

Q. Okay. Now getting back to the numbers of non-residents and international students --

A. Uh-huh.

Q. -- you said that -- you said that seven percent of the average incoming class is reserved for non-resident domestic students?

A. That's correct.

[41] Q. And then three percent is for international students?

A. That's correct. And that fluctuates, eight and two, seven and three.

Q. Okay, so that fluctuates a bit from year to year?

A. Uh-huh.

Q. Okay. Does the University try to have that same ratio for the various schools or is that just a general number that applies to the freshman class?

A. It's the various schools. We make those distinctions at the school level or even major level for those programs that we admit by major. So those distinctions are fine-tuned depending on the level of admit that we're making.

Q. Okay. So if -- So at any given school at the University, the percentage of non-resident domestic students will be roughly seven percent?

A. Yes, approximately.

Q. And for international students approximately three percent?

A. Yes.

Q. And now once -- You explained to me how the number of available spaces is determined. Correct?

A. That's correct.

Q. Once that number is determined, how is the line [42] drawn that indicates the cutoff?

A. Well students have been read and scored and if they're sitting in their first-choice major, then they are sitting on the first-choice matrix and they're sitting at the intersection of their academic index and their personal achievement index. The -- the liaison is charged with finding the number of spaces -- the number of students to match the number of spaces that they have left. Our admissions process is one that's based on a holistic review of files. We -- we use that same mindset when we approach the drawing of the lines on the matrix such that we try, depending on where students fall because obviously they may be all over -- all over this matrix, they don't always line up

where we want them to, we try to represent our line the same way that we represent our process, giving due justice to the student's academic strength as well as their personal achievement strength and we refer to that as the stair step.

And so liaisons try to stair step their lines so that they are capturing -- allowing students who are perhaps the brightest students to perhaps have a less robust personal achievement score and allow students who are the most able outside of the classroom to -- they -- it requires of them -- if they're less able in the classroom, but they're accomplishing outside of the classroom to have a higher threshold and so we utilize what we call the stair [43] step so that we -- if we drew the line vertically, we'd only be representing academic achievement; if we drew it horizontally, we'd only be recognizing personal achievement and so we try to honor both. And liaisons have full discretion in the drawing of their lines with the rules being that they have to take every one in a cell that's in a cell, there's no dividing of the cells, and every one that is above the line is admitted. And so the line is always drawn essentially from the top left down to the bottom right because everyone that will fall above that will gain admission.

Q. Okay. So when this line is drawn, it's drawn to attempt to maximize both the personal achievement and the academic ability.

A. Yes.

Q. Okay. What if there is more than one way to draw the line consistent with the stair-step rule that you indicated, what happens then?

A. The liaison has full discretion to determine where that line is drawn.

Q. So they have no guidelines limiting them in one way or another?

A. The -- Other than what I've just mentioned, I mean, that we respect the process in that way, no. I mean, they start the line from left to right and they move it [44] upwards, you know, across, but they get to make the decision based on where the students have fallen into the matrix as to where they draw that line.

Q. Okay. For particular majors -- where particular majors are evaluated individually, can they have different cutoff lines?

A. For the different majors?

Q. I should say this. For different majors -- where different majors in the same school are evaluated independently --

A. Uh-huh.

Q. -- can they have different cutoff lines?

A. Absolutely, yes, because at that point the major -- students are competing for that major, they're not competing against someone in another major. And so the level of competition is held only within that context.

Q. And for students that fall below and to the right of the cutoff line, how is it determined whether they go to second-level review or not?

A. They go -- they cascade to second-level review -- second-choice review.

Q. Okay.

A. If they're in their first choice and the line has been drawn and they're not above the line, then they cascade to their second choice. And so the process begins again, [45] but we're now at students who are in their second-choice major or a combination of the two.

Q. Okay. In a given -- And let's look at Deposition Exhibit No. 7 that's in front of you. In a given matrix for a major such as that one --

A. Uh-huh.

Q. -- are some of the students within those cells there under review of their first major and some under review of their second major?

A. That's right.

MS. KNEELAND: Objection; form.

Sorry.

A. Yes. Yes, they are.

Q. (By Mr. McCarthy) So the students that are -- the students who are in that matrix being reviewed for their first major, if they fall below or to the right of the cutoff line, they get cascaded to their second major. Correct?

A. That's correct.

Q. What happens to the students that are below and to the right of the cutoff line who are there being reviewed for their second major?

A. Then they are cascaded to Liberal Arts Undeclared, which is our automatic third-choice major if they're not already. Their second-choice major may have been Liberal [46] Arts in which case they remain in that pool. But if the student is not admitted to their first- or second-choice major, they cascade to Liberal Arts Undeclared for a third-choice review and so they're in that matrix.

Q. Okay. Once students get to the third-choice major review in Liberal Arts Undeclared, is the cutoff line drawn in the same manner as it is for other majors and schools?

MS. KNEELAND: Objection; form.

A. If there's space for the College of Liberal Arts then, yes, there's a line drawn for fall admission to Liberal Arts Undeclared just as there are for all other --

(Reporter interrupts)

A. -- schools.

Q. (By Mr. McCarthy) And what happens to the applicants that don't make the cutoff line on the attempt of their third major?

MS. KNEELAND: Objection; form.

A. At this point we are completing admissions for the fall semester, so we -- if we have drawn a line for Liberal Arts Undeclared for residents and nonresidents, then we've completed admission for the fall semester. All majors and colleges and schools are essentially full at that point. So the next determination that needs to be made is who's going to be reread for summer freshman class. And so the same matrix is used, the Liberal Arts Undeclared matrix [47] **because everyone is there and we have only Texas residents are considered for summer freshman class. So if a nonresident is not admitted to Liberal Arts Undeclared for the fall semester, they receive a deny, that's the end of their -- end of their consideration. Texas residents, at this point there may be 9,000 or so students sitting on the Liberal Arts matrix, we draw our final line to admit to the fall semester, then have to determine how many we're going to read for summer freshman**

class. Our summer freshman class, enrolled is about 800 students and it has a yield rate of 50 to 51 percent so we know that -- as is for all of our majors we, what we call, overbook, we overadmit and then let the yield get us down to our class size. So for summer freshman class we know to yield about 800 students, we need to admit 1500 to 1600 students to summer freshman class. We also watch the trend of the yield for summer freshman class, it's been going down, and so we kind of accommodate that as we're adjusting our numbers. So that tells us how many students we need to admit. Essentially we double that number to say we need to read 3,000 to 3100 files in order to make decisions for who will admit to summer freshman class, so we set the number at 3,000 to 3100 students. Then a line is drawn, just like it's drawn for all the -- for the fall admits, to capture 3,000 to 3100 students or so. In this case the students who fall within those lines are the [48] students that are read for summer freshman class. That's the end of the use of the matrix at that point once that line is drawn.

Q. (By Mr. McCarthy) Okay. So the cutoff line to detennine who is reviewed for summer freshman class is drawn consistent with the same rules that apply to the drawing of the cutoff line for other matrixes.

A. Pursuant to the amount of space, yes.

Q. Okay. So it's pursuant to the amount of space and consistent with the stair-step rule.

A. That's right.

Q. Okay. And then how are these 3,000-some applicants reviewed for the summer freshman class?

A. Once we establish who those students are, we've set a date for senior staff reviewers -- I think that are 12 of us that participate in summer freshman class rereads -- we set aside a week to seven days that we'll conduct the summer freshman class review. Our processing unit prints every one of those files, they print -- they're bringing down the boxes for days because it takes awhile to get through all of those and we sit in a room in our director's office and we start reading files. And we read a file and make a determination of admit to summer freshman class, admit to CAP, and in some cases by this point we may have space in the fall -- small amounts of space in individual [49] programs in the fall that we may say we have "X" number -- "X" amount of space in Business and some other major, but the files are read at that point to award and admit decision.

Q. Now if there's space in the fall at that point, is it because the yield rate was lower than expected?

A. Perhaps we've been seeing yield come in, we've been watching deposits at that point, we see that after we finish drawing all of the cuts and run what we call "end process," which is the final count of everything that we think will happen, that there's a little bit of space remaining in a major. So for those reasons there

might be small amounts of space. For last year we didn't have any because we essentially filled with top ten percenters and the few remaining students that we put in some programs that we needed to assure had a class and so the box for fall was actually covered and you might want to really be sure you want to admit this student for the fall. We didn't have quite the liberty to admit students to the fall semester that we have in the past, but it's an option. If you see an outstanding student and you can think of no -- nothing but the fall to award them, it's an option.

Q. How often is it that there is an outstanding student at that stage of the game that has not been admitted to the fall class?

[50] **A. Last year there were about 70 students that were put in the fall box and I wasn't able to put all of them in the fall semester, but we did take another look at them.**

Q. How is it that that many students -- that many outstanding students makes it through without getting accepted to one of their majors?

MS. KNEELAND: Objection; form.

A. I would say that 70 out of 30,000 is not that many. I think it's actually representative of how competitive this is, but students select their first- and second-choice major and so sometimes they fall victim to the selections they made. For instance, it's not uncommon

for a student to have first choice Business, second choice Communications which are two of our most impacted and most competitive schools on campus. Liberal Arts Undeclared is most impacted by top ten percent because every top ten percenter who is not awarded their first or second choice if they're impacted is awarded Liberal Arts and so those spaces are quickly acquired by top ten percenters. So the cutoff for top four Liberal Arts might be very. very high. So it's certainly plausible that -- I mean, a lot of -- many, many students in our summer freshman class we reprocess are outstanding students and it's because of the competitive nature of the limited number of spaces that non-top ten percenters had available to them in the fall [51] **class.**

Q. (By Mr. McCarthy) When senior readers review application files for the summer class, is it correct to say they're just making an admissions decision then?

A. Yes.

Q. Okay. So if -- And you're a senior reader. Correct?

A. **Yes.**

Q. So when you read an application for summer freshman class, when you complete your read of the application, you decide admit to the summer class or CAP program?

A. Yes.

Q. Okay. And the admissions office shoots to admit approximately, you said, 1500 to 1600 or so --

A. Uh-huh.

Q. -- students for the summer freshman class?

A. That's correct.

Q. Out of about 3,000 or 3100 applications?

A. That's correct.

Q. So do the senior readers monitor how -- do senior readers monitor how quick that summer class is filling up when they review the files?

A. Twice a day. At lunch I'll -- we count the boxes, our assistants are counting the boxes and they tell me how [52] many students we have in the CAP box, how many students we have in the summer box. I'll take those two numbers and subtract it from the total and put a sign on the door that says we've read -- we've read "X" number of files, we have this many in summer, this many in CAP, this many to go. The "to go" is often very important.

Q. So do the standards ever change during the summer review process based on how quickly the class is filling up?

A. No. What we've always seen for the years that I've been doing this, and I started managing this process in 2005, is that it stays fairly even. The numbers are fairly consistent throughout the process of the summer read. We don't see summer freshman class filling up faster than CAP or vice versa, but that -- and we monitor it for that purpose to make sure that we're staying consistent and that's always -- it's worked out that it has.

MR. McCARTHY: Can we take a break?

THE REPORTER: Off the record, 3:19.

(Recess)

THE REPORTER: On the record, 3:32.

Q. (By Mr. McCarthy) Dr. Ishop, why did the University first adopt the AI-PAI system of making admissions decisions back in 1997?

MS. KNEELAND: Objection; form.

A. After -- I'm speaking a little bit before my time, [53] I joined the staff in 1998. The University desired to go to an admissions process that was not formulaic or essentially strictly by the numbers and instead to evaluate -- we had reached a point where our application numbers were increasing significantly, we were beginning to control the size of our class because those application numbers were growing thereby becoming more selective and we wanted to institute

an admissions process that was holistic rather than strictly based on test score and class rank, which was the process that we had prior to that. Many of our peer institutions use holistic review processes or a process that encompasses credentials and criteria beyond just test score and class rank and we were entering in to that same realm and wanting to have an admissions process that reflected that.

Q. (By Mr. McCarthy) Okay. What was the defect of the prior system?

MS. KNEELAND: Objection; form.

A. Considering an applicant on the basis of just their test score and class rank leaves out all of the life experience and circumstantial experience that that applicant faces that's also important not only to how they developed and the type of student they are, but also to what they can contribute to our campus. We're a fine academic institution, but we also are responsible for producing [54] leaders for our state, leaders for our nation for that matter, producing students who can return to their communities well prepared to lead their communities and there are aspects of that student's background that aren't captured by test score and class rank that we wanted to be able to examine.

Q. (By Mr. McCarthy) Well prior to the implementation of the AI-PAI system in 1997, isn't it the case that the University was employing some kind of an affirmative action type of program in admissions?

MS. KNEELAND: Objection; form.

A. There was. And prior to that it was part of the evaluation of test score and class rank, there was an affirmative action program that was in place as well.

Q. (By Mr. McCarthy) And so was part of the reasoning for the change in admission systems due to the Hopwood Decision?

A. It was the impetus for the change.

Q. Okay. In 2005 the University first started considering the fact of race in admissions. Correct?

A. That's correct.

Q. Prior to that time the University was conducting a holistic full file review process. Correct?

A. That's right.

Q. So why did the University decide to add race as a [55] factor to be considered in admissions decisions?

A. Because race is an important -- is an important credential to be considered. It's a -- it allows us to, just as the purpose of the holistic admissions process is to contextualize the student's application, race is a factor that helps us do that. It helps us examine the student in their totality, everything -- everything that they represent, everything that they've done, everything

that they can possibly bring to the table. And so it was added once it was allowed to be added so that we could look at those students in that manner.

Q. What impact does the inclusion of race as a factor have on the class at large?

A. What do you mean by "impact"?

MS. KNEELAND: And I'm just going to ask -- Off the record for a second.

(Discussion off the record)

Q. (By Mr. McCarthy) What -- what was the University's -- what was the University's goal or objective in adding race as a factor?

MS. KNEELAND: Again, Ms. Ishop has not been designated for the goals and objectives. That's topic No. 4, I believe, and 6 and 5 and those are for Dr. Walker.

MR. McCARTHY: Okay.

MS. KNEELAND: And, Dr. Ishop, I don't mean [56] to in any way intimate that you don't have some knowledge of that, it's just we picked a particular witness to talk on that topic.

THE WITNESS: Understood.

Q. (By Mr. McCarthy) Is it the case that the consideration of race may be beneficiary for some applicants?

A. What do you mean by "beneficial for some applicants"?

MR. McCARTHY: Can we mark this as Deposition Exhibit 8?

(Deposition Exhibit No. 8 marked for identification)

Q. (By Mr. McCarthy) Dr. Ishop, I'm -- I just handed you what's been marked as Deposition Exhibit No. 8. Can you tell me what that is?

A. Yes, this is my affidavit.

Q. Okay. Can you look at paragraph 4 on the affidavit?

A. Yes.

Q. In the paragraph that runs over to the second page, in that affidavit you say that race may be beneficial for minorities or non-minorities alike depending on the factors of a particular situation. Correct?

A. That's correct.

[57] Q. Okay. What did you mean by that?

A. That race, within the context of the rest of the application, can be beneficial to any applicant, to Whites as well as minority applicants.

Q. And how may the effect of race be beneficial?

A. Race is read within the context of the file, but the race is known within the context of the file. So when a file is being evaluated, whether that file is of a minority applicant or a majority applicant, the context of that student's cultural awareness, racial experiences, the context in which they may have placed themselves in or out of their -- their own environment could benefit any student.

Q. Could you give me an example of how it might help?

A. An example that I can think of is, you know, maybe one that we -- when we first began, you know, doing this process. We had a file from a student, this was a white male student from a suburban high school that sends us a lot of students who wrote in his essays and demonstrated on the his resume his involvement with an after-school activity group for a number of years in South Dallas, Dallas County in North Texas. And he described in his essay how he came out of his bubble -- and bubble is an admissions term -- a high school term that students use to describe their own environment -- and grew to learn a lot about himself and learn a lot about others by participating over a long period [58] of time in these other experiences. So the context of his race and his cultural awareness for others and experience with others was something that was considered when we were reviewing that file.

Q. Are there other ways in which race may be beneficial to them?

A. I don't know what you mean by "other ways." I mean, it's contextual, it's --

Q. I understand.

A. -- it's any number of ways.

Q. Is there another type of example? I mean, I guess your example, if I -- tell me if I characterize this correctly, but your example seems to indicate that race may work to the benefit of the applicant who's exhibited some sort of cultural awareness due to their race.

A. Uh-huh.

Q. Is that right?

A. That's right.

Q. Okay. Is there any other way that race may be beneficial?

MS. KNEELAND: Objection; form.

A. I think, you know, that's the -- the crux of the use of race is to contextualize that applicant's race and their experiences and what they've accomplished and what they present to us in their application. It's not to set [59] aside that demographic and make a distinction in the file. It's used with what all we know about the student, what we know that they've told us, what we know from what they haven't told us, perhaps their letters of recommendation have told us, what they tell us about their -- their background -- their family background, what we know about their school or their neighborhood. It's used within the context of all of that to determine the score that we give that file. So race is

a nugget that helps us understand the file and evaluate the file circumstances. It doesn't stand alone, you know, by itself so there's no -- it's difficult to give examples or it's difficult to -- it's impossible to say, you know, that there's, I guess, another way that it's used without, you know, saying again that it's contextualized.

Q. (By Mr. McCarthy) How many applicants' files do you read each year?

A. I probably review 1200 or so personally, me.

Q. And out of those approximately 1200 or so, how many of those applicants' files are impacted by their race in one way or another?

MS. KNEELAND: Objection; form.

A. I have no idea. I couldn't even begin to estimate that.

Q. (By Mr. McCarthy) But race is beneficial for some.

[60] **A. The review of -- The fact that we include race in our admissions process and the fact that it's a criteria and it's a demographic that's part of the file that we're reading, it's as beneficial for some as their level of involvement with student council may be beneficial for some, as the strength of their letter of recommendation may be beneficial for some. So it's one of those criteria factors that may benefit some students, may not benefit other students, but it's not it's not based on their race, it's based on the context of their file.**

Q. I think you have in front of you still what's marked as Deposition No. 1 -- or Deposition Exhibit No. 1. I'm sorry.

A. All right.

Q. And we talked about that before how on the second page there are listed a number of factors and special circumstances that fall within the components that make up the personal achievement score.

A. Uh-huh.

Q. Now is it inaccurate there that the school, in their official publication, indicates that race is a special circumstance?

MS. KNEELAND: Objection; form.

A. No.

Q. (By Mr. McCarthy) Well, it seems to me -- Is the [61] only way that you can describe how race impacts an applicant's file is through cultural awareness?

A. Through -- I think what I'm trying to explain is that race impact a file contextually. A student's cultural awareness for us is how does -- how does a student contribute to -- In the various methods of diversity that we're trying to bring to our campus, one of those is racial diversity. But for us racial diversity is about how does the student maneuver in their own world, how do they maneuver in someone else's world, what kind

of awareness do they have of their world, what kind of awareness do they have of the other possibilities that are out there? Students tell us that they seek UT Austin because it's a diverse campus. They mean a lot of things when they say -- when they use the word "diversity."

So race as a factor is used to examine the context of that student's life represented by what that student tells us about themself, whereas a test score is used by itself. We can say what a test score is and a test score has a very specific purpose and it's an objective number, race is like all of the other factors that we have listed in the personal achievement index. It's as we examine socioeconomic status, it's as we examine language spoken in the home, it's as we look at the -- their extracurricular activities and the level of achievement [62] within those activities. It helps us put into prospective what that student has accomplished or not accomplished in their high school career.

Q. I believe you mentioned that the University seeks to promote many different kinds of diversities. Is that correct?

A. That's right.

Q. What kind of diversity does the use of race as a factor in admissions promote?

A. Using race in admissions helps us achieve racial diversity.

Q. Okay. When applicants are reviewed for the fall class --

A. Uh-huh.

Q. -- that's when they're placed on a matrix relative to other applicants. Correct?

A. That's right.

Q. As opposed to when they're reviewed for summer class, they're reviewed just individually.

A. That's right.

Q. Okay. And I think you said that when reviewed for the fall class, that means that they're compared against each other. Correct?

A. When reviewed for the fall class, once -- once the scores have been reached, they have a PAI and an AI score, [63] they are in a cell with -- presumably with other students. They may be one in a cell depending on the major, but presumably a group of students will have like scores.

Q. Uh-huh. And the various students in one given matrix are being compared against each other.

A. That's right.

Q. Okay. And in any given matrix, is it the case that some students may have benefited from the consideration of race and others not?

A. That's plausible.

Q. So is it accurate to say that the students who have not been benefited by race in that matrix have been negatively impacted by the positive benefit given to the students that have some benefit from race?

MS. KNEELAND: Objection; form.

A. No, I don't think -- I don't think so. I think what you're saying is that there are students in the cell who -- you're asking if there are students in the cell who have benefited --

Q. (By Mr. McCarthy) Uh-huh.

A. -- from the use of race being compared to students who have not benefited from the use of race. Perhaps. It's an unknown. When we're evaluating the cell, we're not evaluating individual files at that point. When we're in the matrix, we're making decisions on the number of students [64] that are within that cell so that the file had been read individually and scored, essays and resume, and the result of that placed the student within that -- within that cell, but --

Q. So the results of the review of their file determines what cell they're in.

A. That's right.

Q. And in a particular matrix, as we went over before, some students may have benefited from a consideration of race and some may not have benefited from a consideration of race.

A. Yes. I believe I -- if I understand your question, just as any other factor in a file may have benefited or not benefited another student, sure.

Q. Certainly socioeconomic status may benefit some in a matrix and not others in a matrix.

A. Uh-huh, yes.

Q. And the whole file review which takes into account that socioeconomic status ends up determining which cell they're in. Correct?

A. Right, the full file review, exactly.

Q. So then, again, I'll try to restate my question. I think before your answer was perhaps, but if a student is not benefited by a certain factor --

A. Uh-huh.

[65] Q. -- and another student is benefited by that same factor, couldn't it be said that the first student is negatively impacted by that factor?

MS. KNEELAND: Objection; form.

A. I think you're wanting to single out a factor and establish that that factor placed a student within a cell or not and I guess my hesitation is that a single factor from which a student benefits positively or negatively is not the determination for where a student is placed on the matrix.

Q. (By Mr. McCarthy) I understand -- I understand that it's a holistic review. I'm not meaning to say that either race or socioeconomic status itself puts a student in one given cell.

A. Okay.

Q. It's the entire full file review that determines what cell a student ends up in.

A. Right.

Q. But certainly each individual factor is a part of that full file review.

A. Sure. Students arrive at cells for different reasons because all of their files are different. So an individual student that's within a cell may have arrived at that cell from a different -- well, they did, they arrived at that cell from a different file and from a different review. So there are all sorts of combination of reads of [66] the file that help a student arrive at a certain cell. When we begin -- when we read files, we're

not -- you know, looking at my -- my affidavit uses the term benefits, but I think what's most accurate is that it's not necessarily a question of -- in the reading of the file, it's not as though a file is read and a student benefits -- benefits from the use of race, meaning we move a student -- a student -- we're reading a file and we make a different determination because of what we read in regard to race, that race is used in combination with all of these other factors -- if it were socioeconomic status, same issue, if it were being Eagle Scout, same issue -- to help a student arrive at that particular cell. So students -- we start the process advantaging all students and, you know, kind of -- we say in-house kind of so you want to be a six, which six is our top score, and we evaluate students based on that promise of full potential and then work our way to where a student actually achieved.

Q. And I understand that none of these factors are dispositive or determinative as to which cell a student ends up in, but isn't it the case that every one of these factors has some impact at the margin?

MS. KNEELAND: Objection; form.

Q. (By Mr.McCarthy) We'll try this in the reverse way. It is a holistic review of all of these factors and [67] special circumstances. Correct?

A. Correct.

Q. And that holistic review of all those factors and circumstances yields a personal achievement score.

A. That's correct.

Q. Which, in turn, with other components yields a personal achievement index.

A. Correct.

Q. Despite the fact that it is a holistic review, each factor is meaningful. Correct?

A. Yes.

Q. And each factor does, or at least has the ability to, impact personal achievement score. Correct?

A. Yes.

Q. So then isn't it the case that some applicants' scores must necessarily be affected -- by individual factors?

A. Yes.

Q. Okay. During the holistic read of an application file, would you characterize that read as subjective?

A. Yes.

Q. Are there any objective guidelines at all?

A. For the read of the full file that determines the personal achievement score, beyond our training -- and it's in the course of the training that we establish our uniformity for awarding scores -- it's a subjective process.

[68] Q. Okay. And I guess -- Earlier I think you stated that the adversity index gets some sort of score in an objective sense. Correct?

A. That's right.

Q. And the essays are evaluated in a holistic manner, but they ultimately receive an objective score. Correct?

A. They receive a score.

Q. A score.

A. It's a subjective read, but they receive a score.

Q. I'll take out the word objective. So there's a subjective holistic read of those essays and they receive a score.

A. That's right.

Q. And the remaining factors, aside from the essays, aside from the adversity index, are wholly subjective. Is that correct?

A. That's right.

Q. So is it possible that different readers could give different scores to the same application?

A. It's possible and it's something we, one, train against; but, two, we also have a standard of acceptance for there being a one-point differential between scores. We've conducted testing to assure that we're at that level and that's a -- that's kind of an industry standard for -- for reviewing.

[69] Q. I think Dr. Lavergne talked about that earlier, how within one point --

A. Right.

Q. -- of the true score, so to speak, is acceptable.

A. That's right.

Q. Okay. I want to go back to when you sort of gave me the timeline of the admissions process.

A. Okay.

Q. Am I correct in stating that when evaluating non-top ten applicants, the admissions office is aware of the numbers admitted through HB 588?

A. When evaluating all applicants -- and I make the distinction because, again, there are some of those top ten percenters who are not automatically admitted, so at any point in the admissions process we are aware of how many students have been admitted.

Q. And those -- Okay, I guess I'm a little unclear at this point

A. Okay.

Q. Now am I correct in stating that students admitted pursuant to HB 588 are not actually admitted until they're placed within a school?

A. Correct.

Q. Okay. But it is known that they are intended to be admitted?

[70] **A. Right, admissible.**

Q. Admissible.

A. Intent to admit, yes.

Q. Are all of -- does the admissions office determine -- does the admissions office determine how many of those students are admissible before proceeding to evaluate applications of students outside of the top ten?

A. You're asking if we're involved with determining how many of the non-House Bill 588 admits to impacted majors are admissible, if we participate -- if we --

Q. Maybe I didn't -- maybe I didn't phrase this right, it's sort of complicated. What I want to try to find out here is whether the Office of Admissions first determines how many students are admissible pursuant to HB 588 before they proceed to evaluate applications outside of the top ten.

A. We are -- The first step of the process once we begin the admissions process outside of our rolling admit of top ten percenters who meet our threshold board mittance into the various majors, the first step of the process that we began in mid to late February time is to finalize our House Bill 588 admits, which means that we get all of those impacted majors to the 75 percent mark. It may be, for instance, that Business was set at four percent, but four percent only filled 72 percent of the class and so we [71] start counting down in rank order the Business applicants in top ten percent rank order from 95.9 percent down to get ourselves to the 75 percent mark so that we can honor the commitment that we put 75 percent in automatically. The next step -- So that then takes care of all of our House Bill 588 admit students. If they don't -- if they already committed to that first choice -- to that impacted program, then they are now in review and at this point top ten percenters and non-top ten percenters are competing simultaneously.

Q. I understand that, but does the -- but does the admissions office have a -- have a target number of non-top ten admits at that point?

A. We know how many spaces we have overall and we also know how many top ten percenters have applied, so we know how many are out there. What we don't know at that point is where will they be admitted and so we have to complete the process that either

automatically admits them to their first- or second-choice major or admits them by review to their first- or second-choice major.

And I think the point I'm trying to make, I think to answer your question, is that we don't just finish top ten percent and then move on to non-top ten percent. Because on a given matrix, once we've admitted all the students to Business who are top four percent, now I have a [72] matrix of -- and this is purely an estimated number, purely a guess number -- 600 students and I have 80 spaces left to give to The College of Business, that's the remaining 15 percent of Texas residents for the College of Business; of those 800 students that are on the matrix, some of them are top five through ten percent, others of them are from any other class rank range. And so the admission decision is then made by drawing a line on the Business matrix to make that determination.

Q. I think I understand all that, that students -- students that are admissible through HB 588 are not placed in their majors entirely before you start the process for the students that apply outside of the top ten.

A. Okay.

Q. Correct?

The only thing I'm trying to find out is when you start the process of reviewing applicants in the non-top ten, are you aware of the total admissible number of HB 588 students? Not necessarily where they're placed, just the number.

A. The overall number for the class?

Q. Uh-huh.

A. Yes, because we know how many applied and completed their applications.

Q. Okay. So then is there a -- and I understand that [73] the decisions can't be made yet as to major without considering some of those HB 588 applicants with the non-top ten applicants, but is there a target number overall for the whole incoming freshman class in terms of non-top ten admits at that point?

A. The target number for non-top ten percent is the difference between the number of spaces we have and the number of top ten percenters who applied and complete their application by the deadline --

Q. Okay.

A. -- so yes.

Q. Okay. At that point does the Office of Admissions also have statistics about the racial demographics of those admissible under HB 588?

A. The Office of Admissions maintains a headcount -- it's what we call EASI, Electronic Access to Student -- I can't remember what the "I" stands for right now -- Information, I think. We have a headcount that essentially does that, counts applications. It tells us the

number of applicants, the number of Texas residents, non-residents, foreign, number of -- there's a racial breakdown for each of those, we have -- and it breaks it down per semester, college, school, and major if it needs to -- if we need to see it at that level, we can see it at that level. That headcount exists for the Office of Admissions.

[74] Q. Okay. And is that information updated continuously throughout the admissions process?

A. It updates nightly.

Q. Okay. So is it the case that admissions officers on any given day can take a snapshot of what the admitted class looks like so far?

A. Absolutely, it's part of our business. We have weekly staff meetings and one of the things we look at is to see the result of our admissions process. One, to see the result of our prospect pool, how many students are applying and what do those demographics look like, as well as to see -- It reflects what's been done. So if on -- if on a Monday liaisons have what we call released top ten percent decisions where we manually go into the system and admit those top ten percenters who are automatically admissible, we'll see that reflected in the headcount the next day.

Q. And does the status of that headcount on any given time change in any way the admissions office evaluates applications going forward?

MS. KNEELAND: Objection; form.

A. No, not at all. It's purely used to, as we should, manage the enrollment of our class, to watch the results of our process. The only use that I use headcount for -- and I use it on a daily basis and there's a point where we update the system more frequently for a few days as [75] we're rolling decisions very quickly -- I use it simply to get totals, the total for the class so that the liaisons can plug in and see that you've now admitted "X" number of students, total students, Texas resident, non-resident, and foreign because we're counting our -- what we call our 1403 students which are students who are non-citizen Texans per Legislation we have here in Texas.

So we update our total admits so that, again, you know how many spaces you have left. So it's a running tally of how many Texans, non-residents, foreign students, and top ten percenters have been admitted. And there's a spreadsheet that I created that counts down, you know, for them so they know you now have "X" number of Texan spaces left and "X" number of non-residents spaces left.

Q. (By Mr. McCarthy) So let's say for non-resident domestic students -- applicants I should say, at some point during the admissions process, is it ever the case that the admissions office realizes that non-resident domestic students have been accepted at a higher rate than normal thus far?

A. We're not -- That's not what we're doing at that point. One, at that point in the game we haven't admitted too many non-residents, if at all --

Q. Okay.

A. -- because there's no rolling admission of [76] non-residents, there's no top ten percent for non-residents unless --

Q. Okay.

A. -- Texas high school. And so the purpose of the evaluation and analysis at that point is to see how many students have we admitted and to use that information to know how many spaces we have left.

Q. Okay. And to know how many spaces that are left not only in the freshman class totally, but also within the individual majors?

A. We really don't operate from the standpoint of the freshman class.

Q. Okay.

A. It's our beginning number and it's where we hope "to end up; but all of our work done -- all of our work that is done is done at the college level or the major level --

Q. Okay.

A. -- and at the end of the day, you know, at the end of this process all the liaisons have done the work for their college. I've watched those numbers get produced on EASI and I'm plugging it into my own spreadsheet which is where I manage the class and put in the yield rate so that I'm seeing what's going to happen with ultimate yield and at the end of that, if my hours and nights of not sleeping have come together, then what we wanted and what we accomplished [77] should equal by the time the numbers that we've completed admitting class.

Q. In other words, the admissions office is -- has an end goal in mind for the entire class, but is always working towards the individual school and major --

A. Right.

Q. -- just hoping in the end they get to the end number.

A. Not hoping, I mean, it's well planned and we apply a yield rate and admission metrics to that, but we work from the individual college level and the total of those colleges equals the size of the class for the University.

Q. I understand that. I'm sorry, I didn't mean to suggest that you were just hoping blindly. I get that it's all very scientific. And the goal for the entire class is broken down --

A. Exactly.

Q. -- to make up the individual goals for each individual college and major. Correct?

A. That's right.

Q. Okay. So naturally achieving your goal as to individual colleges and majors gets you to your goal of the class at large.

A. That's right.

Q. Okay.

[78] MR. McCARTHY: Can we take a break?

THE REPORTER: Off the record, 4:16.

(Recess)

THE REPORTER: On the record, 4:27.

Q. (By Mr. McCarthy) Dr. Ishop, we talked a little bit, I think, about the optional third essay that applicants can submit.

A. I don't believe we have.

Q. Oh, we haven't? I'm sorry. Well, let's talk about it then.

A. Okay.

Q. This optional third essay, how is that considered in an applicant's file?

A. It's a special circumstances essay where students can essentially tell us anything they want. I believe it says if you think there's anything else that you think that the admissions office needs to know about, you put it here. That is read as part of the personal achievement score. It's not read as an essay, as a piece of writing, but rather as part of the personal achievement score.

Q. So that's considered part of the full file review that goes to the personal achievement score.

A. That's right.

Q. Okay. Is there any consideration at all with regard to the applicant's race or ethnicity with regard to [79] the third essay?

A. Again --

MS. KNEELAND: Objection; form.

A. Again, contextually. Not in regard to just the essay but, I mean, we know an applicant's race. If they submit the -- that essay, you know, then that's part of the read as well. Contextually, yes, it's part of what's reviewed.

Q. (By Mr. McCarthy) So if -- so if that gives some -- So if the third essay gives some meaningful context to the applicant's race, it goes into the holistic review.

MS. KNEELAND: Objection; form.

A. It's all part of the holistic review.

Q. (By Mr. McCarthy) Okay.

A. I mean, it's -- The read of the file doesn't begin in a particular place. Essentially the cover sheet is where we start because that's where all the information -- that's where a lot of the file is recorded and then the file is read and the file is read for information. And wherever there's information that helps us put that student in context and kind of examine who they are and what they represent, then that's what's used in determining -- arriving at that score.

Q. Okay. So the -- the optional third essay could be meaningful as to any of the factors that make up the [80] personal achievement score --

A. Right.

Q. -- depending on the context given in the essay.

A. Depending on the content of the essay. They -- students write on all -- What they think are special circumstances, it's up to them to determine that and some of it is more valuable than others, depending on the rest of the file.

Q. Okay. Is it ever the case that a student writes about -- writes in the optional third essay something that just has no bearing on their application?

A. It could be. For instance, a student might write about their legacy and tell us how many -- how much of their family has attended UT Austin and why they want to be here as well and we do not have -- our legacy policy is such that we don't consider legacy. So in that sense, that information is not useful for the read of the file.

Q. So is it almost the same as if the student just chose not to write the third essay?

A. It's -- it's never negligible.

Q. Okay. And it doesn't -- Then it doesn't work against the student, that is?

A. Right.

Q. Okay.

A. The information -- what they're typically doing is [81] **telling us -- expanding on other parts of the application that we've seen already. In a lot of cases they're representing in essay form what they represented in resume form, that's very common. So in some cases it's just a representation of information we've already seen. But all of the components of the application are kind of read, again, in context of one another, but some documents are supporting documents. High school letters recommendation, counselor letters of recommendation are an example of that. Most often they're supporting things we've already gleaned**

from the applicant's records. Sometimes they provide additional information and sometimes they don't.

Q. Okay. Is it always to the student's advantage to submit an optional third essay?

A. No, not necessarily. Most students don't.

Q. I guess I should say the opposite. Is it -- is it never to their disadvantage to submit the optional third essay?

MS. KNEELAND: Objection; form.

A. Is it never to their disadvantage -- a student -- Students are usually submitting materials that they believe will be beneficial in some way. Rarely -- You know, so circumstances in which a student might give us information is such that we can use it to review favorably their file. Rarely does a student give us something that would be -- [82] would not be reviewed favorably. The question that we have when we're reviewing the file is does this -- is this information useful to how we score the applicant -- how we score the applicant and what kind of personal achievement score we give them. We start this process, again, at the top, you know. So you want to be a six, you know, how -- let's see if you're a six and so we start reading. We start reading essays, we start reading full files, and we let the information that the student gives us -- give us drive where we end up with that score.

Q. (By Mr. McCarthy) Okay. Dr. Bremen is it?

A. Uh-huh.

Q. Dr. Bremen talked earlier today, he explained a bit about the training that readers go through.

A. Uh-huh.

Q. And now I understand -- And I think you've testified to this, so I'll just ask you about it. Isn't it true that the training is, in part, meant to build consensus among the readers?

A. Yes.

Q. Okay. Are there some cases where readers fall out of line, so to speak, and have -- you know, give personal achievement scores that seem to be off?

A. In -- in the training?

Q. Yes, in the training.

[83] **A. Yes, that's part -- part of the process. We start -- we start very far apart and the idea is that over the course of the training we come to agreement on flies that represent certain scores.**

Q. Is there ever a scenario where an individual reader is not coming to the consensus?

A. No.

Q. Okay. During the actual admissions process, is there ever any review done of the readers?

A. Yes.

Q. Okay.

A. Dr. Lavergne conducts every couple -- every few years a reader reliability survey where we send a set of files through and have everyone read them, unaware, and those files are then compared to see how -- how we rank against each other. We also -- by virtue of the fact that we read in two -- two passes now, meaning that someone is reading the essays and someone else, a senior reader, is reading the full file, that has also allowed senior readers who've also been trained to read essays -- although they're not reading essays for the purposes of scoring essays -- to subtly monitor readers. Because if I have a file that I'm reading, I see the essay score that's been given, I'm reading the full file and so that's also a way that senior readers are able to kind of watch the actions of other [84] readers.

Last year we also had Dr. Bremen pull a second set of files and we sent those files through and he compared his scoring of those files per our training process to the -- to how they scored the files and indicated to us whether it was one up, one down, where he agreed or disagreed, and we followed up with staff members as necessary then, too.

Q. Okay. So if there is a reader whose -- if there's a reader whose scores are not consistent with Dr. Bremen's research or -- Actually, let's just say if there's a reader who's scores are not consistent with Dr. Bremen's research, are they required to take more training?

MS. KNEELAND: Objection; form

A. The result of that was that readers were within one point.

Q. (By Mr. McCarthy) Okay.

A. The – if there was ever a question about a reader, then it was a conversation that I had with the reader --

Q. Okay.

A. -- and we'd pull the file and just talk about it. Staff members also -- the readers and staff members also, if they have questions about a file, they'll often consult a senior reader, usually me, to get an opinion on the read of [85] that file. So there's multiple instances of I'm not sures, what do you thinks, as well as more formalized processes to evaluate where readers are and how they're doing in the process.

Q. So there is some formal and some informal mechanism for feedback.

A. Yes.

Q. Okay. And how often is it that your full file review results in you talking to the first reader about the essay score?

A. Rarely at that level. And you're saying when the full file reviewer sees the essay scores.

Q. Uh-huh.

A. We didn't -- I didn't see much of that at all last year. It was more of readers asking questions. Particularly new readers, new staff members when they first come onboard and it's a new process for them, they often ask a lot of questions.

Q. And how often does that happen?

A. Pure speculation. Brand new reader last year might ask a couple of times or if they have a particular file -- even senior readers, when we're reading full files, I might ask one of my associates, you take a look at this and, you know, see what you think about it and we'll talk about it. So we all have -- we've all been trained, but we [86] all -- sometimes we need a second look, you know, to take a look at it.

Q. Sure, okay. I want to go back briefly to our discussion of cutoff lines earlier.

A. Okay.

Q. Did you testify that you sometimes make cutoff line decisions?

A. Yes, I do.

Q. Okay. And how do you determine where to draw the line if there's more than one option?

A. I make a decision based on the drawing of the lines that will get me closest to my target and also represent the stair step or represent both aspects of the admissions process.

Q. So what if there's an instance -- What do you do where you have two options that both gets you to the same target and both are consistent with the stair step?

A. I pick one.

Q. Do you have any guidelines for that?

A. It's a question of which gets me closest. I mean, you gave me an example of a matrix that is one of the sparsest matrixes we'll ever see. A non-resident for nursing is one of our smallest schools. The matrixes that we're typically working with for Texas residents, which are where our most difficult decisions are made, have upwards of [87] hundreds, the Liberal Arts majors has thousands of students within -- within those cells where individual cells might have 20, 30, 40, 200, 400, 500 students in them. And so it's a question, really, of how close can we get. And I can't think of -- in small

numbers, like on this matrix, sure, we could probably draw it a couple of ways to get to 14, but what we're typically dealing with are much larger numbers than that and we don't find instances where you can -- you're going to have a different number and it may be off by one or two and that would be perfectly acceptable, but we just make a decision to pick a line and go with it.

Q. Okay. But let's just say in the instances where you have two choices that are both the same as far as the target is concerned and both the same as far as the stair-step rule is concerned, is there any -- is there any guideline at all or you just pick whichever?

A. Well, the guideline is always to try to reward the most accomplished student or group of students and where that is, is determined by how many students are in the adjacent cell. So it might be that the most accomplished student on a given matrix might be the cell of six that have sixes on their PAI , but a one-tenth lower achievement index or it might be that the closest adjacent cell that helps us get to our target has a higher AI, but a lower PAI. It depends on what else is sitting out there and we make the [88] **decision accordingly.**

Q. So -- And I guess is it fair to say that in those situations where you have two choices, both which go to the same target, both which comply with the stair-step rule, that the choice comes down to deciding whether to prefer PAI or AI?

A. Yes.

Q. And it just depends --

A. It depends on how many students are in those cells, how many are there. We pay a great deal of respect to our highest PAIs. Those students are some of the most accomplished students and we give a great deal of respect to them, but we also -- within the level of competition in all of these individual majors, some of them the competition is so intense that we can't fathom letting a 3.9 predicted -- the AI - we also call it predicted GPA -- go in favor of the 2.96. We -- You know, we may take that higher AI because that student is so phenomenal, you know, on an academic basis and we have to pay homage to that, but it really depends on who's sitting there and what the context of the entire cut looks like. It may be that the cut is already skewed academically because of the competition of the class and so maybe we give a little bit more credit for that rare six that's sitting up there or it may be skewed the other direction and so we're able to pick up the [89] **students who have ones on their PAI, but have the high AI markers. Its really -- it's a balance --**

Q. Okay.

A. -- kind of -- of all of those things.

Q. So in other words, there's not a simple guideline that makes those decisions.

A. No.

Q. It depends on the composition of the matrix as a whole.

A. That's right.

Q. Okay. I need to talk briefly about Topic No. 17.

A. Okay.

Q. This is about documents.

A. Okay.

Q. I promise I'll make it brief.

A. All right.

Q. Once this suit was filed, was there any sort of notification or instructions about preserving documents that was circulated throughout the admissions office?

A. Yes.

Q. Okay. Who issued that statement?

A. The director.

Q. Who's the director?

A. Dr. Walker.

Q. Dr. Walker, okay.

[90] And to whom did they issue it?

A. To all staff, all admissions staff.

Q. Okay. Do you have a copy of that notice with you?

A. No, I don't it was --

(Reporter interrupts)

A. -- an e-mail, so it should be in the -- those records.

Q. (By Mr. McCarthy) Okay. And who was responsible for collecting documents responsive to the plaintiffs' discovery request?

A. I was.

Q. Okay. And what files did you review to collect responsive documents?

A. A litigation hold was placed on all of our electronic documents on our computers and hard drives and so information was taken there, we contacted all staff members to -- that -- well as part of Dr. Walker's request to compile any information they had specific to the admissions process for the freshman class of 2008 and have those documents sent to me and so they were forwarded to me.

Q. And so this search for responsive documents went through electronic files, hard copy files, e-mail files?

A. That's right.

Q. Okay. Do you believe that all documents responsive to the plaintiffs' request have been produced to [91] us at this time?

A. I believe so.

Q. Okay.

MR. McCARTHY: Do you have any questions, Mishell?

MS. KNEELAND: I have just a couple.

EXAMINATION

BY MS. KNEELAND:

Q. Dr. Ishop, what was the total number of spaces available for Texas residents in the fall class of 2008, top ten and non-top ten?

A. Top ten and non-top ten was approximately – about 10,200 or so.

Q. So 10,200 were available for Texas residents.

A. That's right --

Q. And of those spaces, how many were available outside of the top ten percent?

A. Let me answer a different way because -- for the number that I know. We automatically admit top ten percenters and for a few majors we have an automatic admit for the most high-caliber academic students, we call those A-rated students. Outside of those two figures we had -- I had 881 spaces remaining for non-top ten percent applicant, Texas residents, to award decisions to.

MS. KNEELAND: That's all I have.

[92] MR. McCARTHY: I have another question.

FURTHER EXAMINATION

BY MR. McCARTHY:

Q. Are there any schools or majors to which HB 588 does not apply?

A. Yes. School of Architecture and the College of Fine Arts.

Q. Okay. So how are admissions decisions made for Architecture and Fine Arts?

A. The dean and faculty of the School of Architecture works in concert with the admissions office, but they essentially make their admission decisions. We still read the files and score the files and they're provided with all that information, but they make the admission decisions. Portfolios and such are also -- are required for Architecture.

For Fine Arts, they make the -- the artistic decision and we collaborate on the academic decision. They require auditions and portfolios in Fine Arts and so the students have to pass those auditions and such and we work in concert with them for -- on the academic component on the file to make decisions.

Q. And who are the individuals responsible for those decisions in those schools?

A. The liaison for the College of Fine Arts who is an [93] assistant director and the associate director who is liaison for the College of Architecture.

Q. And do those officials have discretion to disregard the AI and PAI scores when making admissions decisions to those schools?

A. The school of -- the College of Architecture doesn't use -- they -- they have the matrix, but they make decisions above and beyond the matrix because they have other criteria as does the College of Fine Arts.

Q. So they're not bound by the --

A. Right.

Q. -- matrix.

A. That's correct.

Q. Okay, all right.

MR. McCARTHY: You have anything else?

MS. KNEELAND: I have nothing else today.

Q. (By Mr. McCarthy) Okay. Before I let you go, Dr. Ishop, I just want you to think back -- We've been talking for a while now. Are there any answers that you gave me during this time that looking back you'd like to change or alter for any reason?

A. I think the only one that comes to mind, I think at the very beginning we were talking about the size of the class and the number of admits and I think I used fewer than 13,000. It's probably more accurate to say approximately [94] 12,000. I think I was a little high with that estimation.

Q. Okay, thank you for that.

A. That's it.

Q. And is there anything that you forgot to tell me before that -- anything else that you might have forgotten to tell me before that you just thought of now?

A. I don't think so, thank you.

Q. Okay. All right. Well, that should be it. There is a very small chance, it's highly unlikely, that we'll want to talk to you more, but I should be done for now.

A. Okay.

Q. Thank you.

A. Thank you.

THE REPORTER: Off the record, 4:50.

(Deposition concluded)

APPENDIX G — EXHIBIT 8 TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, DEPOSITION OF BRUCE WALKER, DATED OCTOBER 7, 2008

[1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. 1:08-CV-00263-SS

ABIGAIL NOEL FISHER; AND
RACHEL MULTER MICHALEWICZ,

Plaintiffs,

VS.

STATE OF TEXAS; THE UNIVERSITY
OF TEXAS AT AUSTIN; ET AL.,

Defendants.

RULE 30(b)(6) DEPOSITION OF BRUCE WALKER TUESDAY, OCTOBER 7, 2008

ORAL DEPOSITION OF BRUCE WALKER, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on the 7th day of October, 2008 …

* * *

[4] (8:08 a.m.)

TUESDAY, OCTOBER 7, 2008

BRUCE WALKER,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. McCARTHY:

Q Good morning, Dr. Walker.

A Morning.

Q As I mentioned a bit ago when we met, my name is Thomas McCarthy and I represent the Plaintiffs in this case.

I want to ask you, are you appearing here today in response to this notice of deposition?

A Yes.

Q Okay.

MS. KNEELAND: Sorry. For the record, at this time I would like to note that Defendants -- Defendant The University of Texas at Austin has designated Dr. Walker to testify on topics, in Schedule A of that notice, 4 through 7 and the policy part of No. 17 which relates to the preservation of and search for responsive documents.

Q (By Mr. McCarthy) Dr. Walker, have you ever been deposed before?

A No, I have not.

[5] Q Okay. I'll let you know a little bit about how the process works. The attorneys have probably told you a little bit about it. But basically I'm going to ask you a series of questions about your role and responsibilities at the university that are relevant in this lawsuit.

A Okay.

Q When I ask you questions, just please answer to the best of your ability. If you don't know, feel free to say you don't know. If my question is unclear, feel free to ask me to restate it. If you have a question that you want to ask your attorney, Ms. Kneeland, you're free to ask her questions. But please, if I have asked you a question, answer the question first and then go ahead and ask Ms. Kneeland a question.

A Okay.

Q If you would like to take a break at some point, use the men's room, get a drink of water, anything like that, just let us know. We can certainly take some breaks.

A Okay.

Q One other thing, if I ask you a question that's a yes or no answer, please state "yes" or "no" and don't just nod your head. So that way the court reporter can get it on the transcript. Okay?

A Yes.

[6] Q All right. Do you have any questions about that?

A No.

Q Okay. Let me ask you a few logistical things before we actually get started in the meat of this deposition.

Have you taken any medications or ingested anything that might affect your ability to participate in this deposition?

A Not that I know of, no.

Q Okay. Did you meet with anyone to prepare for this deposition?

A Yes.

Q Who did you meet with?

A My lawyers.

Q Okay. How many times did you meet with them?

A I think three.

Q Okay. Did you review any documents to prepare for this deposition?

A Have I reviewed any?

Q Yes.

A Yes.

Q Yes?

A Yes.

Q Do you remember what documents you reviewed?

A Well, certainly the Schedule A.

[7] Q Uh-huh.

A And then just to refresh my memory on some of the statistics and stuff, yeah.

Q Okay. So maybe you looked at like the Top Ten reports, that kind of thing?

A Right.

Q Okay. Is there anything that you -- are you aware of any documents that you have looked at but have not been produced to us?

A I'm not aware of any, no.

Q Okay. All right. Dr. Walker, what is your job title?

A I'm vice provost and director of admissions.

Q Okay. And how long have you been in that position?

A Since 1996.

Q Did you hold any positions prior to that at the university?

A No, not at this university.

Q Did you hold similar positions at other universities?

A Yes.

Q What positions?

A I was at the University of Delaware. I was dean of admissions and financial aid. Then prior to that I was [8] at the University of North Texas as associate director.

Q Okay. And what's your education?

A I have an undergraduate degree in theology, a master's degree in student personnel, and a doctorate in higher ed administration.

Q Okay. Outside of your work experience and education, do you have any other experience that relates to your roles and duties here at the university?

A Well, I spent eight years working for the college board, which is the folks that sponsor the SAT.

Q Okay. Are you able to testify fully today as a representative of The University of Texas?

A Yes.

Q Okay. Generally stated, what is the university's policy with regard to undergraduate admissions?

MS. KNEELAND: Objection; form.

You can answer. You can answer. I was just making an objection for the record.

THE WITNESS: Oh. I'm sorry. I don't always hear out of that ear, so...

A You want to know what our process is?

Q (By Mr. McCarthy) What's the policy? Do you have -- like what is the -- does the admissions office have a general statement policy?

A Yes. You mean how the admissions work? I'm [9] **sorry. I'm not --**

Q Yeah.

A -- understanding your question.

Q I mean like a mission statement. Is there a particular just general mission statement of the office of admissions?

A Yes.

Q And what is the -- what is the office of admissions' mission?

A Is to recruit and enroll students in attempting to have a very diverse student body and particularly a freshman class.

Q Okay. And does the university consider itself selective?

A Yes.

Q Okay. Does the university consider itself diverse?

A Yes.

Q Has the university been recognized for its diversity?

MS. KNEELAND: Objection; form.

A I don't -- by who? I'm sure I -- I'm sure we have, but...

MR. McCARTHY: I'm sorry. Could we take a short break?

[10] (Recess from 8:15 a.m. to 8:16 a.m.)

(Exhibit No. 9 marked)

Q (By Mr. McCarthy) Dr. Walker, I'm handing to you what has been marked as Deposition Exhibit 9.

A Okay.

Q Do you recognize what that is?

A It's from our Web site.

Q Uh-huh. And --

A I know it's -- go ahead.

Q Yes. It's from the Web site. And can you look down towards the bottom of the first page and the top of the second page and just read to me what you see there?

MS. KNEELAND: Where? It's --

MR. McCARTHY: I'm sorry. Here. I'll --

MS. KNEELAND: Sorry.

MR. McCARTHY: -- help you out.

MS. KNEELAND: It's a little vague.

MR. McCARTHY: Sorry. Starting at the bottom of the second page.

THE WITNESS: Okay.

A "The University of Texas at Austin ranks sixth in the nation in producing undergraduate degrees for minority groups, according to the May 31, 2007 edition of Diverse Issues in Higher Education magazine."

Q (By Mr. McCarthy) Okay. Can you continue a [11] little bit?

A "In addition to the overall standing, the university ranks tenth nationally among the magazine's Top 100 producers of undergraduates for Hispanics, eighth for Asian-Americans and 59th for American Indians."

Q And you don't need to read the rest into the record, but could you just take a look at it real quick for me, the rest of that paragraph? And you can tell me generally what the paragraph is highlighting.

MS. KNEELAND: I'm going to object. The document speaks for itself. He doesn't need to summarize it.

MR. McCARTHY: That's fine. Okay.

A It's about our -- the rankings.

Q (By Mr. McCarthy) Okay. Now, Dr. Walker, isn't it true that in 1997 the university adopted a system for making admissions decisions based on an Academic Index and a Personal Achievement Index?

A That is true.

Q Okay, Do you recall -- I'm sorry. Why did the university adopt that system?

A Well, there was several reasons. The Fifth Circuit Court had just made the decision in the Hopwood case, and we could no longer use race in our admissions process and we had been doing so for some time. So we [12] were -- but we still were interested in diversity in its full -- full meaning.

And so we -- I had just come, and we were recreating or creating a process that could honor diversity and recognize diversity, and so we created a holistic review of applications. We redefined merit to be much more inclusive than it had been before. There had primarily only been test scores and rank prior to that time, and we understand students are more than just a test score and a rank. They bring other characteristics with them to a university, and we wanted to be able to recognize and reward those characteristics as best we could.

Q Okay. And was that admissions system that -- that was based on the Academic Index and Personal Achievement Index, that was adopted at that time?

A Yes.

Q Was that successful in that respect?

MS. KNEELAND: Objection; form.

A In what respect?

Q (By Mr. McCarthy) You just explained why the university adopted it.

A Uh-huh.

Q Was it successful in reaching those goals?

A We haven't reached those goals yet, but it has -- [13] it did provide us the opportunity to look holistically at a student as opposed to narrowly at a student. Yes, it did accomplish that.

Q Okay. And was the system intended to boost minority enrollment?

A It -- it was hopeful that it could, but that's not the whole reason we did it, no.

Q Was it a reason?

A It was part of the reason, I would say.

Q Okay. And for that reason, for the reason of minority enrollment, has it been successful in promoting minority enrollment?

A Well, I can't -- I can't answer that. If I did answer it, I would have to say I don't know because we added so

many other things to it later. Top Ten Percent, a lot of other things that we did. So we never just stayed with the very first use of this new system.

Q In your -- are you referring to the fact that HB 588 was implemented the following year?

A Yes.

Q Okay.

A And other things, but...

Q Sure. Okay. So in 1998 once the university started implementing HB 588, the university continued to use the AI/PIA system. Correct?

[14] **A That's correct. For those that were not automatically admitted.**

Q Okay. And while the university was implementing HB 588 and using the AI/PIA system for those that were not admitted pursuant to HB 588, did the university increase minority enrollment?

A No. Increase it beyond what?

Q Did it increase it beyond where it had been prior to that?

A You're asking if 1988 minority enrollments were higher than 1997 minority enrollments?

Q No. I'm asking if they ultimately increased minority enrollment above the levels to which it had been prior.

MS. KNEELAND: Objection; form.

A I'm not sure I understand the question. And I'm sorry, but --

Q (By Mr. McCarthy) That's okay. That's okay.

A -- I need clarification.

MR. McCARTHY: Could we take a short break?

(Recess from 8:23 a.m. to 8:25 a.m.)

(Exhibit No. 10 marked)

Q (By Mr. McCarthy) Dr. Walker, I am handing you what's been marked as Deposition Exhibit No. 10. Can you tell me what that is?

[15] A It looks like a press release. Looks like it came from our Web site.

Q Uh-huh. And can you tell me what the title of that is?

A The title is "Enrollment of first-time freshman minority students now higher than before Hopwood court decision."

Q Okay. And can you see in that university press release where the minority enrollment levels prior to the Hopwood case were identified?

A Yes, the first paragraph.

Q Okay. And then what does it say those were?

A It says, "Diversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students -- African-American, Hispanics and Asian-Americans -- to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university's enrollment process."

Q Okay. And does that press release actually say what the percentages of African-American and Hispanic enrollment were prior to the Hopwood case?

I think if you're having trouble finding it, if you look at the second page.

A Okay.

Q If you look at -- there's a chart there.

[16] **A Uh-huh.**

Q That's data provided by The University of Texas at Austin Office of Institutional Research, and it shows the enrollment rates for freshmen in 1996.

A Yes.

Q Can you tell me what those were?

A 1996, African-American, 4.1 percent. You want the percent?

Q Yes, please.

A 1996, Hispanic, 14.5 percent. Asian-American, 1996, 14.7 percent.

Q Okay. And now can I refer you to what's previously been marked as Deposition Exhibit No. 1?

MS. KNEELAND: You can refer him to it, but I think you'll have to hand it to him.

MR. McCARTHY: Yeah, I'll hand it to him.

MS. KNEELAND: Okay.

MR. McCARTHY: I just want to make sure I identify -- let him know what I want him to look at.

Q (By Mr. McCarthy) That's Deposition Exhibit No. 1. Are you familiar with what that document is?

A Yes.

Q Okay. Can you tell me what that document is?

A It is a report from our admissions Web site called Implementation and Results of the Texas Automatic [17] Admissions Law -- that's House Bill 588 -- at The University of Texas-Austin. It's a demographic analysis of entering freshmen of fall of 2007.

Q And can you turn to Page 6 of that document?

A Yes.

Q Towards the bottom of Page 6 there is a chart that identifies enrollment rates for incoming freshman class.

A Okay.

Q Can you tell me for the year 2005 -- I'm sorry. For the year 2004. Can you tell me for the year 2004 what the enrollment rates were for African-Americans, Hispanic and Asian-American students?

A For '04?

Q Yes, '04.

A For African-American, 5 percent. For -- you said for Hispanic?

Q Uh-huh.

A Hispanic was 17 percent.

Q And could you tell me the Asian-American --

A Oh, I'm sorry.

Q -- also?

A Asian-American was 18 percent.

Q Okay. And all of those are higher than the minority enrollment rates for the incoming freshman class [18] in 1996, the year prior to Hopwood. Is that correct?

A That is correct.

Q Okay. In 2005 the university began considering race as a factor in undergraduate admissions. Correct?

A That's correct.

Q Was the university's decision to do that in part a response to the Grutter case?

A In part.

Q Okay. And what was the other reasoning behind it?

A Well, we felt like we had not -- we had not yet attained critical mass for the benefits of -- the educational benefits that diversity would bring.

Q What exactly is critical mass for the university?

A Well, I think for our -- our purposes it's an adequate representation of minority students so that

the benefits that can -- educational benefits that can be derived from diversity can actually happen.

Q Okay. And has the university identified a numerical level of minority enrollment --

A No.

Q -- to which -- no. So the university has not defined what critical mass is as a number?

A No.

Q Okay. How will the university know when it has [19] reached critical mass?

A Well, I think when we see the educational benefits happening and have happened, then we would know.

Q So is the university currently not providing full benefits of a diverse education to its students?

A Well, I -- we're providing the education and we're attempting to provide the full benefits of a diverse -- diversity education. We just haven't attained that critical mass yet.

Q Has the university made any sort of projection as to when they will attain critical mass?

A No.

Q Does the university have any means of measuring their progress towards critical mass?

A Yes.

Q And how is that?

A Well, there's one -- though diversity is spread across the university in all the things that we do, there is one window that we can actually -- through which we can actually look to see how we're doing. And the classroom is one of those -- is that window where we can look to see how we're doing. So that's one way to measure.

Q And what does that window of the classroom tell the university about its progress towards critical mass?

A That we haven't attained it yet.

[20] Q What is it about that window of the classroom that tells the university that it has not attained critical mass yet?

A Well, we have far too many classrooms where there's still no or only one minority student.

Q And how many classrooms as a percentage or a whole number does the university have where there are only one or no minority student?

A Well, we did a study and we -- depends on the size of the classroom. But let's say a classroom that has five

or more students in it, more than half of the class had only one or no African-American students in them. And about the same, but slightly less percent had only one or no Hispanic students in them. And then we have a little bit higher representation of Asians.

Q What -- I think you said that for classrooms -- and please tell me if I'm wrong in restating what you just told me. I want to make sure I have this right.

I believe you said that for classrooms of -- that have five or more students in them that 50 percent of the classrooms have only one or no African-American student?

A That's an approximate.

Q Approximate?

A Yes.

[21] Q Okay. Does the university have a goal in mind in terms of what percent that should be?

A No.

Q No. How will the university know it's reached critical mass if it doesn't have a goal?

A Well, the students will let us know. We talk to them all the time about how they feel about their experience at the university, how they feel in the classroom. We still have students who tell us they feel isolated in the classroom, that they are the only, or the

majority of students tell us that there is no diversity in the classroom. So we talk to the students on a regular basis, and this is what they tell us.

Q Are these -- do these classrooms that tend to lack racial diversity as you have described tend to fall into certain schools or majors within the university?

MS. KNEELAND: Objection; form.

A Not that I'm aware of, no. It's across all of the university classes.

Q (By Mr. McCarthy) What is the university doing to try to remedy these numbers that are deficient?

MS. KNEELAND: Objection; form.

A We're trying to recruit a diverse freshman class.

Q (By Mr. McCarthy) In terms of minority enrollment?

[22] **A Well, in terms of every means of diversity that's possible, including minorities, yes.**

Q I think right now -- but right now you're sort of talking about minority enrollment, though. Is that correct?

A That's correct.

Q So in this respect, to remedy the -- the low numbers of minority students in those classrooms, the university is seeking to increase minority enrollment?

A That's correct.

Q Okay. And how is the university seeking to increase minority enrollment?

A Well, there's a lot of ways that we do that. We try to increase the number of minorities in our -- representation of minorities in our applicant pool, in our prospect pool, and the number of students who get admitted, and then the number of students who enroll. So that's our -- that's our plan, is to increase diversity of our applicant pool.

Q Is the university's use of race as a factor an admissions decision?

A As a factor?

Q Yes.

A Yes.

Q Is the university's use of race as a factor in [23] admission decisions increasing minority enrollment at the university?

A I think so.

Q Is the university making any attempt to measure the effect of the use of race an admissions decision?

A Well, we measure every freshman class by just looking at the -- whether we have improved over the year before.

Q Is it accurate to say that the university is generally increasing its minority enrollment?

A In general, yes.

Q And I believe that you stated that the university takes lots of different measures in order to increase minority enrollment. Is that correct?

A Yes.

Q Okay. Does the university have any way of determining how much of that increased minority enrollment is due to any particular measure that the university has implemented?

A Not -- not really. It's -- because college admissions and the decisions that 18-year-olds make is a very complex and complicated thing, and I don't think you ever know or you can never account for all the reasons why students make the decisions they make. We -- we put out a lot of effort. We do a lot of things to promote the [24] university to the citizens of Texas, but we can never know all the reasons students might have for attending the university.

Q So is it your testimony that it's unclear whether the university's use of race in admissions decisions is increasing minority enrollment?

MS. KNEELAND: Objection; form.

A **Would you state that in a different way?**

Q (By Mr. McCarthy) Sure. Sure.

A **I'm not sure.**

Q Sorry I wasn't clear.

A **Yes.**

Q Is the university's use of race in admissions decisions increasing minority enrollment?

A **It appears to be, yes.**

Q Is it doing so in a measurable amount?

A **Well, measurable to me, yes.**

Q Can you explain how it's measurable to you?

A **Well, a higher representation, higher percentage, higher numbers.**

Q And those higher numbers, again, they're the product of many different initiatives that the university has undertaken. Correct?

A **Right. That's correct.**

Q And how much of that is attributable to the use [25] of race?

A I don't -- I don't think I can give an exact answer to that because it's -- it's hard to separate that from everything else.

Q Okay. Can you look back again at Deposition Exhibit No. 1? That's that HB 588 report.

A Uh-huh.

Q And turn to Page 6 again. And, again, I would like you to look at the bottom, which is a chart --

A Okay.

Q -- that shows enrollment levels for the incoming freshman classes.

A Uh-huh.

Q And 2005 was the year that the university introduced race as a factor in admissions decisions. Correct?

A That's correct.

Q Okay. Could you tell me what the enrollment -- what the percentage enrollment was of African-American students in 2005?

A What percent?

Q Yes.

A Five.

Q Five. And could you tell me what it was for Hispanic students?

[26] **A Eighteen.**

Q And could you tell me what it was for Asian-American students?

A Seventeen.

Q And all those numbers are 2005 numbers. Correct?

A That's correct.

Q Were those numbers any different than the same numbers for the year of 2004?

A Why don't I just read you the numbers from 2004.

Q Sure, that's fine.

A 2004 was 5 percent for African American, 18 percent for Asian-American, and 17 percent for Hispanic.

Q Okay. Dr. Walker, how much has minority enrollment increased at the university since the university began using race as a factor in admissions decisions in 2005?

A Shall I read from your chart or are you just --

Q If you don't know the answer, that's fine, you can check from the chart, I guess, and compare 2004 to the most recent data.

A Yes. It has increased by a few percentage points.

Q Okay. And that increase -- and of that increase you don't know how much is attributable to the use of race as a factor in admissions decisions. Is that correct?

[27] **A Well, the use of race in -- beginning in 2005 is the only thing that changed in 2005. It would be reasonable to think that it had -- it had an effect.**

Q Okay. And are the university's -- I'm sorry. You mentioned that the university takes -- undertakes a number of initiatives to increase minority enrollment. Correct?

A That's correct.

Q What are some of those other initiatives?

A Other than?

Q Other than the use of race in -- as a factor in admissions decisions.

A Well, we have done a lot of things. It's a very broad attempt to create a diverse university. It would start with the changes we made in 1996 prior to the class

entering in 1997. We moved to a different definition of merit, a very much broader definition of merit that included students' leadership roles, their participation in extracurricular activities, their work experience, their service in the community, their -- any special circumstances in their family, their socioeconomic standing, the -- whether or not they lived in a single-family home, whether English was, you know, spoken at home, a language other than English was spoken at home. So we -- we changed that part of our admissions process.

[28] We also created a more I will call it user-friendly process for students. We created a large -- we call it a customer service unit. It's a very large telephone process, telephone bank, so we could be sure and answer all of our calls. So that improved services to students so they could reach us, so that they can complete their application materials. We created a communication group so that we could be sure that our communications to students in the applicant pool was clear, that they understood what they needed to do and what the deadlines were for getting that done.

We put more people out in the field. We opened -- to visit high schools, to increase the diversity of our applicant pool. We opened admissions centers in Houston, Dallas, San Antonio, and this last year in The Valley so that we could put our professionals closer to where the students lived, so we could talk to the families, so they could feel that they had a local contact.

We completely redid our Web site to make it easy to read, easy to understand, easy to use. There's a transactional part of it you may or may not have seen. I doubt you have because you have to have an EID to get into it. But we improved tremendously the transactional part of our Web product so it would be easier for students to [29] apply, to submit the documents they need to submit and to track their application, to know whether they have submitted everything, to look at what they have submitted.

So we invested a lot of money, time, effort into improving our processes for applicants, to improve our contact with students so that we could enhance our applicant pool and then our admitted student pool. Those are some of the things that we have done.

Q In addition to those, I believe that Mr. Michael Orr told us yesterday about several scholarship programs that the university runs?

A That's correct.

Q The university runs a Presidential Achievement Scholarship program. Correct?

A That's correct.

Q And a First Generation Scholarship program. Correct?

A That's correct.

Q And also a Longhorn Opportunity Scholarship?

A That's correct.

Q And those scholarship programs have -- those scholarship programs have helped increase minority enrollment. Correct?

A Yes. I would say yes.

Q Okay. I want you to look at Deposition Exhibit [30] No. 1 again, Dr. Walker.

A Okay.

Q In the middle of Page 2 there's a list of factors and special circumstances that are -- make up part of the personal achievement score and a Personal Achievement Index.

A That's correct.

Q This is part of the admissions process. Correct?

A Correct.

Q Okay. Could you read me that list of factors and special circumstances?

A "Scores on two essays, leadership, extracurricular activities, awards/honors, work experience, service to school or community, special circumstances such as

socioeconomic status of the family, single-parent home, language spoken at home, family responsibilities, socioeconomic status of the school attended, average SAT/ACT of school attended in relation to the student's own SAT/ACT, race (addition approved by the UT Board of Regents in 2003)."

Q Okay. So prior to the addition of race that -- I'm sorry. Let me start that again.

So prior to the 2005 admissions year, all of those factors and special circumstances were considered except for race. Correct?

[31] **A That is correct.**

Q Okay. Why did the university adopt those factors and special circumstances?

A Within special circumstances?

Q Why did the university adopt those factors and special circumstances?

A Oh, and special circumstances. In order to expand the definition of merit, what it means to be a meritorious student.

Q Okay. And was this all part of the university's goal of increasing diversity?

A Yes.

Q Yes. Okay. And I believe that you said that there are many kinds of diversity that the university seeks. Correct?

A That is correct.

Q When the university added the factor of race to that list, what kind of diversity was the university seeking to promote?

A By the addition of race?

Q Uh-huh.

A Racial diversity.

Q Okay. When the admissions office reviews applicant files, it considers all of these factors and special circumstances. Correct?

[32] **A That is correct.**

Q And those -- those factors and special circumstances are not assigned numerical values. Correct?

A That is correct.

Q So is it accurate to say that they are subjective?

A Yes.

Q The university employs many people in its admissions office. Correct?

A Say that again?

Q The university employs many people in its admissions office. Correct?

A That's correct.

Q And there are several people that review applicant files. Correct?

A That's correct.

Q Is it possible that these several people could consider differently those subjective factors?

A I suppose anything is possible, but that's not the way we trained them.

Q Okay. Dr. Walker, I'm going to show you what's been marked previously as Deposition Exhibit No. 7.

A Okay.

Q Do you understand what that document is?

A Yes.

[33] Q Okay. Is that one of the matrices that's used to determine which students are admitted to a particular major?

A That is correct.

Q Okay. And there's a cutoff line drawn that separates the students that are admitted from those that are not admitted. Correct?

A That's correct.

Q Is it accurate to say that a difference of one-tenth of an AI point can be determinative to whether a student is admitted or not admitted?

MS. KNEELAND: Objection; form.

A One-tenth of an AI point?

Q (By Mr. McCarthy) Yes, the Academic Index point.

A Uh-huh.

Q Is it accurate to state that one-tenth of an AI point can be determinative as to whether a student can be admitted or not admitted?

A Yes.

MS. KNEELAND: Same objection.

Q (By Mr. McCarthy) Okay. Could a difference of one PAI point be determinative as to whether a student is admitted or not admitted?

MS. KNEELAND: Objection; form.

A Yes.

[34] Q (By Mr. McCarthy) Okay.

MR. McCARTHY: Could we take a short break?

(Recess from 8:57 a.m. to 9:11 a.m.)

Q (By Mr. McCarthy) Dr. Walker, you testified that the use of race as a factor in admissions helps increase minority enrollment. Correct?

A That's correct.

Q Does the use of race as a factor in admissions help increase the enrollment level of African-Americans?

A I believe so, yes.

Q Does it help increase the enrollment of Hispanic students?

A I believe so, yes.

Q Okay. Now, because the use of race as a factor in admissions is increasing levels of enrollment of certain racial groups, it's necessarily decreasing the enrollment of other racial groups. Correct?

A No, not necessarily.

Q Well, it is sort of a zero-sum game, isn't it? There's only 100 percent. Right?

A Right, but our -- the size of our freshman class varies from year to year.

Q I understand that. But as percentage levels, if some are going up, other ones must be going down. Correct?

[35] **A Correct.**

Q So what effect is the use of race in admissions decisions having on the enrollment of Asian-Americans?

A Well, I can't say there's a direct correlation, so I won't.

Q Okay. And what is -- what effect is the use of race in admissions decisions having on the level of enrollment of Caucasian students?

A Again, I'm -- I'm not sure there's a direct-and-only effect.

Q Okay. The use of race as a factor in admissions decisions is increasing the enrollment rates of African-Americans and Hispanic Americans.

A It appears --

Q Correct?

A It appears to be, yes.

Q Okay. So then isn't it true that it's necessarily reducing the enrollment rates of the remainder of the student population?

A Again, I don't -- I can't be sure it's a direct and not affected by other things.

Q Well, except that if the use of race is increasing the one, if it is increasing the levels of enrollment of Hispanic and African-American students, then a necessary -- a necessary result is that it's reducing [36] the levels of enrollment of the remainder of the student body. Correct?

A Well, since we use race -- we don't -- since race can apply to anyone, black, Hispanic, Asian, white, in our process it's hard for me to isolate that one has been the cause of the other.

Q Okay. So is it the case that the use of race in admissions decisions can benefit nonminority students?

MS. KNEELAND: Objection --

A Yes.

MS. KNEELAND: -- form.

Q (By Mr. McCarthy) Okay. Can you explain how the use of race can benefit a nonminority student?

A Yes. Our -- in our holistic process, race is one of the factors that we use, and it's possible that -- and it doesn't matter what the race is of the student. When you're reading the file, the reader is asking themselves is that a -- what's the context in which we see all these things from the student. And race could be part of that context.

Q Can you give me an example of how the consideration of race can benefit a nonminority student?

A Oh, sure. In Texas we -- I don't like to say segregated schools, so what I say is racially identifiable schools. So if you're in a racially identifiable school [37] **and that race happens to be African-American, and you're a white student, because you live in that area, and you turn out to be president of the senior class, then that's unusual given that you're white. And it suggests an unusual cultural connection that you just don't normally see between African-American and white families.**

So in that case, being white is -- is -- puts everything else in context and would be important to our score for that student.

Q Okay. So that's -- that is a manner in which the consideration of race could benefit a white student?

A That's correct.

Q Okay. Are there other ways in which the consideration of race might benefit a nonminority student?

A I'm sure there are. Let me see if I can conjure up another --

Q Well, you can think about it.

A -- another example.

Q If you think of another example, you can tell me later.

A Okay.

MS. KNEELAND: And I want to be clear. You're asking him to tell you hypothetical student situations or --

MR. McCARTHY: Yes.

[38] MS. KNEELAND: I'm not really clear what you're asking.

MR. McCARTHY: I'm trying to ask where -- I'm trying to ask how the consideration of race can benefit a nonminority applicant.

MS. KNEELAND: Right. And I just want to be clear. You're asking him that sort of hypothetically in the absence of a file?

MR. McCARTHY: Yes.

MS. KNEELAND: Okay.

MR. McCARTHY: Yes. There's no file in front of us right now. Just hypothetically I just wanted an example of how it could work.

Q (By Mr. McCarthy) Dr. Walker, so you just explained how the consideration of race in admissions decisions can benefit a nonminority student. Correct?

A Correct.

Q Okay. Approximately how many nonminority applicants are benefited in that manner?

MS. KNEELAND: Objection; form.

A Well, I -- I have no way of knowing that because you would -- you would have to -- you would have to have an exact application of a number that lifted the student based on race and we don't do that, so I wouldn't have any way of knowing that.

[39] Q (By Mr. McCarthy) The university doesn't keep any statistics on how many students are affected by the consideration of race in admissions decisions?

A No.

Q So then the university does not know how many minority students are affected in a positive manner by the consideration of race in admissions decisions?

A No.

Q Dr. Ishop testified yesterday that applicants being reviewed for the summer class are reviewed in isolation, individually so to speak. That's correct. Right?

A That is correct.

Q Okay. But students that are being reviewed for the fall class are compared against each other. Is that correct?

A Yes. Yes.

Q I can help you.

A Yes.

Q Yes?

A Yes.

Q For example, on the matrix that we looked at, I believe, that's in Deposition Exhibit No. 7 --

A Yes.

Q -- there's a number of students represented by [40] the cells in that matrix, and those students are being compared against each other. Correct?

A That's correct.

Q And that's on the basis of their --

A Well --

Q -- AI score. Go ahead. I'm sorry.

A Right. This is a representation. This -- to me, it looks like a work document from a -- from a process -- either very early in the process or very late in the process. But it is a representation of how lines are drawn and things like that, yes.

Q Okay. And so -- I'm sorry.

MS. KNEELAND: I was going to say I'll interpose that Dr. Ishop testified that this is a matrix for non-Texas students, not for Texas students. It's not really representational of the process. With that objection, you can use it. I just wanted to make that clear.

MR. McCARTHY: Okay. I can grab one that's for Texas students. That's probably better.

Can we take a short break?

(Recess from 9:20 a.m. to 9:21 a.m.)

(Exhibit No. 11 marked)

Q (By Mr. McCarthy) Dr. Walker, I'm handing you what has been marked as Deposition Exhibit No. 11.

[41] **A Okay.**

Q And can you tell me -- can you describe what that document is?

A Again, it looks like a work document that is being used to estimate any certain point in time where we might draw the line for admission purposes, yes.

Q Okay. That was a document that was produced to us. There's a Bates number down in the bottom right corner. Could you tell me what that is?

A D-852.

Q D-852. Okay. And that is -- that was produced to us as an actual matrix that was used at some point in an admissions process?

A Uh-huh. Uh-huh.

Q Okay. And can you tell me what's indicated in the handwriting on the top left?

A Texas.

Q Yes. And so is that a matrix of Texas students?

A It is.

Q Okay. All right. So -- so those students that are represented in the cells in that matrix are being compared against one another. Correct?

A Have already been compared against --

Q Yes. I'm sorry.

A -- one another, yes.

[42] Q So those students that are represented in the cells in that matrix were compared against each other in the admissions process. Correct?

A In all of these, yes.

Q And the cutoff line determines -- the cutoff line determines which students are admitted and which students are not. Correct?

MS. KNEELAND: Objection. I don't know if you can tell that from this document.

A It --

Q (By Mr. McCarthy) Well, the cutoff line tells which students are admitted based on that particular read and which students are not admitted based on that particular read. Correct?

A I have no idea whether these students were actually admitted -- were admitted or not. This, again, appears to be a work document where we are trying to model or anticipate where a line might be.

Q Okay.

A We may have moved that line --

Q Okay.

A -- in final.

Q Okay. That's fine. You testified earlier that in the -- in the review for fall admission students are -- I'm sorry.

[43] In the review for fall admission, applicants are compared against one another. Correct?

A That is correct.

Q Okay. And some of those applicants are benefited by the consideration of race in admissions decisions. Is that correct?

A That is correct.

Q So if some of those applicants are benefited by the use of race, isn't it necessarily the case that the students who were not benefited by the use of race are, in fact, negatively impacted?

MS. KNEELAND: Objection; form.

A Well, since we -- since we don't specify that you give extra weight for if they're African-American or extra weight if they're Hispanic, we use every student's race, doesn't matter what it is. So it could be that there's students there that were advantaged by it and students that just didn't have a score on that particular aspect.

Q (By Mr. McCarthy) I understand that, and that's what I'm getting towards. So there are some students that benefit from the use of race and there's some students that receive no benefit from the use of race?

A That's correct.

Q Okay. So since these students are being compared against one another, isn't it necessarily the case that [44] the students who receive no benefit from the use of race are actually negatively impacted by the use -- by the benefit of race to the other students?

MS. KNEELAND: Objection; form.

A Well, to me the benefit of being in the applicant pool is whether you get admitted or not. I mean, that's the whole goal of this. And we look at all kinds of diversity, race being one of them. It could be that the student who you just described was benefited by a whole lot of other things and got admitted. So in that case I see no -- no way in which they got harmed by our use of race.

Q (By Mr. McCarthy) Admission -- admission to The University of Texas is very competitive, isn't it?

A It is.

Q So -- so isn't it the case that admissions decisions -- so isn't it the case that there's very close competition for slots in the incoming freshman class at --

A Yes.

Q -- The University of Texas?

And all of these many factors, as you said, some of them may benefit some student and some of them might not benefit a student.

A That's --

Q Correct?

[45] **A -- correct.**

Q So isn't it the case that any one particular factor might be dispositive as to a given student?

MS. KNEELAND: Objection; form.

A Well, let me put it this way: No one factor can get a student admitted, and I think we make that clear in our instructions to the student, and no one factor will get a student denied. It's a holistic approach. Everything counts. Race counts, everything else counts. So it would be impossible for me to tell you which one of those students got admitted based on which characteristic. It was the whole of the student. So I can't make those kinds of comparisons.

Q (By Mr. McCarthy) I understand that you cannot identify a particular student that got in for a particular reason. But each one of these factors that's considered is meaningful. Correct?

A That is correct.

Q And they each contribute in some manner to the applicant's personal achievement score. Correct?

A If they have that characteristic, yes.

Q Yes. So if a student has a characteristic that's identified as one of the factors that makes up the personal achievement score, then they are benefited by that factor in terms of their overall personal achievement [46] score. Correct?

A Right.

Q So isn't it the case that -- isn't it the case that an applicant who is admitted at the margin -- I'm sorry. Let me start that question again.

Isn't it the case that an applicant who just makes it over that cutoff line and is admitted to The University of Texas might have not been admitted in the absence of one of those factors?

A Well, you're asking me to --

MS. KNEELAND: Objection to form. I'm sorry.

A You're asking me a hypothetical question I'm not able to answer. Our process just doesn't work that way. I could not possibly go back and identify for you what one thing got a student admitted. That's not the way our process works.

Q (By Mr. McCarthy) I understand that you couldn't identify the particular thing. However, how many -- how many factors are there in that -- I'm sorry. Let me give you back -- I think it's this one. Here we go.

This is Deposition Exhibit No. 1, and that's Page 2, the Personal Achievement Index.

A Uh-huh.

Q Those factors there. So each one of those -- [47] each one of those factors may contribute to an applicant's Personal Achievement Index. Correct?

A That is correct.

Q And none of those factors is assigned a particular value. Correct?

A That is correct.

Q So a student that is admitted -- I'm sorry. The personal achievement score that a student obtains is a function of how the -- how their characteristics meet those factors. Correct?

MS. KNEELAND: Objection; form.

A I'm not sure I can answer that question. I think I'm going to have to ask you to clarify for me.

Q (By Mr. McCarthy) Okay. For any particular factor on that list, if an applicant's file exhibits the factor -- if -- for any -- if an applicant's file exhibits a given factor on that list, then that applicant receives some benefit from that factor that contributes to their personal achievement score. Correct?

MS. KNEELAND: Objection; form.

A Yes.

Q (By Mr. McCarthy) And the absence of one of those factors in an applicant's file means that that applicant receives no benefit from that factor. Correct?

A That is correct.

[48] MS. KNEELAND: Same objection, please.

Q (By Mr. McCarthy) So isn't it necessarily the case that the presence or absence of any one of those factors in an applicant's file could make a difference to their personal achievement score?

MS. KNEELAND: Objection; form.

A Well, that's a hypothetical question, and I -- since none of our decisions hang on any one of these, I can't answer that question.

Q (By Mr. McCarthy) I'm not asking you to identify any particular factor, to say which factor means more or less or which is dispositive or not. But the presence or absence of each factor makes a difference as to an applicant's personal achievement score. Correct?

A That is correct.

Q Which means that the presence or absence of those factors helps determine where a student lands on a matrix. Correct?

A All of the factors, yes.

Q Uh-huh. Each one contributes to where the student ends up on that matrix. Correct?

A That is correct.

Q So the presence or absence of any one of those factors contributes to where a student ends up on the matrix. Correct?

[49] MS. KNEELAND: Objection; form. And I'll just make this easy. I'm going to have a standing objection to everything where it says presence or absence.

And you can answer.

A Well, if you look at things such as socioeconomic status, everybody's got one.

Q (By Mr. McCarthy) Uh-huh.

A Okay? But it -- and it goes from low to high. If you look at leadership, everybody could have leadership but some less than others.

Q Uh-huh.

A So I -- there's no way that I could look at any one student's file and tell you that the absence of something or the presence of something specific --

Q Uh-huh.

A -- was determinative in any way on that student's getting into the university or even their Personal Achievement Index. That's just not the way we do admissions.

Q Okay. Well, let's look at -- I understand that you cannot look at a file and identify which factor made the difference. That's what you're testifying. Correct?

A That is correct.

Q Okay. Let's talk about the factor of leadership.

A Okay.

[50] Q If a student exhibits leadership qualities in their file, for example, they were president of the honor society and captain of the volleyball team and lead some community organization, that student might well receive some benefit from the factor of leadership in their personal achievement score. Correct?

A That's correct.

Q Whereas a student who exhibited no leadership qualities in any respect on their application file might not receive any benefit from the factor of leadership in their personal achievement score. Correct?

A That's correct.

Q In other words, that factor of leadership helps determine an applicant's personal achievement score. Correct?

A It's part of the whole of the -- of the --

Q Yes. In conjunction with the other factors. So that factor of leadership in conjunction with other factors contributes to the applicant's personal achievement score. Correct?

A That is correct.

Q So that factor of leadership in conjunction with the other factors helps determine where that applicant falls on the matrix. Correct?

A Along with all the other stuff in the file.

[51] Q Uh-huh.

A Yes.

Q And so that factor of leadership in conjunction with the other factors and everything in the file determines whether or not that student is admitted to The University of Texas. Correct?

A No.

Q No?

A No.

Q Can you explain why not?

A Well, I think -- I thought I did, but let me try to be clearer. One student could have a leadership -- have leadership and another not and end up with exactly the same Personal Achievement Index score.

Q I understand that.

A And you're asking me to tell you how they got there and I can't.

Q Well, I'm trying to make this clear that I'm saying in conjunction with the other factors, so --

A Yeah, but you're trying to make one of them determinative and it isn't.

Q I understand that it's not always determinative, but one factor could be determinative for some applicant. Isn't that the case?

A No.

[52] MS. KNEELAND: Objection; form.

Q (By Mr. McCarthy) No?

A I can't say it is because couldn't identify it. It's everything. That's the idea of holistic. You look at everything in the file.

Q So --

A And you're comparing every student with every other student on everything in the file, not one thing in the file.

Q So is it the case that the factor of leadership doesn't make a difference to an applicant's personal achievement scores?

A No, I didn't say that. I think we determined that it would, but it will not be the only thing.

Q Okay.

A And it's possible to get to the same score without even having leadership.

Q So the factor of leadership can make a difference?

A It could.

Q Okay. And the factor of socioeconomic status could make a difference?

A It could.

Q And the factor of single-parent family could make a difference?

[53] **A It could.**

Q And the factor of race could make a difference?

A It could.

Q Okay.

MR. McCARTHY: Could we take a short break?

(Recess from 9:40 a.m. to 10:02 a.m.)

Q (By Mr. McCarthy) Dr. Walker, I would like to look at -- I would like you to look at Deposition Exhibit No. 1 again.

A Okay.

Q And that's the HB 588 report. Could you turn to Page 6?

A Okay.

Q And, again, at the bottom of this page there is a chart that highlights enrollment rates. Correct?

A That is correct.

Q Okay.

A What did you say?

Q There's a chart that reflects enrollment rates. Correct?

A Enrollment rates has a specific meaning to me --

Q Oh, okay.

A -- so --

Q I'm sorry.

A So --

[54] Q I don't want to use jargon that's incorrect here. But the chart at the bottom of the page displays percentages of enrollments of various races over the last several years. Correct?

A That's correct.

Q And earlier you testified that minority enrollment rates went up from 2004 to 2005. Correct?

A Well, I think what I testified is that the proportion of African-American students in our freshman class or Hispanics in our freshman class went up, yes.

Q Okay. And you said -- and you testified earlier that the only thing that changed in the 2005 admission year was the addition of race as a factor in admissions decisions. Correct?

A That is correct.

Q What happened to the percentage of white students enrolled in the freshman class from 2004 to 2005?

A In 2004 the percentage was 57 percent. In 2005 the percentage was 56 percent.

Q And similarly, what happened with the percentage enrollment of Asian-American students in the incoming freshman class from 2004 to 2005?

A In 2004 the Asian-American percentage was 18 percent, and in 2005 the Asian-American percentage was 17 percent.

[55] Q Okay. Dr. Walker, are you familiar with the Grutter case?

A Yes.

Q Okay. And are you familiar with the admissions system that the University of Michigan Law School employed in that case?

MS. KNEELAND: Objection; form.

A Well, I'm familiar with what I can read about it.

Q (By Mr. McCarthy) Okay. Isn't it true that in this case the university has characterized its program as -- I'm sorry.

Isn't it true that in this case the university has characterized its admissions program as precisely the type of system expressly upheld in Grutter?

A I don't know that we used precisely, but yes. If you don't use precisely, I'll stipulate to that, yeah.

(*Exhibit* No. 12 *marked*)

Q (By Mr. McCarthy) Dr. Walker, I'm handing you what has been marked as Deposition Exhibit No. 12.

A Okay.

MR. McCARTHY: Can I take a break?

(Recess from 10:06 a.m. to 10:08 a.m.)

Q (By Mr. McCarthy) Dr. Walker, I'm handing you what has been marked as Deposition Exhibit No. 12.

A Okay.

[56] Q Do you know what that document is?

A It looks like it's a legal document. It's the "Opposition to the Motion for Preliminary Injunction."

Q Uh-huh. That's a copy of the brief filed on behalf of the university --

A Okay.

Q -- by the Attorney General's Office.

A Okay.

Q Can you turn to Page 16 of that brief?

A Okay.

Q And if you look at the text, the body of the brief, if you look up about four lines from the bottom, can you read how it describes -- can you read how the Attorney General describes the program?

A That sentence says, "That is unsurprising because UT Austin's admissions program is precisely the type of system expressly upheld in Grutter."

Q Okay. Thank you. Now, the Supreme Court has characterized the University of Michigan Law School's use of race in admissions decisions as indispensable because it raised the level of minority enrollment from 4 percent to over 14 percent. Would you say that the university's -- The University of Texas at Austin's use of race is indispensable in promoting minority enrollment at The University of Texas?

[57] MS. KNEELAND: I'm going to object to that. To the extent you're asking him to make a legal conclusion about what the Supreme Court might conclude about the university's use of race, I'm going to -- I'm going to direct him not to answer.

MR. McCARTHY: I'll make it clear. I'm not asking what he thinks the Supreme Court would say.

Q (By Mr. McCarthy) Dr. Walker, do you think The University of Texas's use of race in admissions decisions is indispensable to increasing minority enrollment?

A Yes.

Q Now, earlier you testified that you're not sure how much the use of race in admissions decisions has an effect on minority enrollment.

A I think what I said was that I can't parse out race from everything else.

Q Okay. So I don't want to misrepresent what you said before. So you can't parse it out. Correct?

A [Nodding].

Q So it's unclear how much the consideration of race is making a difference as to minority enrollment levels. Correct?

A Would you repeat that question again?

Q So it's unclear how much the consideration of race is having effect on minority enrollment levels. [58] Correct?

MS. KNEELAND: Objection; form.

A So you have asked the negative, if it's unclear.

Q (By Mr. McCarthy) Yes. You said --

A I would say yes.

Q -- you couldn't parse it. Yeah, okay. So it's unclear, yes?

A Yes.

Q Okay. Then how in your opinion is the use of race indispensable to increasing minority enrollment?

A Well, it's -- first of all, it lends itself to having a -- the use of race lends itself to having a diverse class and all the ways that that can be described. And the benefits of having a diverse class are so enormous to us that if -- if the use of race has some help to us, then it's important -- and I think -- what was your word?

Q Indispensable?

A Indispensable to us to have that diverse class. If that -- if that helps us, then I would say -- I'll use your word -- indispensable.

Q Okay. Now, earlier you testified that the use of race promotes racial diversity. Correct?

A Yes.

Q Okay. So now, you -- now, I believe you said that the use of race helps promote all kinds of diversity [59] at the university.

A That is true.

Q And how does it do that?

A Well, everyone has a race. Right?

Q Uh-huh.

A So it's -- if race had a -- let me start the statement over again. People that we admit are diverse because we -- by design we're trying to have a diverse class. Race as being only one of many, many ways that diversity could come. So when I said -- I think the word was that race helps us become diverse, then that's what I meant. You know, you don't come with just a race, you come with a lot of other characteristics as well.

Q Okay. So -- but how does the use of race promote those other characteristics?

A Well, I thought I just explained it, but maybe I didn't explain it very well. It's one of many factors. Race is one of many factors that we use.

Q Uh-huh.

A And we don't enroll a student just because they are black or just because they're white or just because they're Hispanic. They're going to bring a lot of other diversity pieces with them.

Q Uh-huh.

A So the use of race in that context brings all [60] **kinds of diversity, not just racial diversity, because students are more than just their race.**

Q Students certainly are more than just race, but isn't it those other factors aside from race that promote other kinds of diversity aside from racial diversity?

MS. KNEELAND: Objection; form.

A Say that again? Ask that question again, please.

Q (By Mr. McCarthy) Students certainly are more than just their race.

A That's correct.

Q But isn't it their characteristics other than race that promote the kinds of diversity there are other than racial diversity?

A Correct.

Q Okay. So doesn't a student's -- doesn't the university's use of race promote only racial diversity?

A No. I mean, you're -- no. I mean, it does -- you're asking me to exclude all the other things the students bring with them and can't do that.

Q I'm not asking you to exclude the other things that the students bring with them. I understand that students bring a lot of things and the university has very much a holistic, full-file review of students to try and promote lots of kinds of diversity.

A Including racial.

[61] Q Including racial. And I don't dispute that at all.

A Right.

Q And that's what -- I understand that's your testimony and the testimony of other officials at the university has been so far in this case, that all those various factors and special circumstances are intended to promote all kinds of diversity. Correct?

A Correct.

Q But I'm having a hard time seeing how the use of race promotes anything other than racial diversity. So, again, let me ask you and I'll try to ask this in a different way.

With the understanding that the university's program -- sorry. Let me start that again.

With the understanding that the university's admissions program seeks to promote all kinds of diversity, isn't it true that the factor of race itself promotes only racial diversity?

A No. You used the word only, and that's -- no.

Q What other kinds of diversity are there?

A Oh, there's geographic diversity, there's --

Q Let's take geographic diversity.

A -- socioeconomic diversity, there's --

MS. KNEELAND: Well, he wasn't done, so --

[62] Q I'm sorry. Go ahead.

MS. KNEELAND: -- why don't you let him --

Q Go ahead.

MS. KNEELAND: -- continue his list.

Q (By Mr. McCarthy) Sorry.

A There's geographic diversity, there's socioeconomic diversity, there's the type of school you came from, there's rural, inner city, suburban, there's your background growing up, single-family home, there's -- in Texas there's cultural diversity. We're a big state and different parts of Texas bring different types of culture. So there's -- there's lots of diversity that comes.

Q Okay. All right. I would like to ask you now a little bit about HB 588.

A Okay.

Q How has HB 588 impacted enrollment at The University of Texas at Austin?

A Ain't it a bitch?

THE WITNESS: Is there a word -- do you have a word for bitch?

THE REPORTER: I do. Thank you.

A How has it impacted us? Well, a larger and larger percent of our admissions decisions are now made automatically through the Top Ten Percent bill. That's [63] **probably the biggest effect that it's had for us.**

Q (By Mr. McCarthy) Okay.

MR. McCARTHY: All right. We would like to take a break.

(Recess from 10:18 a.m. to 10:35 a.m.)

MR. McCARTHY: We've got no more questions to ask Dr. Walker right now.

MS. KNEELAND: All right. We'll reserve for trial or whatever.

(Deposition concluded at 10:35 a.m.)

APPENDIX H — EXHIBIT 11 TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, "RANKINGS & KUDOS," THE UNIVERSITY OF TEXAS AT AUSTIN, DATED JANUARY 21, 2009

THE UNIVERSITY OF TEXAS AT AUSTIN

ABOUT UT

Rankings & Kudos

What starts here changes the world.

The University of Texas at Austin makes the world a better place by leveraging its research and knowledge to address the needs of the state, the nation and the world. This list of some of our recent rankings and kudos highlights the university's depth of resources, talent and technology, as well as how the city of Austin—as a national creative center—and the university complement one another.

If you've run across a ranking or other expression of kudos that might fit with this list, send the information along to the university's **Office of Public Affairs.**

The University of Texas at Austin's schools of Business, Engineering and Law and its College of Education each rank among the **nation's top graduate programs** in this year's U.S. News & World Report magazine survey.

Using quantitative and qualitative measures, the magazine annually ranks graduate school programs in business, education, engineering and law. Certain other Ph.D. programs and specialty programs are ranked in alternate years based on ratings of academic experts, including faculty and administrators. All fields are not surveyed every year by U.S. News & World Report.

The university's programs in accounting, archives and preservation, Latin American history and petroleum engineering rank No. 1 in reputational surveys. Several Ph.D. and graduate programs were ranked among the nation's top five in the magazine's reputational survey.

The University of Texas at Austin's **graduate school rankings**, based on quantitative and qualitative measures:

- **Business** – 18th.
- **Education** – 10th, tied with University of Pennsylvania.
- **Engineering** – 11th, tied with University of California, San Diego.
- **Law** – 16th, tied with University of California at Los Angeles. (The School of Law also ranked 14th, tied with the University of Nevada-Las Vegas and Yale University, among the most diverse law schools listed by U.S. News & World Report.)

The University of Texas at Austin's LBJ School of Public Affairs, and programs in the School of Information, School of Nursing, College of Pharmacy and School of Social Work were ranked among leading public affairs graduate programs using solely qualitative measures:

- **Library and Information Studies** (ranked in 2005) - 7th, tied with Indiana University and University of Pittsburgh

- **Nursing** (master's, ranked in 2007) - 19th, tied with Columbia University, Rush University, University of Virginia, University of Wisconsin and University of Texas Health Science Center-Houston and Vanderbilt University

- **Pharmacy** (Pharm. D.) - 4th

- **Public Affairs** - 14th, tied with American University, Columbia University, Georgetown University, George Washington University, SUNY-Albany, University of California at Los Angeles, University of Minnesota, University of North Carolina, University of Washington and University of Wisconsin.

- **Social Work** (master's) - 6th, tied with University of California at Berkeley

Rankings of The University of Texas at Austin's **graduate programs and fields of study** (some from previous years), based on opinions of deans, department heads and other senior faculty:

- **Business (ranked in 2008)**
  - o accounting - 1st
  - o entrepreneurship- 9th
  - o information systems - 3rd
  - o marketing - 9th

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- **Education (ranked in 2008)**
    - administration/supervision - 6th
    - special education - 4th

- **Engineering (ranked in 2008)**
    - aerospace - 8th
    - chemical - 8th
    - civil- 4th
    - computer engineering - 9th
    - environmental/environmental health - 4th
    - mechanical - 10th
    - petroleum - 1st

- **Fine Arts,** Master of Fine Arts in art and design (ranked in 2008) - 15th

- **Health Disciplines**
    - audiology (ranked in 2008) - 9th
    - clinical psychology (ranked in 2008) - 16th
    - speech-language pathology (ranked in 2008) - 9th

- **Law (ranked in 2008)**
    - tax law - 10th
    - trial advocacy - 9th

- **Library and Information Studies**
    - archives and preservation (ranked in 2005) - 1st
    - law librarianship (ranked in 2005) - 3rd

- **Public Affairs (ranked in 2008)**
    - information and technology management - 9th
    - public policy analysis - 10th
    - social policy - 9th

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- **The Sciences:**
  - biological sciences (ranked in 2007) - 23rd
  - ecology/evolutionary biology (ranked in 2007) - 8th
  - chemistry (ranked in 2007) - 12th
  - analytical chemistry (ranked in 2007) - 5th
  - computer science (ranked in 2008)- 9th
  - computer science systems (ranked in 2008) - 8th
  - computer science theory (ranked in 2008) - 10th
  - artificial intelligence (ranked in 2008) - 5th
  - programming language (ranked in 2008) - 8th
  - Earth sciences (ranked in 2006) - 9th
  - geology (ranked in 2006) - 5th
  - geophysics and seismology (ranked in 2006) - 8th
  - paleontology (ranked in 2006) - 9th
  - mathematics (ranked in 2008) - 14th
  - analysis (ranked in 2008) - 10th
  - applied math (ranked in 2008) - 9th
  - topology (ranked in 2008) - 7th
  - physics (ranked in 2008) - 16th
  - cosmology/relativity/gravity (ranked in 2008) - 8th
  - plasma (ranked in 2008) - 5th

- **Social Sciences and Humanities (ranked in 2005)**
  - economics - 25th
  - educational psychology - 77th
  - English - 19th
  - history - 19th
  - Latin American history - 1st
  - political science - 25th
  - psychology - 12th

- o sociology - 14th
- o sociology of population - 5th

The University of Texas at Austin ranks sixth in the nation in producing **undergraduate degrees for minority groups**, according to the May 31, 2007 edition of Diverse Issues in Higher Education magazine.

In addition to the overall standing, the university ranks 10th nationally among the magazine's Top 100 producers of undergraduates for Hispanics, eighth for Asian Americans and 59th for American Indians.

Among **undergraduate academic programs in the top 100** at the university:

- Engineering ranks fourth overall, fifth for Hispanics, fourth for Asian Americans, 22nd for American Indians and 37th for African Americans.

- Mathematics ranks third overall, third for Hispanics, fourth for Asian Americans and sixth for African Americans.

- Biological and biomedical sciences ranks sixth overall, fourth for Hispanics and sixth for Asian Americans and 50th for African Americans.

- Social sciences ranks 10th overall, seventh for Hispanics and 12th for Asian Americans.

- Area ethnic, cultural and gender studies ranks 15th overall, seventh for Hispanics and 12th for Asian Americans.

- Computer and information science and support services rank 13th overall, sixth for Asian Americans and 37th for Hispanics.

- English ranks 22nd overall, 11th for Hispanics and 13th for Asian Americans.

- Business, management, marketing and related support services rank 29th overall, 13th for Asian Americans and 32nd for Native Americans.

- Psychology ranks 22nd overall, 27th for Hispanics and 15th for Asian Americans.

Last year, the university ranked fifth overall, seventh for Hispanics, ninth for Asian Americans and 65th for American Indians.

The report—**Top 100 Undergraduate Degree Producers**—includes degrees conferred during the 2005-06 academic year that have been reported to the U.S. Department of Education's National Center for Education Statistics through the Completions Survey of the Integrated Postsecondary Education Data Set.

The University of Texas at Austin ranks 70th in the World University Rankings, published October 2008 by Times Higher Education and Quacquarelli Symonds.

The rankings were produced from a peer review in which more than 6,000 academics around the world took part, as did more than 2,000 employers of graduates.

The results show that the United States has 58 of the world's top 200 universities.

Source: **Times Higher Education**

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The University of Texas at Austin ranks 39th in the world and 32nd in its region in the August 2008 Academic Ranking of World Universities, the annual ranking by China's Shanghai Jiao Tong University.

The report shows that 54 percent of the top 100 universities are in the United States.

Source: **Shanghai Jiao Tong University**

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The University of Texas at Austin ranks second among universities and colleges enrolling the **most National Merit Scholars**. In the university's 2007 entering class, there were 283 freshman Merit Scholars, second only to Harvard University where 285 freshman Merit Scholars attend. The National Merit Scholarship Program "identifies and honors academically talented U.S. high school students."

Source: **National Merit Scholarship Corporation**

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In its February 2008 listing for the "100 Best Values in Public Colleges," Kiplinger's Personal Finance magazine listed The University of Texas at Austin 24th among its **best public college values**. The ranking paired academic quality with cost of attendance.

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The 2007 Faculty Scholarly Productivity Index rates **faculty members' scholarly output** and compiles overall institutional rankings on 375 universities that offer the Ph.D. degree.

The index examines the number of book and journal articles published by each program's faculty, as well as journal citations, awards, honors and grants received.

The University of Texas at Austin ranked in the top 10 in the disciplines below. (A discipline may appear more than once if it is related to more than one department.)

- **Biological and biomedical sciences:** ecology (9); evolutionary biology (8)
- **Business:** business, various (10); finance (3); marketing (6)
- **Education:** curriculum and instruction (6); science education (6); special education (6); teacher education specific subject areas (10)

- **Engineering:** aerospace engineering (8); biomedical engineering (6); chemical engineering (4); materials science and engineering (8)

- **Family, consumer and human sciences:** communication and communication studies (3); mass communications/media studies (8)

- **Health science professions:** pharmacy (7); pharmacy (6); pharmacy (9)

- **Humanities:** area and ethnic studies, various (3); art history and criticism (7); Asian languages (6); Asian studies (4); music specialties (6); philosophy (3); Slavic languages and literatures (5); theatre literature, history and criticism (7)

- **Physical sciences and mathematics:** applied mathematics (3); computational sciences (7).

Source: **The Chronicle of Higher Education: Faculty Scholarly Productivity Index**

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In September 2007, U.S. News & World Report magazine released its list of the "50 **Best Graduate Schools** of 2008." The University of Texas at Austin placed 19th. The schools were ranked according to their performance in categories such as average starting salary for graduates, percentage of employment after graduation, enrollment and rate of acceptance.

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In the 2008 DesignIntelligence ranking of the nation's **best architecture and design schools**, the School of Architecture at The University of Texas at Austin was ranked No. 6 for undergraduate programs and No. 10 (tied with Clemson University and Rice University) for graduate programs.

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The September 2007 issue of Hispanic Business magazine features the "**Best Schools for Hispanics**" report with top 10 lists in the fields of law, business, engineering and medicine. The University of Texas at Austin School of Law was named the No. 3 law school in the nation for Hispanics, the university's McCombs School of Business placed No. 2 for business and the Cockrell School of Engineering took the No. 6 spot for engineering.

•

In its College Guide '08, Newsweek magazine featured its list of the 25 Hottest Schools. The University of Texas at Austin made the list in the category "**Hottest for Saving America's Schools.**" The prominence of the university's professors and programs—Chrys Dougherty, Uri Treisman, UTeach and Teach for America—involved in education reform were cited.

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The Michener Center for Writers at The University of Texas at Austin was named one of the "**Ten Top Graduate Programs in Creative Writing**" by The Atlantic Monthly magazine in the 2007 Fiction Issue's guide to the nation's top writing programs. The Michener Center was also noted in two other categories: "Five Highly Selective Programs" and "Five Well-Funded Programs."

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In the Wall Street Journal's annual ranking of the **best business schools**, The University of Texas at Austin's McCombs School of Business moved up 13 spots to No. 18. The ratings are based on a survey of corporate recruiters, who rank the schools and their MBA students on factors such as faculty expertise, interpersonal skills, ethics and integrity and strategic thinking. (Austin American-Statesman, September 20, 2006)

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The Global Gaming League, an online gaming organization, has named The University of Texas at Austin the **best college for online gaming** based on its criteria of student gaming population, location to gaming facilities, student gaming organizations, tournaments and LAN (local area network) parties, tech-friendliness, Internet connection and curriculum.

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In Newsweek magazine's August 2006 list of the **top 100 global universities**, The University of Texas at

Austin ranked 27th overall and eighth among U.S. public universities. The ranking "takes into account openness and diversity, as well as distinction in research."

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In the U.S. News & World Report magazine's list of the **top national public universities** for its "America's Best Colleges 2007" guide, the university ranked 13th among 162 institutions surveyed. The university was ranked 17th in this category last year. In the magazine's survey of 248 American universities—public and private—The University of Texas at Austin ranked 47th, a jump from 52nd a year ago.

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In its listing of "America's Best Colleges 2007," U.S. News & World Report magazine ranked The University of Texas at Austin 31st in the category of "**Best Values:** National Universities." The ranking "relates to a school's academic quality, as indicated by its U.S. News ranking, to the net cost of attendance for a student who receives the average level of financial aid."

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The 2007 Fiske Guide to Colleges, an annual publication edited by former New York Times Education Editor Edward B. Fiske, listed The University of Texas at Austin among 20 "**best buys**" among public colleges and universities. The guide coupled the institutions' academic quality with the cost of attendance.

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The Washington Monthly, a District-based political magazine, ranks the university 17th among national universities on **community and national service**.

The Princeton Review listed The University of Texas at Austin among its list of "America's Best Value Colleges" in the 2007 edition. The publication said the university is "designated as one of the **best overall bargains**—based on cost and financial aid—among the most academically outstanding colleges in the nation."

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The University of Texas at Austin's Blanton Museum of Art is the **largest university art museum in the country** and the third largest art museum in Texas.

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The University of Texas at Austin has maintained an **active recycling program since 1993**. About 18,500 blue recycling bins are located across the main campus and Pickle Research Campus. During the 2005-06 fiscal year, the university recycled more than 2.9 million pounds of paper, preserving almost 25,000 trees and saving more than 4,800 cubic yards of landfill space. The paper recycling program also generated nearly $105,000 in rebate funds for the university. (**Facilities Services Recycling Program**)

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The University of Texas at Austin is the **26th-best university in the world**, according to a global ranking produced by the Times of London in its Oct. 28, 2005, edition. The university ranked 14th among the top North American public and private universities. The Times ranking was based, in part, on a survey of 2,375 research-active academics.

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In a recent report on the **innovativeness of universities worldwide**—conducted by the Research Center for Innovation and Development of Zhejiang University in Hangzhou, China—The University of Texas at Austin ranked No. 4 among 200 institutions around the world, behind Harvard University, Stanford University and the University of California, Berkeley. The criteria for the ranking included indicators such as the number of faculty Nobel Laureates, the amount of research funding faculty members receive, the amount of cited research by faculty members and the number of doctor's degrees awarded.

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The Times of London, in its Nov. 5, 2004, edition, rated The University of Texas at Austin **seventh in the world** in the amount of cited research by faculty members.

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In the latest survey by the National Research Council, **seven doctoral programs** ranked in the top 10 in the nation and 22 departments ranked in the top 25. Among Texas colleges and universities, UT Austin ranked No. 1 in 30 of the 37 fields in which it was evaluated.

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McCombs School of Business ranked 9th in the country on BusinessWeek magazine's list of the **top undergraduate business schools.** (Austin American-Statesman, April 29, 2006)

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The University of Texas at Austin is one of only six colleges to earn an 'A' grade for **endowment transparency**.

The Sustainable Endowments Institute, a group that studies university investment policies, has kept tabs on green initiatives and whether colleges invest in green-friendly ways. In its January 2007 College Sustainability Report Card, the institute looked at public data from 100 colleges in the United States and Canada and gave a letter grade in each of seven categories: administration, food and recycling, green building, climate change and energy, shareholder engagement, investment priorities and endowment transparency.

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What others are saying about The University of Texas at Austin ...

The University of Texas System ranks No. 1 for **biotechnology patents** among 424 universities in the world, according to the Milken Institute and its September 2006 report on universities' biotechnology research and commercialization.

"There is a specialization about biotechnology in the UT System," said Armen Bedroussian, co-author of the report. "I also believe that among the UT campuses, UT Austin has the best commercialization index in the report."

The report includes rankings of the top universities based on the quality of their biotech research, the number and quality of their patents and their ability to transfer the technology into commercial uses. (**Milken Institute's "Mind to Market" report**)

"The **Central Texas economic engine known as UT Austin**, with these three campuses (the main campus known as the Forty Acres, the 475-acre J.J. Pickle Research Campus and the planned Dell Children's Medical Center of Central Texas), will provide a rare impetus to the Austin area's economic destiny for decades to come." (The Neal Spelce Austin Newsletter, Sept. 8, 2006)

The 2007 Fiske Guide to Colleges said The University of Texas at Austin is "**on anybody's list of the top 10 public universities in the nation**. The Plan II liberal arts honors program is one of the nation's most renowned. Though it is also the capital of Texas, Austin ranks among the nation's best college towns."

"Few if any cities rank extremely high in all categories," said Expansion Management chief editor Bill King about his magazine's 2006 Mayor's Challenge ranking of the **best places in the U.S. to locate a company.** "But cities like Pittsburgh, Austin, [Texas] and Raleigh-Cary, [N.C.] do well in just about every area." (Pittsburgh Post-Gazette, Aug. 15, 2006)

"We are very excited about UT's **shared commitment** to offer leading-edge children's healthcare, research and education right here in Austin," Susan Dell, co-founder and chairman of the Michael & Susan Dell Foundation said in announcing grants of $50 million to establish three new world-class facilities at UT Austin. "These new facilities are a perfect complement to other investments we've made in children's health, math and science education, and instilling healthy habits to combat major risks like Type 2 Diabetes in children. This is a great opportunity to take advantage of UT Austin's historical excellence in Life Sciences research and, in turn, make a practical difference in the lives of children." (The University of Texas System news, May 15, 2006)

The Texas pipeline is full of **wonderful opportunities to commercialize.**

For example, in May 2005, The University of Texas at Austin Office of Technology Commercialization unveiled 11 new technologies that are patented and "ready to commercialize," not to mention the 181 identified technologies that are also now available.... Texas stands atop the country, according to Site Selection Magazine, as the **best place to do business**. (Austin Chamber of Commerce, June 2005)

"Austin is a high-tech city with an **attractive quality of life**. It is an appealing environment for the innovators we need at Freescale," Freescale CEO Michel Mayer said in a memo to employees explaining why the company chose Austin as the site for its global headquarters. He also noted the proximity of two great universities—The University of Texas at Austin and Texas A&M. (Austin Chamber of Commerce, April 2005)

"Discoveries made at UT Austin help **stimulate our economy**. Companies such as (Molecular Imprints, LabNow, Entercel and Proactive Technologies) commercialize the discoveries made on campus or when they are licensed to companies. Most of these discoveries come about as a result of the massive amount of research grants to UT Austin. The large research enterprise on the Forty Acres has pulled in nearly $400 million in research grants." (The Neal Spelce Austin Newsletter, Feb. 11, 2005)

"UT Austin is the single most important engine **driving the Austin area economy**. One example: Austin would not even be a player in this high tech age if the University of Texas was located elsewhere, plain and simple. There are other examples, but take it to the bank that what helps UT Austin gain in stature and greatness benefits our economy immeasurably." (The Neal Spelce Austin Newsletter, Jan. 14, 2005)

Austin Partners in Education has named The University of Texas at Austin as the Partner of the Year for 2004. "Ever so quietly, a committed university community works tirelessly year after year in concert with us, striving to improve every facet of our school district," Austin Independent School District (AISD) Superintendent Pat Forgione said, adding that the scope and breadth of the UT partnership programs with Austin schools are impressive: "It is not possible to acknowledge and thank the countless key leaders at UT, who, in addition to all of their other duties, give countless hours to the Partners Program. The university's **commitment to our children** is truly remarkable, and we are proud to honor the University of Texas as the 2004 Partner of the Year." (Austin Independent School District, April 26, 2004)

"UT Austin is a **great economic engine for this area**. It provides knowledge, research, collaboration and people. This, in turn, creates jobs and is one reason Austin was recently ranked 3rd in the nation as the best area to launch a business or a career. The listing comes courtesy of Forbes magazine as it named the nation's top metros for new business operations. The national business publication cited our area's diverse, educated workforce as one of the main criteria for selection. And, of course, UT Austin figures prominently in that equation." (The Neal Spelce Austin Newsletter, Nov. 5, 2004)

"The university **opened the doors of the universe to me**," Lady Bird Johnson said after the University of Texas System Regents authorized the union of The University of Texas at Austin and the Lady Bird Johnson Wildflower Center. "By the time I had earned two degrees, I realized that education was the beginning of a quest that lasts, and it enabled in me a greater capacity to enjoy the world. These qualities emboldened me to establish the center." (Office of Public Affairs news, The University of Texas at Austin, June 20, 2006)

"One of the most important things about the Harry Ransom Center is that the material will be **accessible to students and the public**," Robert De Niro said in explaining why he donated his archives to The University of Texas at Austin. "Ultimately, that's what it's all about." (Office of Public Affairs news, The University of Texas at Austin, June 7, 2006)

What others are saying about the city of Austin . . .

Austin ranked No. 6 in a July 2008 list of the top 10 "**Best Cities to Live, Work and Play,**" according to **Kiplinger's Personal Finance magazine**, which looked for places "with strong economies and abundant jobs," as well as "reasonable living costs and plenty of fun things to do." The list also factored in population growth and the percentage of the workforce in the creative class.

The magazine cited Austin for "a strong economy, a solid, moderately priced housing market, a growing population and enough natural beauty to justify staying outside even if the weather weren't great—which, by the way, it is." The University of Texas at Austin, the state capitol and downtown redevelopment were also highlighted as keys to Austin's vitality and livability.

In its annual report—**Boomtowns 2007: The Best Cities for Doing Business**—Inc.com analyzed job-growth data, supplied by the Bureau of Labor Statistics, on 393 metropolitan areas across the nation. The Austin-Round Rock area ranked No. 16 in the Top 20 Large Cities category, up from the 26th spot in the same category on the 2006 list. In the Top Overall Cities category for 2007, Austin-Round Rock placed No. 110, up from the 173rd overall spot in 2006.

The strong showing of Austin and other Texas cities on the Boomtowns 2007 list can be attributed to factors such as "relatively low business costs, a recovery in technology—and most important, the thriving energy sector, which is attracting a new cadre of highly paid professionals to an increasingly sophisticated high-tech business. Job growth in Austin, hit hard by the dot-com bust, is now more than triple that of rival high-tech centers like Boston (No. 56) and San Jose (No. 60)."

Austin ranked No. 1 as the **U.S. city with the most vital economy**, according to **Moody's Economy.com** June 2007 Business Vitality Index, which looked at the current and prospective economic conditions and economic risk of 379 U.S. cities.

The city of Austin placed No. 2 on Prevention magazine's March 2007 list of the **best walking cities** in the nation. The ranking, commissioned by the American Podiatric Medical Association, was based on factors such as air quality, the percentage of people who walk to work, access to parks, number of athletic shoes sold and weather. (**Prevention's Best Walking Cities of 2007**)

A February 2007 report by SustainLane, a green media company, named Austin the No. 1 U.S. city in incubating and clustering **clean technology companies**. The report ranked 50 cities and credits Austin with creating a robust test facility that is an innovative and economic step forward for the clean energy market. (**SustainLane's Top U.S. Cities for Cleantech Incubation Clusters**)

In its November/December 2006 issue, National Geographic Traveler magazine rated 94 places worldwide and named Austin as the "**best little city in America**." (**National Geographic Society Press Room**)

In its 2006 ranking of the **top 10 green cities** in the U.S., The Green Guide named Austin No. 2. The guide looked for cities with energy-efficient, least polluting and healthy living spaces and cited Austin "for its commitment to solar power and green building." In 2005 Austin also made The Green Guide's top 10 list. It was the only southern city to do so. (**Green Guide's Top 10 Green Cities in the U.S.: 2006**)

The city of Austin placed No. 2 among the **10 best big cities to live**, as determined by Money magazine. Criteria included financial factors, education and quality of life. (**Money Magazine's Best Places to Live 2006: 10 Best Big Cities**)

In the U.S. Census Bureau's 2005 American Community Survey, Austin ranked fifth among the **most educated cities** in the nation. Of Austin residents 25 years and older, 44.1 percent hold at least a bachelor's degree. (**U.S. Census Bureau's American Community Survey, November 2006**)

According to research by the firm Morgan Quitno Press, Austin is No. 5 among the nation's **safest large cities** (500,000 or more). Round Rock came in at No. 13 in the overall list of safest cities. (**Morgan Quitno's Safest and Most Dangerous Cities**, October 2006)

In its fourth annual Mayor's Challenge ranking of the **best places in the U.S. to locate a company**, Expansion Management magazine cited Austin-Round Rock as the top U.S. metropolitan area overall for businesses to locate. (**Expansion Management Online: 2006 Mayor's Challenge**, August 2006)

In its August 2006 ranking of the nation's **heart-healthy cities**, Men's Journal magazine ranked Austin No. 2, citing Mayor Will Wynn's efforts to make Austin the fittest city in the U.S. by 2010. The magazine also placed Austin at No. 2 among the 50 **"best places to live"** in its April 2006 list citing cities that are the perfect combination of adventure, attractiveness and affordability. (**Men's Journal**)

In its ranking of North America's most **vegetarian-friendly cities**, People for the Ethical Treatment of Animals places Austin at No. 8 among the top 10 large vegetarian/vegan-friendly cities. (**People for the Ethical Treatment of Animals**, April 2006)

Kiplinger's Personal Finance magazine ranked Austin fifth among 50 "**smart cities**" in the June 2006 issue. (**Kiplinger's Personal Finance 50 Smart Places to live**)

Austin was named No. 5 on the list of America's **most-educated cities** (May 2006) and is on the list for the 10 **hot cities for job growth** (May 2006). (**MSN.com: Most-Educated Cities in the United States, CNN.com: 10 hot cities for job growth**)

Austin now ranks among the nation's elite cities when it comes to "smarts." In fact, Bizjournals.com (the parent of the Austin Business Journal) recently conducted a survey with Austin as #3 on the list of "**Smartest U.S. Cities.**" Seattle and San Francisco are #1 and #2, with Colorado Springs and Minneapolis, #4 and #5. Other Texas cities in the top 53 large U.S. cities: Arlington (#12), Dallas (#35), Houston (#38), San Antonio (#40) and El Paso (#48).

In the Bizjournals.com survey, communities were ranked in three population categories, based on a formula that rewards places with heavy concentrations of college graduates. The rankings reflect each community's collective brainpower, which is tied to its residents' abilities to innovate, create, compete—and make money. "Make money?" A worker with a graduate degree earns 45 percent more, on average, than a colleague with a bachelor's degree, and 167 percent more than someone who never went beyond high school, according to the U.S. Census Bureau. As a result, not surprisingly, America's brainpower is concentrated in tech centers, college/university towns, national and state capitals and affluent suburbs. (The Neal Spelce Austin Newsletter, June 16, 2006)

The Austin/Round Rock area has the **second-most-educated workforce** in the country. Some 40.2 percent of adults in the city of Austin and 36.7 percent of adults in the metro area hold a bachelor's or advanced degree. (**Round Rock Chamber of Commerce**)

Sources for Rankings and Kudos include:

- **BusinessWeek Undergrad Rankings**
- **College Sustainability Report Card**
- **Faculty Scholarly Productivity Index (FSPI): Top**

Research Universities

- o **The University of Texas at Austin FSPI ranking**

- **Fiske Guide to Colleges**
- **Global Gaming League's First Annual Top Gaming Colleges Survey**
- **Kiplinger's Personal Finance 50 Best Values in Public Colleges**
- **Kiplinger's Personal Finance Best Values in Public Colleges: The Kiplinger 100**
- **Newsweek's Top 100 Global Universities**
- **Princeton Review America's Best Colleges**
- **Times of London World University Rankings**
- **U.S. News & World Report Rankings & Guides**

- **Austin Chamber of Commerce: Texas Legislature Enriches State Incentives for New Businesses**
- **Austin Chamber of Commerce: Freescale Semiconductor Selects Austin for Global Headquarters**
- **Office of Public Affairs News**
- **The University of Texas System News**

APPENDIX I — EXHIBIT 28 TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, GUEST EDITORIAL, "THE 'TOP TEN PERCENT LAW' IS WORKING FOR TEXAS," DATED OCTOBER 19, 2000

THE UNIVERSITY OF TEXAS AT AUSTIN

The "Top 10 Percent Law" is Working for Texas

by

Dr. Larry Faulkner, President

The University of Texas at Austin

A guest editorial appearing in many Texas newspapers on October 19, 2000.

As I travel around Texas, I often encounter the perception that the "Top 10 Percent Law" is causing a large number of qualified applicants to be denied admission to The University of Texas at Austin. That is not really the case. It is true that admissions have become much tighter, and it is true that many qualified students are not gaining admission. But the increased competitiveness is the result of the growth in the population of 18-year-olds and a very sharp rise in the number of applications. In 1997, UT Austin received 14,982 applications compared to more than 21,000 this year, an increase of 43 percent.

The Top 10 Percent Law (officially House Bill 588) guarantees that Texas high school graduates who rank in the top 10 percent of their senior class be admitted to any state institution of higher learning. Two years ago, 42 percent of UT Austin freshmen were top 10 percent graduates. This year, the figure is 47 percent. So, *more than half* the spaces in the freshman class remain available to non-top-10-percent graduates. Furthermore, because the freshman class has increased in size to more than 7,600, there are about as many spaces for non-top 10 percent graduates as in past years.

Meanwhile, the Top 10 Percent Law has enabled us to diversify enrollment at UT Austin with talented students who succeed. Our 1999 enrollment levels for African American and Hispanic freshmen have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies. And minority students earned higher grade point averages last year than in 1996 and have higher retention rates. An impressive 94.9 percent of 1998 African American freshmen returned to enroll for their sophomore year in 1999. For Hispanics, 85.8 percent returned for their second year. So, the law is helping us to create a more representative student body and enroll students who perform well academically.

Critics contend the Top 10 Percent Law requires admission of some students who have lower standardized test scores than those who are rejected. This does occur. However, top 10 percent high school students make much higher grades in college than non-top 10 percent students. In fact, top 10 percent students at every level of the SAT earn grade point averages that exceed those of non-top 10 percent students having SAT scores that are *200 to*

300 points higher. Strong academic performance in high school is an even better predictor of success in college than standardized test scores.

Because the pool of applicants is rising, admission to the state's leading universities will continue to be more selective. That is a result of a growing population, improved schools and the hard work of students.

Throughout The University of Texas System, we are developing innovative ways to increase educational capacity. Our state will need increased intellectual capital to sustain economic growth in the 21st century. The Top 10 Percent Law is helping us to achieve that, while building a stronger Texas for us all.

APPENDIX J — EXHIBIT 29 TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, ARTICLE, "THE UNIVERSITY OF TEXAS AT AUSTIN'S EXPERIENCE WITH THE 'TOP 10 PERCENT' LAW", DATED JANUARY 16, 2003

THE UNIVERSITY OF TEXAS AT AUSTIN

The University of Texas at Austin's experience with the "Top 10 Percent" Law

January 16, 2003

AUSTIN, Texas—The University of Texas at Austin conducts its undergraduate admission program under guidelines established by the "Top 10 Percent" Law (officially House Bill 588) that guarantees that Texas high school graduates who rank in the top 10 percent of their senior class be admitted to any state institution of higher learning.

At a White House briefing on Jan. 15, White House spokesman Ari Fleischer highlighted the program Bush spearheaded as governor of Texas. Bush opposed racial preferences at state universities, opting instead for a program he calls "affirmative access," under which the top 10 percent of all high school students are eligible for admission.

The University of Texas at Austin, while following this policy, in 1997 adopted a "holistic" approach to admissions.

Variables in the "holistic" approach are factors such as the student's academic record that includes class rank, completion of high school curriculum required by The University of Texas at Austin and the extent to which the student exceeded the university's required units. Among the "personal achievement" variables considered are the student's record for leadership, awards, extracurricular activities, work experience, socio-economic status of the family and school attended, and other factors. Students also must demonstrate their writing ability on two essays.

The University of Texas at Austin has effectively compensated for the loss of affirmative action, partly by increasing recruiting and financial aid for minority students. About 50 percent of its incoming first-year class includes "top 10 percent" qualifiers. The other half is admitted using normal admission criteria. Last fall, the first-year class included 272 African Americans, or 3.4 percent of the total of 7,936. It also included 1,138 Hispanics, or 14.3 percent of the total. The percentage of entering African American and Hispanics in fall 1996, the year the 5th Circuit Court of Appeals' decision struck down the use of affirmative action in Texas, was 4 and 14, respectively.

President Bush announced on Jan. 15 that the U.S. Justice Department will file a brief with the U.S. Supreme Court outlining the administration's opposition to the University of Michigan's affirmative action program.

The undergraduate admission process at the University of Michigan involves a point system where African American, Hispanic and Native American applicants earn 20 "bonus" points on the basis of race out of a 150-point system.

Bush called the system "a quota system" that rejects or accepts students "based solely on race," which he said is "impossible to square with the Constitution."

"We do not have, and have never had, quotas or numerical targets in either the undergraduate or Law School admissions programs," said University of Michigan President Mary Sue Coleman. "Academic qualifications are the overwhelming consideration for admission to both programs."

The Supreme Court's decision will define the role of affirmative action in the United States.

The links below provide information about The University of Texas at Austin's admission policies.

APPENDIX K — EXHIBIT 30 TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, NEWS, "ENROLLMENT OF FIRST-TIME FRESHMAN MINORITY STUDENTS NOW HIGHER THAN BEFORE HOPWOOD COURT DECISION," DATED JANUARY 29, 2003

THE UNIVERSITY OF TEXAS AT AUSTIN

NEWS

"Enrollment of first-time freshman minority students now higher than before Hopwood court decision"

January 29, 2003

AUSTIN, Texas—Diversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students—African Americans, Hispanics and Asian Americans—to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university's enrollment process.

A report by the university's Office of Institutional Research for the 2002 fall/summer enrollment shows there were 266 African Americans, 932 Hispanics and 942 Asian Americans enrolled as first-time freshmen at the university in 1996. The numbers of African Americans and Hispanics dropped after the Hopwood ruling, although the figures for Asian Americans increased. In 1997, the numbers for first-time freshmen were down to 190 African Americans, 892 Hispanics and 1,130 Asian Americans.

More recent enrollment figures show a more encouraging trend. The summer/fall 2002 semester report shows that first-time freshmen enrollment for all three ethnic groups has increased to a level above the 1996 pre-Hopwood figures. Minority enrollment last fall included 272 African Americans, 1,137 Hispanics and 1,452 Asian Americans.

The university was forced to change its admission practices after a federal court ruling in a case that began in 1992 when law school applicant Cheryl Hopwood and others sued the university, claiming they were denied admission because the law school gave preferential consideration to black and Mexican-American applicants.

U.S. District Judge Sam Sparks ruled in 1994 that the Law school could consider race in admission to maintain diverse enrollment or remedy past discrimination. The 5th Circuit Court of Appeals overturned the decision in 1996, ruling that any consideration of race, even as one factor among many, is unconstitutional. As a result of the court's ruling, all affirmative action programs involving race and ethnicity in admission ended at public universities in Texas in June 1996.

The "Top Ten Percent" legislation (HB588) was enacted into law by the Texas Legislature in 1997 to assure the very best of each high school admission to the state university of their choice. The university also has taken other initiatives to encourage minority enrollment.

The decline in the Hispanic and African American freshman population in the first years after the Hopwood ruling resulted in a lower total number of minority undergraduate students in subsequent years. In 1996, the university's undergraduate minority enrollment included 1,479 African Americans, 5,247 Hispanics and 4,459 Asian Americans. By 1997 the ethnic minority enrollment figures were 1,353 African Americans, 5,234 Hispanics and 4,783 Asian Americans.

The summer/fall 2002 undergraduate enrollment includes more Hispanic students (5,459) and Asian-American students (6,616) than in the last pre-Hopwood year. While there are still fewer African-Americans than in the last pre-Hopwood year by about 7 percent, the number of African-American undergraduates has been rebuilt from the low point in 1999, when the total was 1,277 students.

The rebuilding of diversity on campus also can be seen in the university's School of Law, where minority enrollment before Hopwood included 97 African Americans, 179 Hispanics and 88 Asian Americans. After Hopwood, the 1997 figures were 67 African Americans, 145 Hispanics and 94 Asian Americans. The figures for Hispanics and African Americans dropped even more in subsequent years and reached a low in 1999 of 17 African Americans and 114 Hispanic law students.

The minority enrollment at the Law School for the Fall 2002 semester was 54 African Americans, 150 Hispanics and 87 Asian Americans.

At the graduate level, there is greater representation in 2002 of both Hispanic students and Asian-American students than in 1996. There has been a steady fall, however, in the number of African-American graduate students. The graduate student minority population in 1996 included 335 African Americans, 781 Hispanics and 442 Asian Americans. The totals in all groups fell in 1997 to 300 African Americans, 769 Hispanics and 423 Asian Americans. The report for fall 2002 shows 248 African Americans, 797 Hispanics and 586 Asian Americans.

The enrollment of white students at The University of Texas at Austin has increased on the undergraduate level but decreased on the graduate and law school levels since 1996. The summer/fall semester numbers for first-time freshmen were 4,159 in 1996, 4,730 in 1997 and 4,882 in 2002. The total number of fall undergraduates during those years were 23,345 in 1996, 24,219 in 1997 and 24,453 in 2002. Law school enrollment of white students was 1,115 in 1996, 1,089 in 1997 and 1,070 in 2002. The graduate school enrollment of white students was 6,886 in 1996, 6,761 in 1997 and 5,931 in 2002.

The Office of Institutional Research Web site provides a **statistical handbook** for the 2002-03 academic year that shows additional information about the university's enrollment and demographics.

For more information contact: Robert D. Meckel, Office of Public Affairs, 512-475-7847.

Appendix K

The University of Texas at Austin
Office of Institutional Research

Fall Enrollment of First-Time Freshmen - Fall & Summer (TABLE S12A/B)

	Number			Percent Distribution		
	1996	**1997**	**2002**	**1996**	**1997**	**2002**
African American	266	190	272	4.1%	2.7%	3.4%
Hispanic	932	892	1,137	14.5%	12.6%	14.3%
Asian American	942	1,130	1,452	14.7%	15.9%	18.3%

Fall Enrollment - Undergraduate (TABLE S4A/B)

	Number			Percent Distribution		
	1996	**1997**	**2002**	**1996**	**1997**	**2002**
African American	1,479	1,353	1,372	4.1%	3.7%	3.5%
Hispanic	5,247	5,234	5,459	14.7%	14.2%	13.8%
Asian American	4,459	4,783	6,616	12.5%	13.0%	16.7%

Fall Enrollment - Undergraduate (TABLE S4A/B)

African American - Number/Percent Distribution

1995	1,469	4.2%
1996	1,479	4.1%
1997	1,353	3.7%
1998	1,311	3.5%
1999	1,277	3.4%
2000	1,298	3.4%
2001	1,335	3.5%
2002	1,372	3.5%

Fall Enrollment - Law (TABLE S4A/B)

	Number			**Percent Distribution**		
	1996	**1997**	**2002**	**1996**	**1997**	**2002**
African American	97	67	54	6.4%	4.7%	3.6%
Hispanic	179	145	150	11.8%	10.2%	10.1%
Asian American	88	94	87	5.8%	6.6%	5.9%

Appendix K

Fall Enrollment - Law (TABLE S4A/B)

African American - Number/Percent Distribution

1995	100	6.6%
1996	97	6.4%
1997	67	4.7%
1998	40	2.9%
1999	17	1.2%
2000	33	2.3%
2001	41	2.9%
2002	54	3.6%

Fall Enrollment - Graduate (TABLE S4A/B)

	Number			Percent Distribution		
	1996	**1997**	**2002**	**1996**	**1997**	**2002**
African American	335	300	248	3.1%	2.8%	2.2%
Hispanic	781	769	797	7.3%	7.3%	7.2%
Asian American	442	423	586	4.1%	4.0%	5.3%

Appendix K

Source: The University of Texas at Austin 2002-03 Statistical Handbook

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APPENDIX L — EXHIBIT 31 TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, ARTICLE, "THE UNIVERSITY OF TEXAS AT AUSTIN REACTS TO THE SUPREME COURT'S AFFIRMATIVE ACTION DECISIONS," DATED JUNE 23, 2003

The University of Texas at Austin reacts to the Supreme Court's affirmative action decisions

June 23, 2003

AUSTIN, Texas—The U.S. Supreme Court's landmark decision Monday (June 23) upheld the use of affirmative action in college admissions in two cases involving the University of Michigan at Ann Arbor, but rejected the way the school carried out affirmative action in its undergraduate admissions policy.

Dr. Larry R. Faulkner, president of The University of Texas at Austin, said the rulings in the Michigan case sweep away the restrictions of the 1996 Hopwood decision, a decade-long case that eliminated the consideration of race in admitting students at the university's School of Law and other higher education institutions in Texas.

"We are very pleased here at The University of Texas at Austin that the Supreme Court's rulings today place the state of Texas and higher education institutions in the state on the same competitive basis as education institutions throughout the United States," Faulkner said in a news conference.

The University of Texas at Austin will modify its admissions procedures to comply with the court's rulings in time for the fall 2004 semester, Faulkner said. This will include implementing procedures at the undergraduate level that combine the benefits of the Top 10 Percent Law with affirmative action programs that can produce even greater diversity, he said.

Establishing these procedures for graduate and professional programs will be a priority, Faulkner said, because "we don't have a good substitute for affirmative action" in those programs.

The Michigan rulings establish a new precedent under which individualized, "holistic" admissions procedures, such as those in place at The University of Texas at Austin that consider multiple factors in a high school student's background, are affirmed as legal, he said.

"While competition (in recruiting and admissions) is an issue for us, this gets to the heart of what we are trying to accomplish as an institution," Faulkner said. "There is a compelling responsibility for a central public institution like this one to act directly and positively to educate the leadership of the future.

"That leadership comes from all sectors of society," he said. "We have to actively engage in our obligation to meet that responsibility. Today's court decision makes it easier for us to accomplish that goal."

In a case involving Michigan's law school, the court upheld the admissions policy in a 5-to-4 decision. The majority said that the policy was narrowly tailored to further a compelling interest in "obtaining educational benefits that flow from a diverse student body."

In the undergraduate case, the majority said that the university's current policy, which is more formulaic, was not narrowly tailored to achieve educational diversity.

The rulings do not affect the Top 10 Percent Law in Texas, (officially House Bill 588), which guarantees that Texas high school graduates who rank in the top 10 percent of their senior class be admitted to any state institution of higher learning.

The University of Texas at Austin's preliminary fall 2003 enrollment figures show that students admitted automatically under the Top 10 Percent Law would account for 69 percent of the freshman class and about 75 percent of the incoming freshmen listed as Texas residents. That total could jump to 85 or as much as 100 percent by the next Legislative biennium.

The university is seeking a legislative approval of a cap on the percentage of automatically admitted Texas residents of 60 percent, Faulkner said.

"The inability to consider any factors other than the single criterion of high school rank is unhealthy for an institution of higher education," he said.

For more information contact: Don Hale, 512-471-3151.

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APPENDIX M — EXHIBIT O TO AFFIDAVIT OF PAUL M. TERRILL, ARTICLE, "TOP 10 RULE LIMITS UT," DATED MARCH 20, 2008

The Houston Chronicle

March 20, 2008 Thursday
3 STAR EDITION

Top 10 rule limits UT, says its leader; Powers argues forced admission blocks diversity

BYLINE: LISA SANDBERG, Austin Bureau

SECTION: A; Pg. 1

LENGTH: 603 words

DATELINE: AUSTIN

AUSTIN - The University of Texas at Austin has been forced to offer admission to a record number of Texas high school students using just a single criteria - class ranking - and that has hurt the university's ability to increase its racial and ethnic diversity, the school's president said Wednesday.

Eighty-one percent of the students being offered admission to UT's 2008 fall freshman class got in because they graduated in the top 10 percent of their high schools. That number is up 10 percent over 2007 figures and likely will rise to include all students in the not-too-distant future, William Powers Jr. warned.

On Wednesday and in testimony before a House panel a day earlier, Powers said the university could attract a more diverse student body if it was not forced by the state, under a decade-old law, to accept every student with a high class rank.

"Only about one in four students admitted under the top 10 percent law is African-American or Hispanic, so there's a natural limit if we don't have discretion in who we can go after," he said. "It's a capacity problem."

Powers supports capping at 50 percent the number of incoming freshmen admitted by UT-Austin under the top 10 percent law, and giving admission officers more discretion to use other factors, including race, when considering the rest.

Limiting the law has been a tough sell for Powers, particularly in long-neglected areas of the state. UT-Austin's minority enrollment is higher now than at any time since the law was passed.

From 1998 to 2007, the number of Hispanic undergraduates has risen by 29.3 percent to 6,700.

The percentage of African-American students has jumped by 32.4 percent to 1,700. UT's total undergraduate population stood last fall at a little more than 37,000.

Equal opportunity

Rep. Helen Giddings, D-Dallas, co-authored the top 10 percent law in response to a federal ruling that officials in

Texas believed barred race from being used in admission decisions.

The rule applies to every public institution in the state and gives equal opportunity to top students at any public school.

She credits her law with boosting enrollment at UT from both inner city and rural schools. She said UT's flagship school drew students from 616 Texas high schools in 1996, and now draws from 853 high schools.

"We cannot back away from making sure that these universities reflect the population of the state," she said.

Mike Villarreal, D-San Antonio, said the university's admissions policy seems "to be working very well." He was part of a coalition of urban Democrats and rural conservatives that last year defeated a bill that would have instituted the 50 percent cap.

Disadvantaged groups

Powers said the emphasis on class ranking excludes other measures that have proved to boost enrollment among disadvantaged groups, such as ensuring that high-performing students from disadvantaged backgrounds actually are able to attend college.

Powers said UT's outreach and scholarship efforts have been at least as important in bringing in underrepresented students.

Speaking before a House panel on higher education on Tuesday, he added that class ranking leaves an entire set of students in the cold: the Bill Gateses and Michael Dells of the world who showed exceptional talent in some areas, but didn't necessarily have high grade-point averages.

MINORITY INCREASE

UT-Austin's minority enrollment is higher now than at any time since the top 10 percent law was passed. Between 1998 and 2007 ...

... the number of Hispanic undergraduates has risen by 29.3 percent to 6,700

... the percentage of African-American students has jumped by 32.4 percent to 1,700.

LOAD-DATE: March 20, 2008

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NOTES: lsandberg@express-news.net

GRAPHIC: Mug: William Powers Jr. supports capping the rule at 50 percent for incoming freshmen. (p. 6)

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APPENDIX N — DEFENDANTS' STATEMENT OF FACTS, FILED FEBRUARY 23, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. 1:08-CV-00263-SS

ABIGAIL NOEL FISHER, and
RACHEL MULTER MICHALEWICZ,

Plaintiffs,

UNIVERSITY OF TEXAS AT AUSTIN; et al.,

Defendants.

DEFENDANTS' STATEMENT OF FACTS

Defendants University of Texas at Austin ("UT Austin"); Kenneth I. Shine; David B. Prior; William Powers, Jr.; Board of Regents of the University of Texas System, John W. Barnhill, Jr., H. Scott Caven, Jr., James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, Prentice L. Gary; and Bruce Walker file this Statement of Facts in Support of their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment pursuant to Local Rule CV-7.

I. UT Austin's Undergraduate Admissions for 2008

1. UT Austin considers itself a highly selective institution. Deposition of Kedra B. Ishop, taken October 6, 2008 ("Ishop Dep.") 9:20-23 (cited excerpts attached at Tab 2); Deposition of N. Bruce Walker, taken October 7, 2008 ("Walker Dep.") 9:13-15 (cited excerpts attached at Tab 5); Deposition of Gary Lavergne taken October 6, 2008 ("Lavergne Dep.") 11:20-24 (cited excerpts attached at Tab 3).

2. In recent years, UT Austin has received applications from approximately four times the number of students it has space to enroll in its freshman class. "Implementation and Results of the Texas Automatic Admissions Law (HB 588) at UT Austin," Oct. 28, 2008 ("*2008 Top 10 Report*") at 6, Exhibit C to the Affidavit of Gary M. Lavergne, executed February 19, 2009 ("Lavergne Aff."), attached at Tab 8 (2006: 27,315 applications, 7,417 enrolled; 2007: 27,237 applications, 7,479 enrolled).

3. For the class entering Summer/Fall 2008, UT Austin received 29,501 applications, offered admission to 12,843 applicants and ultimately enrolled 6,715 students as first-time freshman. *2008 Top 10 Report* at 6.

4. UT Austin's admissions policy is designed for the purpose of admitting a meritorious and diverse student body. Walker Dep. at 9:10-12.

5. Diversity is a "major priority" for UT Austin's students, faculty and staff, and it is UT Austin's aim to set

a "high standard for diversity in higher education." UT Austin's Office of Division of Diversity and Community Engagement, "2008 Impact Report" at 4, Exhibit A to the Affidavit of Gregory Vincent, executed February 23, 2009 ("Vincent Aff."), attached at Tab 10.

6. The University's broad vision of diversity encompasses various aspects of the human experience, including an applicant's culture; language; family, educational, geographic, and socioeconomic background; work, volunteer, or internship experiences; and leadership experience, among other elements. Walker Dep. 27:16-24. This broad vision of diversity also includes race. Walker Dep. 59:7-23; "Proposal to Consider Race and Ethnicity in Admissions," June 25, 2004 (the "*2004 Proposal*") at 3-4, attached as Exhibit A to the Affidavit of N. Bruce Walker, executed February 23, 2009 ("Walker Aff."), attached as Tab 11.

7. The policy is intended to enhance the educational experience of students on campus. *2004 Proposal* at 24. It is also intended to identify and develop the next generation of leadership, with the understanding and expectation that many of the University's graduates will become future leaders of Texas. *2004 Proposal* at 24-25.

8. The University expects that its students will experience concrete benefits from diversity. Walker Aff. ¶ 4. In the University's judgment, these include, but are not limited to, cross-racial understanding; cross-ethnic understanding; and the breaking down of racial, ethnic,

and geographic stereotypes. Walker Aff. ¶ 4. Students—regardless of race—should not feel like spokespersons for their race. Walker Dep. 21:6-13. UT Austin's admissions staff has read studies that tout other benefits: diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for society, and for entry into professions, where they will need to deal with people of different races, cultures, languages, and backgrounds. Walker Aff. ¶ 4. And the University's administrators know that graduates of the University of Texas will go on to become future leaders of this state, in government, industry, and public service, and perhaps others. Walker Aff. ¶ 4.

A. Selection Pool

9. Applicants do not compete with the entire universe of students who apply for the entering freshman class at UT Austin. Affidavit of Kedra B. Ishop, executed February 23, 2008 ("Ishop Aff."), attached at Tab 7, ¶ 7. The UT Austin admissions policy instead compares each applicant only to those other applicants who share both (1) the same residential status and (2) the same self-selected, preferred academic program.[1] Ishop Aff. ¶¶ 7-10.

10. UT Austin first places each applicant into one of three selection pools based on their residential status—Texas residents, non-residents (applicants residing within

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[1] Admission to several majors or programs is different than the process described in this section (for example, majors such as Fine Art and Architecture require auditions or specialized portfolios and are not subject to the Top 10% law). Ishop Dep. 92:10-22. The Plaintiffs did not apply to these programs. Ishop Aff. ¶ 2.

the United States but outside Texas), and foreign students. Ishop Aff. ¶ 7.

11. Approximately 90% of all slots available in the entering class are allotted for Texas residents. Ishop Dep. 39:16-17.

12. Applicants are then further divided based on their desired academic program. Ishop Dep. 14:11-15; 36:1-9. In some cases, applicants may be compared to other applicants based on the school or college that offers the intended major designated by the applicant. Ishop Dep. 35:14-21. For example, all applicants who state a preference for any of the majors within the School of Business will be compared to all other Business School applicants, regardless of major. Ishop Dep. 35:15-16. In other cases, applicants may be compared to other applicants based on the particular major they prefer. For example, those who select a major within the School of Engineering are compared only to other applicants who select the same major. Ishop Aff. ¶ 9. In the case of the College of Natural Sciences, applicants who select a major in Computer Sciences are compared to other applicants who select that same major; all other applicants within the College of Natural Sciences are compared with one another regardless of intended major. Ishop Aff. ¶ 9.

B. Factors Considered in the Admissions Process

13. The decision to admit one particular applicant over another within the same selection pool turns on one or more of the following three factors: (1) high school class

rank ("HSR"), (2) Academic Index ("AI"), and (3) Personal Achievement Index ("PAI"). *2008 Top 10 Report*, at 2; Ishop Dep. 30:3-31:15. A student's class rank is based on the applicant's high school grades only, while the AI and PAI are numbers generated by the UT Austin admissions office based on additional information provided to UT Austin by the applicant or an outside reporting agency such as the College Board. Ishop Aff. ¶¶ 3-4; Ishop Dep. 16:8-12; *2008 Top 10 Report* at 2-3.

14. The first two factors (class rank and AI) are based solely on an applicant's academic performance. *2008 Top 10 Report* at 2. The third factor (PAI) is a number derived from scoring the applicant's admissions essays and an admissions officer's holistic review of an applicant's entire application file. *2008 Top 10 Report* at 3.

15. The vast majority of Texas residents admitted to the freshman class are offered admission based on either class rank or a high AI alone, without any consideration of the PAI. Ishop Aff. ¶ 7. For example, for the class entering Fall 2008, only 841 available spaces in the freshman class remained available for Texas residents (out of 10,200 available spaces) after all automatic admissions based on academic performance were made. Ishop Dep. 91:9-24.

1. Class Rank and the Top Ten Percent Law

16. Texas law requires UT Austin to give primary consideration to the applicant's class rank, without regard to other criteria. *2008 Top 10 Report* at 1-2; *see also* TEX. EDUC. CODE § 51.803. Effective starting with

the fall entering class of 1998, UT Austin (like all public universities in Texas) must offer admission to any applicant who graduates in the top ten percent of his or her class from a high school in Texas, pursuant to a Texas law known as House Bill 588 or, more commonly, the "Top 10%" law. *2008 Top 10 Report* at 1-2; TEX. EDUC. CODE § 51.803. The law applies to every public high school in Texas, as well as every private high school in Texas that ranks its students and makes those rankings available to university admissions officers. TEX. EDUC. CODE § 51.803(a).

17. Although Texas law guarantees every Top 10% applicant automatic admission to UT Austin, the applicant is not guaranteed admission to his or her preferred academic program within UT Austin. Ishop Dep. 14:16-19; Lavergne Dep. 15:20-21.

18. Applicants who are eligible for guaranteed admission under the Top 10% law, but who are not admitted into either their first or second choice academic program due to space limitations within those programs, are entitled to admission to UT Austin as an undeclared major in the College of Liberal Arts. Ishop Dep. 50:15-18.

2. Academic Index (AI)

19. The review of admissions applications involves a calculation of a predicated grade point average ("PGPA") via a multiple regression equation. SAT/ACT scores and class rank are used to determine an applicant's PGPA. Ishop Aff. ¶ 3; Lavergne Dep. 17:13-25.

20. The PGPA is a number that attempts to predict the applicant's freshman year grade point average for a particular academic program. Lavergne Dep. at 17:13-18:18. Its functional range is 0.00 to 4.00 and it is calculated through a multiple regression equation using numerical components from two sources: (1) high school class rank and (2) standardized test scores from either the SAT or the ACT. Lavergne Dep. 17:13-25, *2008 Top 10 Report* at 2.

21. An applicant's Academic Index (AI) is derived by combining the applicant's PGPA with a bonus of 0.1 points (called a "units plus"), if the applicant qualifies for it. Ishop Aff. ¶ 3. The "units plus" bonus is awarded to those applicants who take more than UT Austin's minimum high school coursework requirements in at least two of three designated subject areas. Ishop Aff. ¶ 3; Lavergne Dep. 17:13-25; 2008 Top 10 Report at 2. If an applicant does not qualify for the "units plus" bonus, his PGPA and AI will be the same. Ishop Aff. ¶ 3. The opportunity to receive the 0.1 bonus makes 4.1 the highest AI recognized by the Office of Admissions. Ishop Aff. ¶ 3; Lavergne Dep. 17:13-25.

22. For purposes of calculating the applicant's PGPA, the applicant's class rank is based on his or her grade point average relative to others in the same high school class at the time of application, which typically occurs either at the end of junior year (after six semesters) or halfway through the senior year of high school (after seven semesters). Ishop Dep. 15:15-16:6.

23. Applicants may choose to submit either SAT or ACT test scores. Ishop Dep. 12:3-6; Lavergne Dep. 27:21-28:3.

24. For applicants who take the SAT or ACT more than once, UT considers only the highest total score from any single test. Ishop Dep. 12:3-6; *2008 Top 10 Report* at 5 n.5.

25. The particular formula used to calculate an applicant's PGPA varies depending on the particular academic program within UT Austin to which the applicant applies. Lavergne Dep. 18:5-12. Different colleges and schools weigh the Math and Critical Reading components of an applicant's standardized test score differently. Lavergne Dep. 18:5-12. Liberal Arts, Communications, Fine Arts, Social Work, and Education use the same formula to calculate PGPA; Nursing, Natural Sciences, Geosciences, and Architecture use another; and the Schools of Engineering and Business each have their own unique formulas. *2008 Top 10 Report* at 5 n.6.

26. The PGPA formulas, without the 0.1 bonus, as reflected in the *2008 Top 10 Report*, are:

Appendix N

For Liberal Arts, Communications, Fine Arts, Social Work, and Education:

PGPA = -0.19949 + (SAT V * 0.00142) + (SAT M * 0.00191) + (HSR * 0.01459)

OR

0.09689 + (ACT E * 0.02513) + (ACT M * 0.04577) + (HSR * 0.01351)

For Nursing, Natural Sciences, and Architecture:

PGPA = -1.10339 + (SAT V * 0.00088166) + (SAT M * 0.00230) + (HSR * 0.02416)

OR

-0.51242 + (ACT E * 0.00824) + (ACT M * 0.05007) + (HSR * 0.02199)

For Engineering:

PGPA = -1.53545 + (SAT V * 0.00072937) + (SAT M * 0.00313) + (HSR * 0.02285)

OR

-1.78910 + (ACT E * 0.01074) + (ACT M * 0.07335) + (HSR * 0.02708)

For Business:

PGPA = -2.31253 + (SAT V * 0.00157) + (SAT M * 0.00229) + (HSR * 0.03419)

OR

-2.14521 + (ACT E * 0.02892) + (ACT M * 0.05405) + (HSR * 0.03409)

SAT V = SAT Verbal Score; SAT M = SAT Math Score
ACT E = ACT English Score; ACT M = ACT Math Score
HSR = High School Class Rank

2008 Top 10 Report at 5 n.6.

3. Personal Achievement Index (PAI)

27. For those applicants who are neither automatically admitted into their first-choice academic program on the basis of superior academic performance alone, nor presumptively denied admission due to a low PGPA (see discussion of "C" group applicants below), UT Austin admissions officials undertake a holistic review of the entire application file to determine an applicant's PAI. *2008 Top Ten Report* at 3; Ishop Aff. ¶¶ 4, 12.

28. In addition to the applicant's class rank, standardized test scores, and high school transcript, an application file consists of the geographic and personal background information submitted on the standard application form and two required essays. *2008 Top Ten Report* at 2-3; Ishop Aff. ¶ 4; Ishop Dep. 12:13-13:5. An applicant's file may also contain letters of recommendation; an optional third essay detailing any special circumstances or other personal information the applicant wishes to share; and anything else the applicant includes with the application, such as a resume, artwork, or writing samples. Ishop Aff. ¶ 4; Ishop Dep. 12:13-13:21.

29. The PAI is determined based on a weighted average of scores the applicant receives for each of the two required essays and a "personal achievement" score given to the applicant based on a holistic review of the file, with slightly greater weight given to the personal achievement score. Ishop Aff. ¶ 5; *2008 Top Ten Report* at 3. For each component, the applicant receives a score on a scale of 1 to 6, with 6 being the highest score possible. Ishop Aff.

¶¶ 5, 18; *2008 Top Ten Report* at 3. The PAI is computed by averaging the two essay scores and then multiplying that number by three; multiplying the personal achievement score by four; adding those two subtotals together; and then dividing the sum by seven: [(average essay score x 3) + (personal achievement score x 4)] / 7. Lavergne Dep. 57:11-17.

a. Essay Scores

30. Applicants must submit two essays. Ishop Dep. 12:15-17; *2008 Top 10 Report* at 3.

31. For the fall entering class of 2008, the first essay question (Essay A) directed applicants to "describe someone who has made an impact on your life and explain how and why this person is important to you." Ishop Aff. ¶ 4, Ex. A. Essay B instructed applicants to "choose an issue of importance to you"—whether personal, school-related, political, local, or international—and explain "the significance of that issue to yourself, your family, your community, or your generation." Ishop Aff. ¶ 4, Ex. A.

32. Each of the two required essays are read and scored on a scale of 1-6 (6 being the highest possible score) by one of twenty-three members of the admissions staff specially trained to read and score essays. Ishop Aff. ¶¶ 5, 13.

33. Essays are scored based on the quality of the writing, without regard to the subject matter chosen or the viewpoint expressed. Deposition of Brian Bremen, taken

October 6, 2008 ("Bremen Dep.") 10:18-21 (cited excerpts attached at Tab 1). In scoring, readers are instructed to consider the complexity of thought, substantiality of development, and facility of language demonstrated by the essay. Bremen Dep. 10:20-21. The two required essays are scored in comparison to other essays from the same admissions pool. Bremen Dep. 10:3-12.

34. An optional third essay, Essay C, invites applicants to describe any personal information that UT Austin should consider, such as "exceptional hardships, challenges, or opportunities that have shaped or impacted your abilities or academic credentials, personal responsibilities, exceptional achievements or talents, educational goals, or ways in which you might contribute to an institution committed to creating a diverse learning environment." Ishop Dep. 78:12-20. Unlike the two required essays, the optional essay is not given its own score at any stage of the admissions process; rather, it is read as part of the holistic review of the applicant's file that determines the applicant's personal achievement score. Bremen Dep. 18:10-21; 20:18-20.

35. To ensure consistent scoring across all of the admissions office's essay readers, UT Austin requires training of essay readers on an annual basis by Dr. Brian Bremen, an associate professor in UT Austin's English Department. Bremen Dep. 7:16-17; 31:7-11. Dr. Bremen has been a consultant for the College Board for approximately thirty years, and he chaired the Test Development Committee for the SAT II writing test. Bremen Dep.

8:16-18. He has served as a consultant to UT Austin's admissions office for more than twelve years. Walker Aff. ¶ 7.

36. For each annual training, Dr. Bremen selects, out of a pool of about a thousand essays, approximately thirty-six to serve as exemplars for each essay topic—with about six samples for each of the six possible essay scores. Bremen Dep. 27:15-22.

37. The training begins by giving readers a set of essays, with scores pre-marked in ascending order, so that they can learn the differences in scoring. Bremen Dep. 27:23-24. Readers are then given sample essay sets to score, with the actual scores concealed. Bremen Dep. 27:25-28:2. Readers then together read through groups of exemplar essays for each score possible (one through six) until the readers develop a high degree of consistency in similarly scoring the same essay amongst different readers. Bremen Dep. 27:7-14.

38. The goal of the training is to ensure that all readers assign either the same score to any particular essay, or vary by no more than one point above or below the essay's true score, Lavergne Aff. ¶ 8. Bremen Dep. 25:1-13; 29:15-20.

39. Readers are also given a scoring guide that describes typical characteristics of essays with particular scores. Bremen Dep. 52:15-53:9; "Scoring Guide," Affidavit of Brian Bremen, executed February 23, 2009 ("Bremen Aff."), attached at Tab 6,. ¶ 6 & Ex. A. For example, an

essay scoring a 6 must demonstrate "clear and consistent competence," "effectively and insightfully address the writing task," be "well-organized and fully developed," and display "consistent facility in the use of language." Bremen Dep. 52: 19-25; "Scoring Guide," Bremen Aff. Ex. A. An essay scoring a 1 "demonstrates incompetent writing," reflects "very poor organization" and "very thin development," and contains "expressions so awkward that meaning is somewhat obscured." "Scoring Guide," Bremen Aff. Ex. A.

40. Readers leave the training session with a packet consisting of 36 exemplar essays for each question type that represent each score on the scoring scale and to which the readers can refer during the reading process. Bremen Dep. 27:17-28:14; 26:6-8.

41. In addition to this training, UT Austin also conducts "inter-rater reliability analyses" every several years, to ensure consistency among readers. Ishop Dep. 83:12-16; Lavergne Dep. 47:15-22, 51:15-20. The most recent analysis, conducted in 2005, showed that essay readers scored within one point of each other 91% of the time, comparable to the reader consistency goals set by the College Board for the SAT writing test. Lavergne Aff. ¶ 8; Lavergne Dep. 49:6-50:22.

42. In 2007, Dr. Bremen also sampled readers' essay scores against his own scores to ensure reader reliability. Ishop Dep. 84:12-16.

43. Consistency of essay scoring is further enforced when senior readers undertake a holistic review of the entire applicant's file, including the essays. Ishop Dep. 83:16-84:1. These senior readers review the essays and other aspects of the file for purposes of determining the personal achievement score, not the writing quality of the essays, but the senior readers have also been trained on essay reading and thus are able to informally review and monitor scoring. Ishop Dep. 83:16-84:1.

b. Personal Achievement Score

44. Twenty-two senior members of the UT Austin admissions office conduct a holistic review of entire application files, including the two required essays and any supplemental information provided by the applicant (such as the optional third essay and any letters of recommendation), in order to determine the personal achievement score. Bremen Dep. 16:15-17:13. At this stage, all three essays (if the applicant included the optional third essay) are reviewed for substantive content and for what they reveal about the applicant as a person, rather than for writing quality. Bremen Dep. 16:15-17:13, 18:5-19:4.

45. Every applicant is awarded a personal achievement score of 1-6 based on the reader's holistic evaluation of the applicant's demonstrated leadership qualities, extracurricular activities, honors and awards, work experience, community service, and a variety of special circumstances. Ishop Aff. ¶ 5; Ishop Dep. 18:9-19:14. All components are considered in the context of the applicant's entire file, and no numerical value is ever

assigned to any of the individual factors that may make up the personal achievement score. Ishop Aff. ¶ 5; Ishop Dep. 23:1-6; Bremen Dep. 22:7-10.

46. The component of the personal achievement score that involves consideration of an applicant's special circumstances includes the socioeconomic status of the applicant's family (parents' education and combined income); whether the applicant is from a single-parent home; whether a language other than English is primarily spoken in the applicant's home; special family responsibilities, such as earning income or caring for other family members, that reduce the applicant's available time for other extracurricular activities; the socioeconomic status of the applicant's high school; the average SAT/ACT score of students attending the applicant's high school in relation to the applicant's own score; and, beginning with applications for the 2005 entering class, the applicant's race or ethnicity. Ishop Dep. 22:13-20; Bremen Dep. 44:1-6.

47. In evaluating personal achievement, reviewers consider both the breadth and depth of an applicant's involvement in activities and pursuits. Ishop Dep. 18:19-20. Reviewers look for applicants who have maximized the opportunities presented by their circumstances and made a meaningful difference, whether through volunteering or other community involvement, family commitments, or working. Bremen Dep. 23:1-15.

48. The training for the readers who determine the personal achievement score is similar to the training given to essay readers, in that the goal is to develop consensus and uniformity in scoring amongst readers. Bremen Dep.

25:1-13, 26:16-27:7. First, senior admissions officers select two or three files from a group of approximately 50 that each officer believes exemplify each of the six possible personal achievement scores. Bremen Dep. 26:16-27:5. Each officer's selected files are then read and scored by four other senior officers. Bremen Dep. 26:16-27:7. Those files that receive the same score by all five readers are then used as exemplar files for all of the senior readers to instruct them on what a "perfect" file for each of the six possible scores looks like. Bremen Dep. 26:16-27:7. File readers are trained in this manner to achieve consistency across file readers, with the goal being that all readers will assign either the same score to the same file or vary by no more than one point above or below the true score. Bremen Dep. 25:1-4.

49. At no time is any individual factor ever determinative. Walker Dep. 45:5-12. And consideration of race, in the context of an entire application, can benefit any applicant, regardless of race. Ishop Aff. ¶ 5; Ishop Dep. 57:14-58:4; Walker Dep. 36:21-37:9.

50. According to the most recent inter-rater reliability analysis conducted on the file reading process in 2005, readers scored within one point of each other 88% of the time, consistent with industry standards. Lavergne Aff. ¶ 8; Lavergne Dep. 52:8-53:21.

C. The Admissions Decision Process

51. UT Austin admits all freshmen into a specific academic program offered by the University. Ishop Dep.

16:22-24. A student who is ultimately offered admission as a freshman in a particular academic program at UT Austin is typically admitted at one of four distinct stages in the process: (1) automatic admission to their first choice of academic program based on either the Top 10% law or a particularly high AI; (2) admission into either their first or second choice of academic program, based on their AI and PAI scores; (3) admission as an undeclared major in the College of Liberal Arts (for Texas residents and non-residents only); and (4) admission through the summer program, based on a second read of the entire application file (Texas residents only). Ishop Dep. 29:21-31:5; 44:23-45:2; 45:20-25; 46:14-47:2. Most students admitted as freshmen to UT Austin are granted admission at the first stage of the process. Ishop Dep 91:19-24.

1. Automatic Admission Based on Either the Top 10% Law or a High PGPA

52. A large majority of applicants who are offered admission to UT Austin are admitted based solely on class rank, pursuant to the Top 10% Law. *2008 Top 10 Report* at 9, Table 2b. For the Summer/Fall 2008 entering class, 81% of all enrolled students from Texas high schools were admitted under the Top 10% Law. *2008 Top 10 Report* at 9, Table 2b. By comparison, for the fall entering class of 1998, the first year that the Top 10% Law took effect, 41% of enrolled students from Texas high schools were admitted under the Top 10% Law. *2008 Top 10 Report* at 9, Table 2b.

53. Although the Top 10% Law requires admission only into UT Austin, and not necessarily into the

applicant's preferred academic program, many schools and colleges within UT Austin grant admission to every applicant who qualifies under the Top 10% Law and selects that school or college as his or her first choice of academic program. Ishop Aff. ¶ 7.

54. Some academic programs could fill most of their admission slots based on the first choice preferences of Top 10% applicants alone, while others, such as the School of Business, would be oversubscribed based on that population alone. Ishop Dep. 14:20-15: 32:7-14; Ishop Aff. ¶ 11. For those programs that could fill 80% or more of the space in their freshman class based on the first choice preferences of Top 10% applicants alone (known as "impacted" programs), UT Austin caps the percentage of Top 10% applicants that will be *automatically* admitted to those programs at 75% of the program's available admission slots. Ishop Dep. 14:20-15:5, 32:7-14.

55. For 2008 admissions, the School of Business, College of Communication, School of Engineering, School of Nursing, and the Kinesiology and Health Education programs within the College of Education were all considered impacted programs, and capped their automatic Top 10% admissions accordingly. Ishop Aff. ¶ 11; Ishop Dep. 32:15-19. For example, the School of Business offered automatic admission to only those Top 10% applicants who graduated within approximately the top 4% of their high school class and selected a business major as their first choice. Ishop Dep. 32:19-21. The remaining 25% of the slots were filled using the AI/PAI matrix, as described below, a process that included both Top 10% and non-Top 10% applicants. Ishop Dep. 35:4-10.

56. In addition to those automatically admitted under the Top 10% rule, UT Austin's admissions office also establishes "A" and "C" group parameters for some colleges and schools; these parameters are used to automatically admit, or presumptively deny, applicants based on their AI alone. Ishop Aff. ¶ 12.

57. For 2008 admission, five colleges or schools admitted applicants automatically on a rolling basis if their AI exceeded a particular threshold (so-called "A" group applicants): Natural Sciences (3.5 AI); Geosciences (3.6 AI); Liberal Arts (3.9 AI); Social Work (3.6 AI); and three programs in Education (Applied Learning & Development (3.6 AI); Special Education, (3.4 AI), and Bilingual Education, (3.4 AI)). Ishop Aff. ¶12. After all admissions offers based solely on academic performance (either pursuant to the Top 10% rule or due to the applicant's high AI) were made for the Fall 2008 entering freshmen class, only 841 available admissions slots (out of a possible 10,200) remained open for Texas residents. Ishop Dep. 91: 19-21.

58. UT Austin has also established an academic "floor" below which certain applicants are deemed presumptively inadmissible (designated "C" group applicants). Ishop Aff. ¶ 12.

59. For the Fall 2008 entering freshman class, applicants with an AI of 2.599 and below were designated "C" group applicants. Ishop Aff. ¶ 12.

60. The files of "C" group applicants are reviewed by a senior admissions reader and are referred for full file

review only if the reader determines that the file warrants full review, in which case the review process proceeds in the same manner as for all other applicants. Ishop Aff. ¶ 12.

61. If a "C" group applicant is not selected for full file review, the applicant is by default assigned a set of PAI scores of "3(essay 1)-3(essay 2)-3(personal achievement)", which—in conjunction with the applicant's relatively low AI—effectively precludes admission to the freshman class. Ishop Aff. ¶ 12.

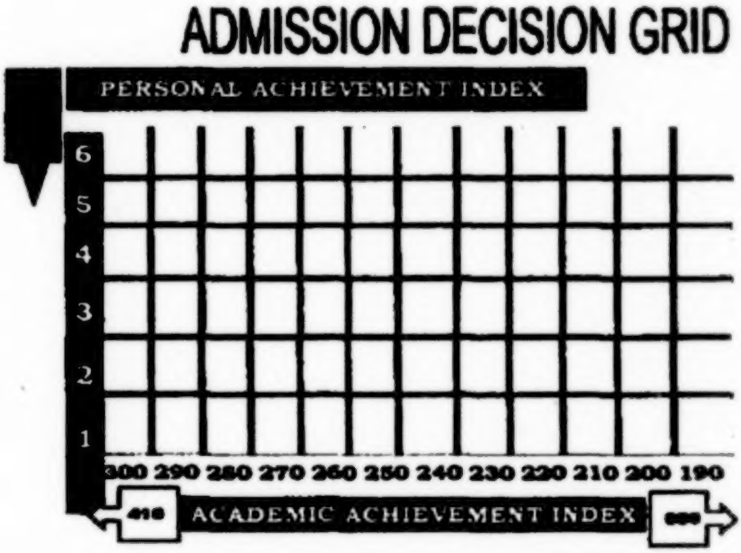
2. Admission Into Either First or Second Choice Academic Program Through the AI/PAI Matrix

62. Admissions slots that remain in each academic program after allotted slots are filled by those who are automatically admitted due to their Top 10% status or high AI are filled based on the applicant's combined AI and PAI scores. Ishop Aff ¶¶ 11-12; Ishop Dep. 29:18-30:14.

63. In this process, applicants are clustered into groups of applicants who share the same combination of AI and PAI scores, and each group is considered for admission based solely on those scores. A liaison (an associate or assistant director of admissions) is assigned to manage the admissions process at this stage for each academic program. Ishop Aff. ¶ 14; Ishop Dep. 30:11-17, 38:6-8.

64. The process begins when the admissions office generates an initial AI/PAI matrix for each academic program. Ishop Aff. ¶ 14; Ishop Dep. 30:1-6.

65. On each matrix, PAI scores are plotted on the vertical left axis ascending from 1 to 6 in whole-number increments; AI scores (which are first multiplied by a factor of 100 to derive a whole number ranging from 000 to 410) are plotted on the horizontal bottom axis, starting at the far left with 410 and descending in increments of 10. The cell that represents the highest combination of AI and PAI scores is located in the top left hand corner of the matrix, and the lowest combination can be found in the bottom right hand corner. The 2008 Top Ten Report includes the following sample illustration of the AI/PAI matrix (or "decision grid"):


ADMISSION DECISION GRID
PERSONAL ACHIEVEMENT INDEX
6
5
4
3
2
1
300 290 280 270 260 250 240 230 220 210 200 190
410
ACADEMIC ACHIEVEMENT INDEX
000

2008 Top 10 Report at 3.

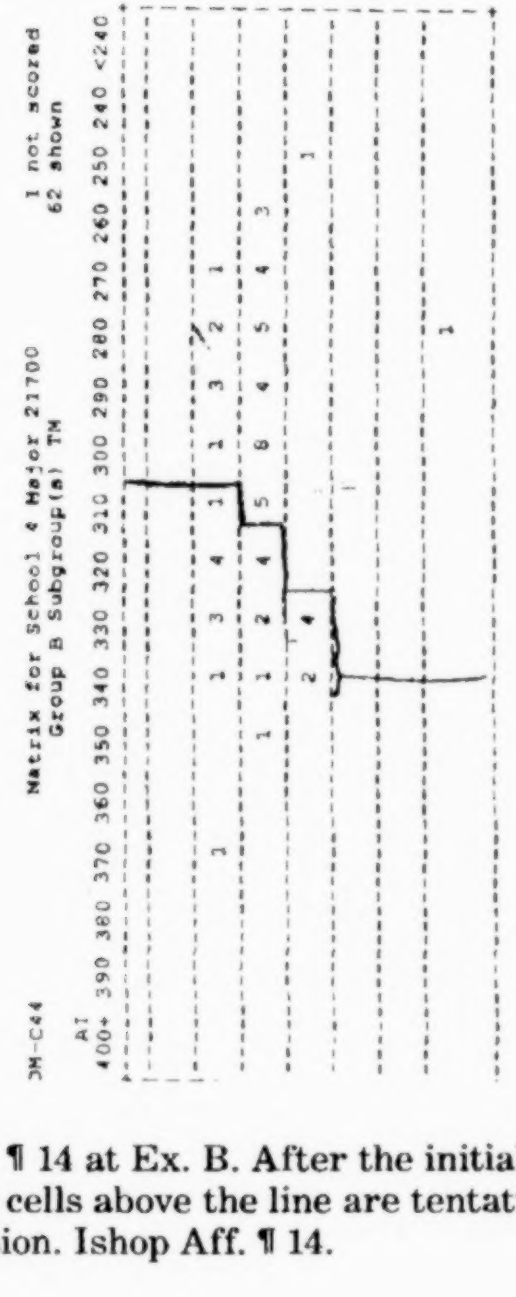
66. Each cell on the matrix contains a number representing the total number of applicants who share that particular combination of AI and PAI scores. Ishop Dep. 31:7-11; 62:24-63:3.

67. Every academic program's initial matrix is populated by only those applicants who selected that program as their first choice. Ishop Dep. 30:1-6.

68. The liaison then makes an initial determination as to which cells are likely to be admitted, taking into consideration (1) the number of available spaces left in the program, (2) the number of applicants in each cell, and (3) the desire to admit those with the highest combinations of AI and PAI scores. Ishop Dep. 42:2-43:4; 87:17-89:10. Liaisons have discretion as to where to draw the initial decision line, applying these considerations. Ishop Dep. 43:19-20.

69. Starting with the cell in the top left hand corner reflecting the highest combination of AI and PAI scores, each liaison adds adjacent cells based on these considerations until enough cells have been tentatively considered for admission to fill the remaining slots in each program. Ishop Aff. ¶ 14. This results in a "stair-step" decision line on the matrix, as seen in the following example from the class of Fall 2008:

Appendix N



DM-C44 Matrix for School 4 Major 21700 1 not scored

Group B Subgroup(s) TM 62 shown

400+	390	380	370	360	350	340	330	320	310	300	290	280	270	260	250	240	<240
			1			1	3	4	1	1	3	2	1				
					1	1	2	4	5	8	4	5	4	3			
						2	4								1		
												1					

Ishop Aff. ¶ 14 at Ex. B. After the initial decision line is drawn, all cells above the line are tentatively considered for admission. Ishop Aff. ¶ 14.

70. At the conclusion of this initial stage, any applicant who does not fall within one of the cells tentatively considered for admission into their first choice of academic program may now be considered for admission into their second choice program. Ishop Dep. 44:17-25. This is accomplished by updating every program's matrix so that each cell now represents the total number of applicants with that particular combination of AI and PAI scores who have designated that program as either their first choice or (for those students not tentatively admitted to their first-choice program) their second choice. Ishop Dep. 44:23-45:10.

71. Adding these second choice applicants to the matrix will, for many programs, increase the total number of students that fall within one of the cells that have been tentatively considered for admission, and exceed the number of slots available in that particular program. Ishop Aff. ¶ 14. When that occurs, each liaison must manage program enrollment by adjusting the initial set of cells considered for admission to match the available number of slots, again taking into consideration the desire to admit those with the highest combination of AI and PAI scores. Ishop Aff. ¶ 14.

72. Each program's matrix is then updated again to reflect the availability of any new second choice applicants that emerge from this adjustment process. Ishop Aff. ¶ 14. At the conclusion of this second round, each liaison makes a final determination of which cells to admit to each program, and all applicants who fall within any of those cells are accordingly deemed admitted. Ishop Aff. ¶ 14.

3. Admission as an Undeclared Major in Liberal Arts (Texas Residents and Non-Residents Only)

73. Any remaining Top 10% applicants not admitted into either their first- or second- choice program are offered admission as an undeclared major in the College of Liberal Arts. Ishop Dep. 14:11-19; 50:15-19. This compliance process typically exhausts most of the remaining slots for admission. Ishop Dep. 49:13-14; 50:18-19.

74. When admissions decisions were made for the Fall 2008 semester, only 186 admissions slots remained available in the College of Liberal Arts undeclared major program for Texas residents after automatically admitting all Top 10% applicants and those applicants with a sufficiently high AI (3.9 and above). Ishop Aff. ¶ 14.

75. To fill these remaining slots in the College of Liberal Arts, an AI/PAI matrix is created and populated with those Texas resident applicants who failed to gain admission to either their first- or second- choice academic programs. Ishop Aff. ¶ 14. The admissions office then draws the stair-step admission line on this matrix to capture the number of applicants necessary to complete the fall entering class and offers these applicants admission as an undeclared major in the College of Liberal Arts. Ishop Dep. 6:2-23; Ishop Aff. ¶ 14.

76. At this point, all remaining applicants not yet offered admission who are not Texas residents are denied admission. Ishop Aff. ¶ 15; Ishop Dep. 47:2-5.

4. Admission to Summer and CAP Programs (Texas Residents Only)

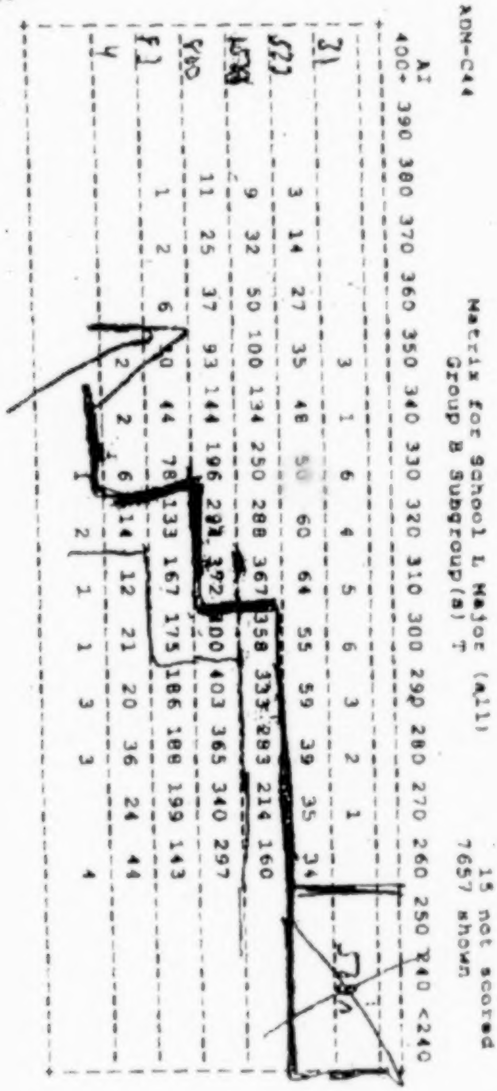
77. UT Austin has developed a summer program that allows an additional group of Texas residents to be admitted to the University, provided that they are willing to begin their coursework early, during the summer months immediately preceding the beginning of the fall semester. Ishop Aff. ¶ 15.

78. Any Texas resident who fails to gain admission to the fall semester freshman class will either be offered admission to UT Austin as a freshman through the Summer Freshman Class program, or can qualify for a transfer to UT Austin after her freshman year provided that she complies with the terms of the Coordinated Admissions Program ("CAP"). Ishop Aff. ¶ 15.

79. To determine who will be offered admission through the summer program, a group of senior admissions staff members give a second read to the entire file of those Texas residents who narrowly failed to gain fall admission as an undeclared major in the College of Liberal Arts based on their AI and PAI scores. Ishop Aff. ¶ 15; Ishop Dep. 47:8-48:25.

80. In 2008, 3,029 applicants were granted a second read based on having AI and PAI scores just below those admitted for the fall semester under the third stage of the admissions process. Ishop Aff. ¶ 15. Specifically, the applicants granted this second read were those with the highest combination of AI/PAI scores that remained on the AI/PAI matrix for the College of Liberal Arts, undeclared major, after all admissions decisions for Fall 2008 were

made. Ishop Aff. ¶ 15. The following is the "second read" matrix for the Fall 2008 admission cycle (with the arrow pointing to that side of the stair-step line that was granted a second read):



ADN-C44

Matrix for School L Major (all)
Group B Subgroup(s) T

15 not scored
7657 shown

	AI 400+	390	380	370	360	350	340	330	320	310	300	290	280	270	260	250	240	<240
31						3	1	6	4	5	6	3	2	1				
523			3	14	27	35	48	50	60	64	55	59	39	35	34			
[illegible]			9	32	50	100	134	250	288	367	358	333	283	214	160			
900			11	25	37	93	144	196	291	372	400	403	365	340	297			
F1			1	2	6	10	44	78	133	167	175	186	188	199	143			
4						2	2	6	14	12	21	20	36	24	44			
								1	2	1	1	3	3		4			

Ishop Aff. ¶ 15 at Ex. C. Of the 3,029 applicants granted a second read, approximately half were offered admission into the Summer Freshman Class program. Ishop Aff. ¶ 15.

81. Any Texas resident applicant not offered admission as a freshman to either the Fall or Summer programs may qualify for a transfer to UT Austin through CAP. Ishop Aff. ¶ 15. Any student who accepts the offer of CAP admission may transfer into UT Austin after their freshman year if they have completed 30 approved credit hours at a participating UT System campus and have maintained a GPA of at least 3.2 at that school. Ishop Aff. ¶ 15.

D. The Admissions Process after *Grutter*

82. The precise methodology by which UT Austin compares applicants with others of the same residential status and preferred academic program has undergone a certain amount of change over the past 15 years as a result of court decisions, legislation, and University policy. *2008 Top 10 Report* at 2, 4.

83. The core elements of UT Austin's admissions process have remained largely constant since the entering class of 1997, when UT Austin began using the AI/PAI system. Walker Dep. 11:15-19; *2008 Top Ten Report* at 4.

84. Beginning with applicants for the Fall 2005 entering class, and following the U.S. Supreme Court's June 2003 ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003), UT Austin added race as an element considered

in undergraduate admissions; however, it did so under the existing four-stage admissions process described above. Ishop Dep. 54:19-21; Ishop Aff. ¶ 4.

85. Prior to 1997, UT Austin's undergraduate admissions policy focused primarily on an applicant's class rank and SAT or ACT score. *2008 Top 10 Report* at 2. UT Austin also utilized an affirmative action admissions policy designed to increase enrollment of minority students, particularly African-American and Hispanic students. Ishop Dep. 54:8-14.

86. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 533 (1996), the Fifth Circuit prohibited UT Austin from considering race in any manner in admissions. In response to that decision, UT Austin changed its undergraduate admissions program by ceasing the use of race as a factor in admissions and adding a holistic evaluation of applicants. *2008 Top 10 Report* at 4.

87. Applicants for the eight entering classes between 1997 and 2004 were evaluated using the AI/PAI system, without any consideration of race. Walker Dep. 11:15-19; *2008 Top Ten Report* at 4.

88. The only substantive difference between the AI/PAI system in place from 1997 to 2004 and the AI/PAI system in place today is that, starting with applications for the 2005 entering class, UT Austin authorized its admissions reviewers to consider race or ethnicity in their holistic determination of an applicant's personal achievement score. Walker Dep. 30:23-31:1; *2008 Top Ten Report* at 4.

89. UT Austin adopted this change in response to the decision of the U.S. Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld the University of Michigan's use of race as a factor in its law school admissions program and abrogated the *Hopwood* decision. *2008 Top Ten Report* at 4.

90. Following the *Grutter* decision, the Board of Regents of the University of Texas System adopted a resolution authorizing each System campus to consider whether or not to alter their admissions policies in light of *Grutter*. Walker Aff. ¶ 8, 9.

91. Pursuant to that resolution, UT Austin convened a group of admissions staff, professors, and lawyers to consider whether and how its admissions policies should be modified in response to *Grutter*. Walker Aff. ¶ 10.

92. As a part of its consideration, UT Austin considered whether or not the campus and—of critical importance, the classrooms—had a critical mass of underrepresented minorities (that is, Hispanic and African Americans). Walker Dep. 18:9-13; 19:17-20:15. The University also conducted a study, the results of which were cited in a report in November 2003, that examined the presence or absence in undergraduate classrooms of students from the four most prevalent racial/ethnic groups on campus (White, African-American, Asian, and Hispanic). Walker Aff. ¶ 11; "*Diversity Levels of Undergraduate Classes at the University of Texas at Austin, 1996-2002*" (the "*Diversity Study*"), Lavergne Aff. Ex. B. The results of the Diversity Study showed

that, in 2002, in the classes in the category that UT Austin considers most relevant for examining student participation and interaction (i.e., classes with 5-24 students), 90% had one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students. Walker Aff. ¶ 11; *Diversity Study* at 8 (Table 3); *2004 Proposal* at 26, Table 8. Based on this study, UT Austin concluded that it had not attained a critical mass of underrepresented minorities. Walker Aff. ¶ 11; *2004 Proposal* at 24-25. Because critical mass is a necessary (but not sufficient) condition of achieving diversity, UT Austin further concluded, based on the study, that the educational benefits of a diverse student body were not being provided to all the University's undergraduate students. Walker Aff. ¶ 11; Walker Dep. 18:11-13; *2004 Proposal* at 25. In making this determination, the University did not set a specific numeric goal for critical mass. Walker Dep. 18:19-19:3. Rather, officials discovered when talking with students that minority students still felt isolated in the classroom and a majority of undergraduates believed there was no diversity in the classroom. Walker Aff. ¶ 12; Walker Dep. 21:6-12.

93. After several months of study and deliberation, including retreats, interviews, review of data of diversity in the classroom, and other factors, UT Austin decided to authorize the consideration of race in its undergraduate admissions policy. Walker Aff. ¶¶ 10-13.

94. On June 25, 2004, UT Austin internally circulated a document entitled "Proposal to Consider Race and Ethnicity in Admissions." *2004 Proposal* at 1. The

document proposed the limited use of race in admissions at UT Austin and expressed the University's "intent to comply with the law as expressed in the decisions of the United States Supreme Court in the cases of *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), and *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003)." *2004 Proposal* at 1.

95. In August 2004, after almost a year of deliberations, the UT System approved a revised admissions policy for UT Austin that included an applicant's race in the list of special circumstances that reviewers can consider in determining the applicant's personal achievement score. Walker Aff. ¶ 14.

96. This change took effect starting with applications for the freshman entering class for Fall 2005. Ishop Aff. ¶ 4. As a practical matter, this meant that: (1) an applicant's race (if reported by the applicant) was now included on the application file; and (2) readers were now taught to include race, but only in the same manner as any other special circumstance. Walker Aff. ¶ 15.

97. Like every other component of an application, race alone does not determine any applicant's personal achievement score. Bremen Dep. 44:15-19, 59:14-25; Ishop Dep. 19:20-20:3; Walker Aff. ¶ 15.

98. File readers are trained to consider race in conjunction with an applicant's demonstrated sense of cultural awareness. Bremen Dep. 40:24-41:22, 60:16-19. Depending on the content of the application, race can positively impact the holistic evaluation of any applicant,

including Caucasian applicants, or may have no impact whatsoever. Ishop Dep. 57:2-12; Bremen Dep. 32:7-19; Walker Dep. 36:3-37:6.

99. An applicant's race is considered only to the extent that the applicant, viewed holistically, will contribute to the broader vision of diversity desired by UT Austin. Ishop Dep. 55:2-11.

100. No admissions officer or anyone else at UT Austin monitors the racial or ethnic composition of the group of admitted students at any time during the admissions process in order to consider whether an applicant will be admitted. Ishop Aff. ¶ 17.

101. As an internal practice, the UT Austin admissions office informally reviews its various admissions procedures each year. Walker Aff. ¶ 16. Additionally, UT Austin's undergraduate admissions policy requires periodic, formal review of the use of race. Walker Aff. ¶ 16; *2004 Proposal* at 6, 32. Every five years, the admissions process for the freshman class is reviewed to assess whether consideration of race is necessary to create a diverse student body, or whether race-neutral alternatives exist that are able to achieve the same results. *2004 Proposal* at 32. The first formal review is scheduled to begin in Fall 2009. *2004 Proposal* at 32.

II. Race-Neutral Recruitment and Outreach Efforts

102. Following the *Hopwood* decision in 1996, UT Austin began using a number of race-neutral recruitment

efforts, aimed at improving the overall diversity of its student body, that remain in place today. Affidavit of Michael K. Orr, executed February 20, 2009 ("Orr Aff."), attached at Tab 9, ¶¶ 3-21; Deposition of Michael Orr, taken October 6, 2008 ("Orr Dep.") 20:19-21:5 (cited excerpts attached at Tab 4).

103. In addition, UT Austin has made substantial efforts to increase the quantity and quality of services provided to all prospective students. Orr Aff. ¶¶ 3-21; Orr Dep. 20:19-21:5.

A. Scholarship Programs

104. UT Austin created the Longhorn Opportunity Scholarship ("LOS") program after the *Hopwood* decision in 1996. Orr Aff. ¶ 7; Orr Dep. 12:11-16. The LOS program identifies high schools in underserved communities with historically few UT matriculates and provides a guaranteed number of scholarships to the Top 10% applicants who graduate from those schools. Orr Aff. ¶ 7. The scholarships are intended to increase the number of Top 10% students from these historically underrepresented schools who choose to come to UT Austin. Orr Aff. ¶ 7.

105. UT Austin originally identified 39 high schools as LOS schools, based on criteria such as students' average socioeconomic status, population of first-generation students, and the percentage of students that send test scores to UT Austin. Orr Dep. 11:25-12:5. There are currently 69 schools that UT Austin identifies as LOS schools. Orr Aff. ¶ 7.

106. In addition to the LOS program, UT Austin initiated two other scholarship programs following the *Hopwood* decision in 1996. The Presidential Achievement Scholarship ("PAS") is a need-based scholarship that is based on a student's family income, high school characteristics, and the student's academic performance relative to others in that high school. Orr Aff. ¶ 6; Orr Dep. 15:17-23. Finally, the First Generation Scholarship Program provides need-based scholarships to students who would be the first in their family to attend college. Orr Aff. ¶ 9; Orr Dep. 17:15-18.

107. These scholarship programs are aimed at helping enable qualified students from lower socioeconomic backgrounds to attend UT Austin. Orr Dep. 18:1-12, 19:15-20. They are not limited to minority students. Orr Dep. 20:13-15; 21:8-22:9.

108. From 1997 to 2007, UT Austin awarded $59 million in scholarships, with another $20 million of tuition waivers awarded. Orr Aff. ¶ 10. In 2007, UT Austin awarded $5.8 million through the PAS and LOS scholarships alone. Orr Aff. ¶ 10.

B. Regional Admissions Centers

109. Starting in 1996, UT Austin's annual recruitment budget was increased by $500,000. Orr Aff. ¶ 12.

110. Since then, UT Austin has established three new regional admissions centers in addition to the existing centers in Houston: Dallas (2000), San Antonio (2005),

and Harlingen (2007). Orr Aff. ¶ 12; Orr Dep. 15:2-14. The purpose of these centers is to increase UT Austin's visibility and interaction with prospective students, parents, and high school administrators within their respective geographic markets. Orr Aff. ¶ 12.

111. The centers provide a location to host receptions and information sessions about the admissions process, and serve as a home base for counseling staff. Orr Dep. 13:19-24.

112. Staff in these regional admissions centers have helped coordinate more than 1,000 College Day/Night events held at high schools across the state. Orr Aff. ¶ 12. Additionally, these centers coordinated approximately 1,000 day visits to high schools statewide to encourage prospective Top 10% students to apply and enroll at UT Austin. Orr Aff. ¶ 12.

C. Other Significant Programs and Events

113. UT Austin holds as many as 5 annual "Longhorn Lock-In" events, which are overnight visits to UT Austin for prospective students. Orr Aff. ¶ 17. These events serve prospective students from targeted high schools in the Dallas, San Antonio, Houston, and Rio Grande Valley areas. Orr Aff. ¶ 17.

114. As part of its UT Scholars program, UT Austin organizes overnight campus visits for admitted scholarship recipients from Dallas, Houston, San Antonio,

the Rio Grande Valley, and central Texas. Orr Aff. ¶ 18. More than 300 students participate annually. Orr Aff. ¶ 18.

115. UT Austin conducts three "Longhorn for a Day" campus visit programs for prospective students from Dallas, San Antonio, Laredo, and Houston. Orr Aff. ¶ 19. Over 150 students participate annually. Orr Aff. ¶ 19.

116. UT Austin annually hosts four "Longhorn Saturday" events on campus for prospective students and their families. Orr Aff. ¶ 20. This program has hosted more than 3,000 individuals and a related program, called "Rise and Shine," has hosted over 1,200 persons. Orr Aff. ¶ 20. Registration and attendance at both events is open to all. Orr Aff. ¶ 20.

117. UT Austin also holds an annual program called the Honors Colloquium that brings 500-600 students for a three-day campus visit during the summer. Orr Dep. 23:9-15.

118. UT Austin hosts an annual, multi-day conference on campus for high school counselors called "Counselors Colloquium" to focus attention on the University. This program is offered at no cost for those who could not otherwise afford to attend, in order to ensure broad representation of high school counselors. Orr Aff. ¶ 21.

Respectfully submitted,

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APPENDIX O — AFFIDAVIT OF KEDRA B. ISHOP, FILED FEBRUARY 23, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. 1:08-CV-00263-SS

ABIGAIL NOEL FISHER, and
RACHEL MULTER MICHALEWICZ,

Plaintiffs,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Defendants.

AFFIDAVIT OF KEDRA B. ISHOP

THE STATE OF TEXAS

COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, personally appeared KEDRA B. ISHOP, who, being by me duly sworn, upon her oath stated:

1. My name is Kedra B. Ishop. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated in it. I make this affidavit in support of Defendants' Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment. I have previously submitted an affidavit in this matter in connection with Plaintiffs' application for a Preliminary Injunction. To the extent that any statistics in this affidavit conflict with statistics in that prior affidavit or provided during my deposition, it is because, at those times, the University of Texas at Austin did not have full information on the total applicants, admitted applicants, and enrolled students; that information was not finalized until late October 2008.

2. I have been employed in the Office of Admissions at the University since 1998 and have held the position of Associate Director of Admissions since 2003. As part of my job duties I participate directly in all facets of the admissions process at the University. In particular I was very involved in all aspects of the 2008 admissions process, which included the applications of Ms. Fisher and Ms. Michalewicz, who are plaintiffs in a suit filed against the University of Texas at Austin. I have reviewed the admissions files of both Ms. Fisher and Ms. Michalewicz. Ms. Fisher and Ms. Michalewicz applied for admission as residents of Texas who were not eligible for automatic admission under House Bill 588 ("HB 588," also known as the "Top Ten Percent Law"). They did not apply to any special programs within the university, such as Plan II honors or majors in Fine Arts that have a portfolio requirement.

3. The review of admissions applications involves the calculation of an academic index ("AI") which is derived from the calculation of a predicated grade point average ("PGPA") (produced via a multiple regression equation) and a curriculum-based bonus point ("units plus"). SAT/ACT scores and class rank are used to determine an applicant's PGPA. If the applicant took more than UT Austin's minimum high school coursework requirements in at least two of three designated subject areas, a bonus of 0.1 points ("units plus") is added to the PGPA to produce the student's AI. The maximum AI that a student can obtain under this system is a 4.1, which correlates to an AI on the admission decision matrix (explained below in paragraph 14) of 410.

4. The Admissions office also determines a Personal Achievement Index ("PAI") for each applicant. The PAI is UT's holistic evaluation of an applicant. Applicants are required to submit two essays. A true and correct copy of a list of UT Austin's essay topics for the 2008 freshman class is attached as Exhibit A. Applicants may choose to submit an optional third essay detailing special circumstances; a resume or detailed listing of extracurricular activities, honors, awards, work experience and service; and letters of recommendation. In addition to encompassing the two required essays, the PAI reflects UT's evaluation of the applicant's demonstrated leadership qualities, extracurricular activities, honors and awards, work experience, community service, and special personal circumstances. The special personal circumstances considered include: the socioeconomic status of the applicant's family and

school, whether the applicant is from a single-parent home, whether languages other than English are spoken at the applicant's home, the applicant's family responsibilities, and (starting with the fall class of 2005) the applicant's race. Other than the scores each of the two required essay receives, no numerical value is ever assigned to any of the individual components that make up the PAI. Further, because race is a factor considered in the context of each applicant's entire file, it may be a beneficial factor for minorities or non-minorities alike, depending on the applicant's unique circumstances. Applicants may also choose to answer questions or present information related to other special circumstances to be considered in the evaluation of their file.

5. Each required essay is read and scored according to a scale of 1-6 by one of twenty-two specially trained essay readers, who read and score the essays based on the quality of the writing. Then, the entire application, including the required essays and any supplemental information provided by the applicant (i.e. letters of recommendation, the optional essay, and resume) is reviewed and assigned a "personal achievement score" (or "leadership score") on a scale of 1-6. Full files are read by one of twenty-three specifically trained PAI senior readers. From the three scores—the two essay scores and the personal achievement score—a PAI is computed. The personal achievement score is given slightly more weight than the essays in the calculation.

6. The purpose of readingentire admissions files is to determine the PAI. The "whole file" readers are

not making admissions decisions at this point of the review, but are simply assigning a PAI score. Nor is the file reader making a judgment regarding academic strength when determining the PAI, as that is accounted for in the applicant's AI.

7. Undergraduate admissions decisions are made for 11 Colleges and Schools within the University. Three competitive pools exist: Texas residents, non-residents (that is, applicants residing within the United States but outside Texas), and foreign students. Admission decisions for Texas and non-resident applicants are made by the admissions office liaison to each college or school. Foreign admission decisions are made by admissions staff in the Graduate and International admissions office. Applicants are separated into these three pools and they compete only against others in that pool for admission. The vast majority of admitted Texas residents are offered admission based on either class rank or AI alone, without any consideration of the PAI. Although HB 588 requires admission only into UT Austin, and not necessarily into an applicant's preferred academic program, many schools and colleges within the University grant admission to every applicant who qualifies under the Top 10% Law and selects that school or college as his or her first choice of academic program.

8. For six colleges/schools—Liberal Arts, Social Work, Nursing, Business, Communications, and Geosciences—admissions decisions are made at the college/school level. The AI/PAI requirements for entry into these academic programs are the same regardless of the major admitted to within the college/school.

9. For three colleges/schools, admissions decisions are made for specific majors per our enrollment management principles. College of Natural Sciences admissions decisions are made for two groups: the Computer Science major and all other Natural Sciences majors. College of Education admissions decisions are made for kinesiology, special education, bilingual education, and general education. College of Engineering admissions decisions are made for architectural, aerospace, electrical and computer, chemical, civil, mechanical, and petroleum engineering.

10. Decisions for the remaining two schools, the School of Fine Arts and the School of Architecture, are made within the Dean's offices of those schools and in consultation with the admissions office.

11. The admissions process begins by establishing automatic admissions cut-offs for individual colleges and schools. Some academic programs could fill most of their admission slots based on the first choice preferences of Top 10% applicants alone, while others, such as the School of Business, would be oversubscribed based on that population alone. To address this, the University has established a policy that allows these Top 10% "impacted" programs to restrict the percentage of their class that is automatically admitted under HB 588. For admission to the 2008 freshman class, Business, Communications, Nursing, Kinesiology, and each major in Engineering restricted spaces offered automatically under HB 588 to no more than 75% of their program. Fine Arts and Architecture do not grant HB 588 automatic admission.

12. The admissions office also establishes "A" group and "C" group parameters for some colleges/schools based solely on an applicant's AI, without consideration of an applicant's PAI. In 2008, five colleges/schools had "A" groups for the entering class of 2008: Natural Sciences (3.5 AI), Geosciences (3.6 AI), Liberal Arts (3.9 AI), Social Work (3.6 AI), and three programs in Education (Applied Learning & Development (3.6 AI); Special Education (3.4 AI) and Bilingual Education (3.4 AI)). "A" group applicants are those who have high AIs and who are offered admission based solely on their AI. The exceptional academic strength of these applicants determines their earlier (rolling) admission, allowing the admissions office to offer earlier admittance to these highly competitive students. "C" group applicants are those whose AI has typically rendered their admissions chances highly unlikely. All applicants with an AI of 2.599 and below are considered "C" group applicants. The file of each "C" group applicant is reviewed by a senior admissions reader, who will refer the applicant for a full file review if warranted from the contents of the file. If referred for a full file review, the review process is the same as the review of any other applicant. If not referred for full file review, the file is assigned scores of 3 (essay 1), 3 (essay 2), and 3 (personal achievement or leadership) which—in conjunction with the applicant's low AI score—effectively precludes admission. After all admissions offers based solely on academic performance (either pursuant to the Top 10% rule or due to the applicant's high AI) were made for the Fall 2008 freshmen class, only 841 available admissions slots (out of a possible 10,200) remained open for Texas Residents.

13. Early on in each year's admissions process, UT Austin conducts training sessions for essay and full file readers, led by faculty member Brian Bremen, a recognized national expert in holistic reading. For the entering class of 2008, 45 readers participated in essay or full file review. The reading process began in mid-October 2007 and ended in the third week of February 2008. Four full months of reading were required to review 17,131 files.

14. The process of admission into particular programs outside of the automatic admissions begins when the admissions office generates an initial AI/PAI matrix for each academic program. On each matrix, PAI scores are plotted on the vertical left axis ascending from 1 to 6 in whole-number increments; AI scores (which are first multiplied by a factor of 100 to derive a whole number ranging from 000 to 410) are plotted on the horizontal bottom axis, starting at the far left with 410 and descending in increments of 10. Thus, the cell that represents the highest combination of AI and PAI scores is located in the top left-hand corner of the matrix, and the lowest combination can be found in the bottom right-hand corner. All applicants with the same AI and PAI combination will be placed in the same cell on the matrix. Following the completion of file review, the admissions office liaisons for the three most "impacted" academic programs—Business, Communications, and Engineering—meet to begin the admission and "cascade" process. The number of applicants within each cell in the matrix guides the liaison making admissions decision as he/she decides where to establish the cut-off for

admits and cascades. An example of a working document matrix is attached as Exhibit B. On that matrix, you can see where the liaison has drawn the "stair step" admit line at that point in time. When the line is drawn to tentatively establish the admitted cells, the remaining applicants (i.e., those located in the cells that fall below the admit line) are "cascaded" to the matrix for their second choice academic program, where the process begins again. Adding these "cascaded" applicants to a matrix will, for many programs, increase the total number of students that fall within one of the cells that had already been tentatively considered for admission. When that occurs, each liaison must manage program enrollment by adjusting the initial set of cells considered for admission to match the available number of admissions slots, again taking into consideration the desire to admit those applicants with the highest combination of AI and PAI scores. At the conclusion of this second round, each liaison makes a final determination of which cells to admit to each academic program, and all applicants who fall within any of the cells above the line drawn on the matrix are accordingly deemed admitted. This "admit and cascade" process occurs for all academic programs until all applicants not admitted to their first- or second-choice academic program are cascaded to the matrix for Liberal Arts, undeclared major, the default, third-choice program for all applicants. When admissions decisions were made for the Fall 2008 semester, only 186 admissions slots remained available for Texas residents in the College of Liberal Arts, undeclared major, academic program after automatically admitting all Top 10% applicants and those applicants with a sufficiently high AI score. To fill these 186 remaining slots in the College of Liberal Arts, an AI/PAI matrix was created and populated with those Texas resident applicants who failed to gain admission to either their first- or second-choice academic programs. The admissions office then drew the stair-step admit line on this matrix to capture the number of applicants necessary to complete the fall entering class and offered these applicants admission as an undeclared major in the College of Liberal Arts.

15. If a non-resident applicant is not admitted for their first- or second-choice academic program or into the Liberal Arts, undeclared major, the applicant is denied admission. Texas residents, however, are given further consideration. Specifically, UT Austin has developed a summer program (called the "Summer Freshman Class") that allows an additional group of Texas residents to be admitted to the University, provided that they are willing to begin their coursework early, during the summer months immediately preceding the beginning of the fall semester. If a resident applicant is not admitted but fell within a cell on the final Liberal Arts, undeclared major, matrix close to applicants who were admitted, the applicant's file is re-read by a senior reader. During this second read, the admissions officers are not bound by the applicant's AI/PAI scores. For admission into the 2008 freshman class, 3,029 applicants were granted a second read based on having AI and PAI scores just below those admitted for the fall semester under the third stage of the admissions process. Specifically, the applicants granted this second read were those with the highest combination of AI/PAI scores that remained

on the AI/PAI matrix for the College of Liberal Arts, undeclared major, after all admissions decisions for fall 2008 were made. A true and correct copy of the "second read" matrix for the fall 2008 admission cycle (with the arrow pointing to that side of the stair-step line that was granted a second read) is attached as Exhibit C. Based on this second reading, the reader decides whether to admit the applicant to the fall semester (a rare occurrence), to the Summer Freshman Class, or to the Coordinated Admission Program ("CAP"). CAP allows students to transfer to the University of Texas at Austin after completing the CAP terms, including 30 approved credit hours their freshman year at a participating System campus and maintaining at least a 3.2 GPA. Of the 3,029 applicants granted a second read for fall 2008, approximately half were offered admission into the Summer Freshman Class program; the rest were offered admission to CAP. All Texas residents who apply to UT Austin by the application deadline are at least offered the option of participating in the CAP program, through which they can be admitted into the University of Texas at Austin.

16. The admissions process for the entering class of 2008 was an unprecedented experience. At the point of the admissions process in which admissions decisions began to be made based on the AI/PAI matrices, 92% of the admissions spaces available for Texas residents had already been awarded to Top 10% applicants. More specifically, only 841 admission slots remained available University-wide for the fall semester after accounting for all Top 10% and 'A' group automatic admits.

17. No admissions officer or anyone else at UT Austin monitors the racial or ethnic composition of the group of admitted students at any time during the admissions process in order to consider whether an applicant will be admitted.

18. As previously discussed, the impact of HB 588 automatic admission was significant for the entering class of 2008. Given the lack of space available in the fall freshman class due to the Top 10% Plan, it is accurate to say that, based on their high school class rank and test scores, neither Ms. Fisher nor Ms. Michalewicz could have gained admission through the fall review process. Ms. Fisher had a Liberal Arts AI of 3.1 and a Business AI of 3.1. Ms. Fisher's Liberal Arts AI of 3.1 reflects the sum of her Liberal Arts PGPA (3.093) plus the "units plus" bonus of 0.1 for exceeding UT Austin's minimum high school coursework requirements. Ms. Fisher's Business AI of 3.1 reflects the sum of her Business PGPA (3.038) plus the "units plus" bonus of 0.1. Ms. Michalewicz had a Liberal Arts AI of 3.3 and a Business AI of 3.2. Ms. Michalewicz's Liberal Arts AI of 3.3 reflects the sum of her Liberal Arts PGPA (3.234) plus the "units plus" bonus of 0.1 for exceeding UT Austin's minimum high school coursework requirements. Ms. Michalewicz's Business AI of 3.2 reflects the sum of her Business PGPA (3.123) plus the "units plus" bonus of 0.1. These AI's were not high enough to gain admission to either Business or Liberal Arts for fall 2008. Because of the lack of space beyond Top 10% automatic admits for the fall freshman class, all applicants who cascaded to the Liberal Arts, undeclared major, matrix were only eligible for Summer

Freshman Class or CAP admission, unless their AI exceeded 3.5. Consequently, even if Ms. Fisher and Ms. Michalewicz had each received a "perfect" PAI score of 6, neither would have received an offer of admission to the freshman entering class of fall 2008.

/s/

Kedra B. Ishop

APPENDIX P — EXHIBIT A TO AFFIDAVIT OF KEDRA B. ISHOP, "TOPICS AND TIPS FOR WRITING YOUR ADMISSION ESSAYS"

Topics and tips for writing your ADMISSION ESSAYS

To be complete, your application must include at least two essays. Most students should submit personal essays A and B. However, if you're applying to an honors program, a major with special requirements, or for scholarships, you may need to submit additional or different essays.

Essay Topics

A Personal Essay 1 (if applying for summer/fall 2008 & beyond)

Write an essay in which you tell us about someone who has made an impact on your life and explain how and why this person is important to you.

Submit online

B Personal Essay 2 (if applying for summer/fall 2008 & beyond)

Choose an issue of importance to you—the issue could be personal, school related, local, political, or international in scope—and write an essay in which you explain the significance of that issue to yourself, your family, your community, or your generation.

Submit online

D Submit this essay in place of Essay A when applying for admission to architecture, art history, pre-design, studio art, or visual art studies/art education.

Major-specific essay (if applying for summer/fall 2008 & beyond)

Personal interaction with objects, images and spaces can be so powerful as to change the way one thinks about particular issues or topics. For your intended area of study (architecture, art history, design, studio art, visual art studies/art education), describe an experience where instruction in that area or your personal interaction with an object, image or space effected this type of change in your thinking. What did you do to act upon your new thinking and what have you done to prepare yourself for further study in this area?

Submit online

Optional Essay

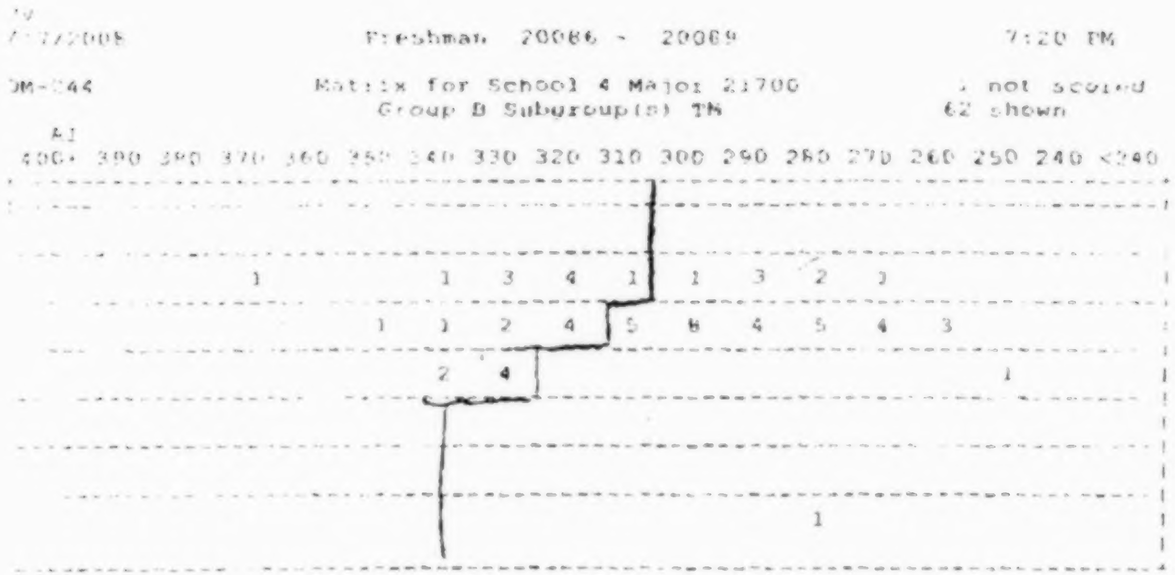
In addition to the two required essays, some applicants choose to submit a response to Essay C. Essay C is optional and cannot be submitted in place of a required essay. Students submitting Essay C do so in order to submit additional information to the university about special circumstances.

Appendix P

Special Circumstances: Essay C

There may be personal information that you want considered as part of your admissions application. Write an essay describing that information. You might include exceptional hardships, challenges, or opportunities that have shaped or impacted your abilities or academic credentials, personal responsibilities, exceptional achievements or talents, educational goals, or ways in which you might contribute to an institution committed to creating a diverse learning environment.

APPENDIX Q — EXHIBIT B TO AFFIDAVIT OF KENDRA B. ISHOP, "MATRIX FOR SCHOOL 4 MAJOR 21700"



7/7/2008 Freshman 20086 - 20089 7:20 PM

DM-044 Matrix for School 4 Major 21700 1 not scored

Group B Subgroup(s) TN 62 shown

AI

400+	390	380	370	360	350	340	330	320	310	300	290	280	270	260	250	240	<240
			1			1	3	4	1	1	3	2	1				
					1	1	2	4	5	8	4	5	4	3			
						2	4								1		
										1							

90.16

600	3.0
500	3.1
400	3.3
300	3.4
200	2.3

37

1 to 82

APPENDIX R — AFFIDAVIT OF GARY M. LAVERGNE, DATED FEBRUARY 19, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. 1:08-CV-00263-SS

ABIGAIL NOEL FISHER, and
RACHEL MULTER MICHALEWICZ,

Plaintiffs,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Defendants.

AFFIDAVIT OF GARY M. LAVERGNE

THE STATE OF TEXAS

COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, personally appeared Gary M. Lavergne, who, being by me duly sworn, upon his oath stated:

1. My name is Gary M. Lavergne. I am over 18 years of age, of sound mind, capable of making this affidavit,

and personally acquainted with the facts stated in it. I make this affidavit in support of Defendants' Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment. I have previously submitted affidavits in this matter in connection with Plaintiffs' application for a Preliminary Injunction. To the extent that any statistics in this affidavit conflict with statistics in that prior affidavit or provided during my deposition, it is because, at those times, the University of Texas at Austin did not have full information on the total applicants, admitted applicants, and enrolled students; that information was not finalized until late October, 2008.

2. I am currently employed full-time by the University in the Office of Admissions. My current official job classification is Program Manager. My job responsibilities include, but are not limited to, research and policy analysis. In this position I am required to access and analyze data related to admissions and enrollment and other related statistics. I have held this position since September 1, 2000.

3. My job duties include access to the data maintained by UT Austin even prior to my tenure at the University. A publication that comes within my area of responsibility, and which contains the University's official data for the 1996 freshman applied, admitted and enrolled data, is *Implementation and Results of the Texas Automatic Admissions Law, Volume 1.* A true and correct copy of that document is attached as Exhibit A.

4. I am also responsible for performing analysis as required by the University or the Legislature. In

November 2003, the University published a study relating to diversity in the classroom. I analyzed the University's data and compiled that report, called *Diversity Levels of Undergraduate Classes at the University of Texas at Austin, 1996-2002*. A true and correct copy of that document is attached as Exhibit B.

5. My job duties include access to the datasets used to develop a series of annual reports commonly called the "Top 10% Reports" and commonly cited as *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin*. A true and correct copy of the "Implementation and Results of the Texas Automatic Admissions Law (HB 588) at UT Austin," dated Oct. 28, 2008 (hereinafter, "2008 Top 10 Report") is attached as Exhibit C.

6. My job duties include compilation and analysis relating to the University's applicant pool, the applicants admitted, and those enrolled. To ensure consistency, a fixed "census" date is used. The University's census date is the 12th class day of the fall semester. Using the University's databases, I have compiled certain data that may be useful for understanding the makeup of the University's applicant pool, applicants admitted, and those enrolled, by race and whether the admission was through the Top 10% law. This data is the source for the following attachments: Total Number of Non-Top 10% Applicants for Years 2003 through 2006 (All Races Combined), attached as Exhibit D; Total Number of Non-Top 10% Admits for Years 2003-2008 (All Races Combined), attached as Exhibit E; Total Number of Non-Top 10% Applicants for Years 2003-2008 by Race, attached as Exhibit F; and Total

Number of Non-Top 10% Admits for Years 2003-2008 by Race, attached as Exhibit G.

7. For the class entering Summer/Fall 2008, UT Austin received 29,501 applications and offered admission to 12,843 applicants. 2008 Top 10 Report at 6. The University ultimately enrolled 6,715 students as first-time freshman for Fall 2008.

8. My job duties also include conducting periodic inter-rater reliability analyses during the admissions process. I conduct these reviews for both the essay readers and the full-file reviewers. The goal of these reviews is to measure the frequency of readers scoring within one point of each other. The expectation of this type of consistency established by the College Board for the SAT Writing test is that readers should score within one point of each other approximately 92% of the time. ACT, Inc., the publisher of the ACT Assessment, reports similar inter-rater reliability rates for its essays. This is widely considered the industry standard. The most recent formal analysis for UT Admissions, conducted in 2005, showed that essay readers scored within one point of each other 91% of the time, comparable to the reader consistency goals set by the College Board and ACT, Inc. for the SAT and ACT writing tests. According to the most recent inter-rater reliability analysis conducted on the file reading process in 2005, readers scored within one point of each other 88% of the time, consistent with industry standards.

/s/
Gary M. Lavergne

APPENDIX S — EXHIBIT D TO AFFIDAVIT OF GARY M. LAVERGNE, "TOTAL NUMBER OF NON-TOP 10% APPLICANTS FOR YEAR 2003-2008 (ALL RACES COMBINED)"

Total Number of Non-Top 10% Applicants for Year 2003-2008 (All Races Combined)

	Total Apps	HB 588 Admits	Non-HB 588 Apps
2003	24519	7132	17387
2004	23008	7089	15919
2005	23925	7466	16459
2006	27315	8353	18962
2007	27237	8476	18761
2008	29501	9253	20248

APPENDIX T — EXHIBIT E TO AFFIDAVIT OF GARY M. LAVERGNE, "TOTAL NUMBER OF NON-TOP 10% ADMITS FOR YEARS 2003-2008 (ALL RACES COMBINED)"

Total Number of Non-Top 10% Admits for Years 2003-2008 (All Races Combined)

	Total Admits	HB 588 Admits	Non-HB 588 Admits
2003	11504	7132	4372
2004	11788	7089	4699
2005	12207	7466	4741
2006	13307	8353	4954
2007	13800	8476	5324
2008	12843	9253	3590

APPENDIX U — AFFIDAVIT OF N. BRUCE WALKER, FILED FEBRUARY 23, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. 1:08-CV-00263-SS

ABIGAIL NOEL FISHER, and
RACHEL MULTER MICHALEWICZ,

Plaintiffs,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Defendants.

AFFIDAVIT OF N. BRUCE WALKER

THE STATE OF TEXAS

COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, personally appeared N. BRUCE WALKER, who, being by me duly sworn, upon his oath stated:

1. My name is N. Bruce Walker. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated in it. I make this affidavit in support of Defendants' Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment.

2. I am the Vice Provost and Director of Admissions for the University of Texas at Austin, a position I have held since 1996. I have been involved in college admissions, either as an admissions officer or as an administrator at the College Board for a total of 35 years. As part of my job duties, I participate directly in all facets of the admissions process at the University. In particular, I am responsible for guiding and administering the University's admission policy as the University strives to meet its mission.

3. Generally stated, the goal of the Admissions Office is to admit a meritorious and diverse student body. In addition to academic credentials, the University also looks to an applicant's life experiences, including an applicant's culture; race, language; family, educational, geographic, and socioeconomic background; and the applicant's personal achievement such as work, volunteer, or internship experiences; and leadership experience, among other elements.

4. UT Austin values diversity for the educational benefits it produces. Knowing that graduates of the University of Texas will go on to become future leaders of this state, in government, industry, and public service, and perhaps others, the University understands its responsibility to provide a student body that permits all

students to experience concrete benefits from diversity. In the University's judgment, these benefits include, but are not limited to, cross-racial understanding, cross-ethnic understanding, the breaking down of racial, ethnic, and geographic stereotypes. In my many years in admissions, I have read studies that tout other benefits: diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for civic responsibility in a diverse society, and for entry into professions, where they will need to deal with people of different races, cultures, languages, and backgrounds.

5. Holistic review places value on the applicant's achievements in the context of their life experiences, which bear directly on the multifaceted diversity that an applicant would bring to the University, should he or she be admitted and enroll.

6. The holistic review process was put in place, under my guidance, for the entering freshman class of 1997. This holistic review process is similar to that used at many selective universities, whether public or private. In that process, the University looks not just at the academic achievements of an applicant, but also applies additional considerations that take into account an applicant's full life experiences, including their personal achievements. For the 1997 admissions cycle, the factors considered by the admissions office included:

- Scores on two essays
- Leadership
- Extracurricular Activities

- Awards/honors
- Work experience
- Service to school or community
- Special circumstances:
  - o Socio-economic status of family
  - o Single parent home
  - o Language spoken at home
  - o Family responsibilities
  - o Socio-economic status of school attended
  - o Average SAT/ACT of school attended in relation to student's own SAT/ACT

7. In connection with putting the holistic review in place, the University developed an extensive training program for staff who would read the applications. To find someone to develop and provide training, I contacted the College Board, who administers the Scholastic Achievement Test ("SAT") to obtain recommendations for an expert in holistic review training. To my surprise, Brian A. Bremen, who is an Associate Professor of English here at the University, was recommended. I interviewed Dr. Bremen, learned that he had been involved with the College Board for many years as a trainer for holistic reading and hired him to work with the University on its admissions process. Dr. Bremen has served as a consultant to the University in this capacity for 12 years.

8. In 2003, the Supreme Court issued its decision in *Grutter v. Bollinger,* 539 U.S. 306 (2003). That case was one that was widely followed in higher education circles, and a case which we at the University tracked very closely. As a result, when *Grutter* was decided, the University faced an important decision: whether or not to use race in its admissions process.

9. Once the Board of Regents of the University of Texas System authorized its component institutions to consider whether or not to use race, the University undertook a thoughtful review of its process.

10. In August of 2003, the Office of Admissions convened a retreat and invited faculty and attorneys to join the admission staff and Dr. Brian Bremen, our trainer. Over the course of a weekend, we debated what, if any, difference injecting race into the holistic review process would make in attracting and admitting under-represented minority students. The consensus was that using race would benefit the University by increasing the number under-represented minority students and thus further the University's overall goal of having a student body that is meritorious and diverse in a variety of educationally relevant ways.

11. The University also conducted a study, the results of which were cited in a report of November 20, 2003, that examined the presence or absence in undergraduate classrooms of the four most prevalent racial categories (White, African-American, Asian, Hispanic). The results of the study showed that, in 2002, 90% of (5-24 student)

classes had one or zero AfricanAmerican students, 46% had one or zero Asian-American students and 43% had one or zero Hispanic students. Based on this study, UT Austin concluded that it had not attained a critical mass of underrepresented minorities. Because critical mass is a necessary (but not sufficient) condition of achieving diversity, UT Austin further concluded, based on the study, that the educational benefits of a diverse student body were not being provided to all the University's undergraduate students.

12. The University also relied on anecdotal information from students – those who have the most direct interaction in the classroom. Their observations backed up what the study data revealed – that there was insufficient minority representation for the full benefits of diversity to occur.

13. UT Austin concluded that it could not accomplish its diversity goals without considering race in admissions. As a result, the University put forth a proposal to consider race in its admissions process. A true and correct copy of the *Proposal to Consider Race and Ethnicity in Admissions*, June 25, 2004 (hereinafter, "2004 Proposal"), is attached as Exhibit A.

14. In August 2004, after almost a year of deliberations, the UT System approved a revised admissions policy for UT Austin that included an applicant's race in the list of special circumstances that reviewers can consider in determining the applicant's personal achievement score. Beginning with the entering

class of 2005, the University's list of considerations for personal achievement included:

- Scores on two essays
- Leadership
- Extracurricular Activities
- Awards/honors
- Work experience
- Service to school or community
- Special circumstances:
    - Socio-economic status of family
    - Single parent home
    - Language spoken at home
    - Family responsibilities
    - Socio-economic status of school attended
    - Average SAT/ACT of school attended in relation to student's own SAT/ACT
    - Race

15. As a practical matter, the only changes of note in the process were that: (1) an applicant's race (if reported by the applicant) was now included in the application file; and (2) readers were now taught to include race in the same manner as any other special circumstance. Race, like any other factor, is by itself never determinative of

an admissions decision and like every other factor is never considered in isolation or out of the context of the other aspects of the student's application file. Race is considered as part of the larger holistic review of every applicant regardless of race. No applicant is reviewed separately or differently because of their race or any other factor. An applicant's race, standing alone, is neither a benefit nor detriment to any applicant. Instead, race provides – like language, whether or not someone is the first in their family to attend college, and family responsibilities – important context in which to evaluate applicants, and is only one aspect of the diversity that the University seeks to attain.

16. The University believes that its holistic method of considering the race of all applicants benefits underrepresented minorities in the same way that our use of "race-neutral" factors such as socio-economic status at home or languages spoken do. Adding race to the other factors that we consider simply increases the chance that an underrepresented minority student will be sufficiently meritorious and diverse in all the ways that we consider educationally relevant. Again, however, race considered in context can be a positive thing for any applicant. It is not rare for UT Austin to admit a white student who was the president of a white majority high school, and neither is it uncommon for UT Austin to admit a Hispanic student was president of a Hispanic majority high school. Setting aside for a moment the other factors that we would consider, both of these students would be valued for taking leadership roles in their respective high schools, but their race in this narrow example would not be of particular moment in

terms of overall diversity. On the other hand, both a white student who is president of his or her majority African-American high school and an African-American student who is president of his or her majority white high school bring an additional aspect of diversity when one considers the relative rarity of being a student leader who can reach across racial lines.

16. The University's policy calls for formal review of the use of race every five years. Also, as an internal practice, the UT Austin admissions office informally reviews its various admissions procedures each year.

/s/
N. Bruce Walker

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 15, 2011
CERTIORARI GRANTED FEBRUARY 21, 2012

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The University of Texas at Austin

PROPOSAL TO CONSIDER RACE AND ETHNICITY IN ADMISSIONS

June 25, 2004

On August 7, 2003, the Board of Regents of The University of Texas System adopted a resolution authorizing each institution to develop and propose plans to consider race and ethnicity as part of the admission process. In response, The University of Texas at Austin herein submits recommendations to alter its admission processes for graduate students, law students, and undergraduates. It is the intent of the University to comply with the law as expressed in the decisions of the United States Supreme Court in the cases of *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), and *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003).

I. RATIONALE

The Supreme Court expresses the rationale for diversity as a compelling state interest that can justify the use of race in university admissions. (*Grutter*, 123 S.Ct. at 2339). One value of diversity in the classroom, according to the Court, is that it breaks down stereotypes *Id.* at 2329-40. This value in turn presupposes a sufficient number of minority students, or "critical mass." To break down stereotypes, there should be enough minority students for classroom discussion to reflect "a variety of views among minority students." *Id.* at 2334. A second value of diversity is that it "promotes cross-racial understanding." *Id.* at 2339. A third value is that diversity in the classroom "better prepares students for an increasingly diverse workforce and society." *Id.* at 2340. "[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.*

Each of these educational values of diversity applies to the process of education at The University of Texas at Austin.

The Court expressed a fourth value of diversity in the context of educating a diverse population. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 2341. Because college degrees are often prerequisite to many types of leadership in our country and our state, the University plays a key role in preparing a diverse set of leaders.

Moreover, racial and ethnic minority group members continue to be underrepresented in many of the occupations that require a college degree. Table 1 presents census data that show that Black and Hispanic individuals in the United States are a consistently smaller proportion of these occupations than their proportion of the labor force. [1]

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[1] The term "Black" is used whenever it was the designation used in the source document, as is the case with Tables 1 and 2, which were produced by federal agencies.

TABLE 1
PROPORTION OF SELECTED OCCUPATIONS WHO ARE BLACK OR HISPANIC, 2002, UNITED STATES

Selected Occupations	Percent Black	Percent Hispanic
Total employed in labor force, all occupations	10.9%	12.2%
Selected Occupations		
Architects	2.3	5.2
Engineers	4.5	4.0
Computer System Analysts	6.9	5.2
Natural Scientists	4.1	2.9
Pharmacists	8.0	2.5
Teachers, College and University	5.4	5.4
Lawyers	4.6	3.1
Editors and Reporters	4.7	3.3

SOURCE: U.S. Bureau of the Census, Statistical Abstract of the U.S., 2003, p. 399, Table 615

The University of Texas at Austin prepares degree candidates in each of the fields as well as many others. Although not all of its graduates stay within the state, reviewing the occupational composition within the state of Texas is a useful comparison. Table 2 presents EEOC data from 2000 for the state of Texas.

Hispanics comprise a fraction of the Texas labor force that is more than twice their fraction of the national labor force. The Black proportion of the Texas labor force is just slightly lower than the national proportion. In most occupations in Texas, as in the nation, minorities are underrepresented in these occupations.

In Texas, unlike the nation, the fraction of pharmacists who are Black is larger than the fraction of Blacks in the labor force. In other occupations, the fraction of Blacks is well below their overall representation in the labor force. The fraction of Hispanics in these occupations is well below their representation in the labor force. There is not yet a visibly diverse set of leaders in these and many other occupations that require a college degree.

TABLE 2
PROPORTION OF SELECTED OCCUPATIONS WHO ARE BLACK OR HISPANIC, 2002, TEXAS

Selected Occupations	Percent Black	Percent Hispanic
Total employed in labor force, all occupations	10.5%	27.5%
Selected Occupations		
Architects	2.4	11.5
Engineers	na	Na
Computer System Analysts	8.4	9.7
Natural Scientists	na	Na
Pharmacists	11.7	12.4
Teachers, College and University	5.3	10.9
Lawyers	3.9	8.1
Editors and Reporters	4.9	12..1

SOURCE: Derived by the Texas State Data Center from the Census 2000 EEO Data available at the following site: http://www.census.gov/eeo2000/index.html. Occupational codes are slightly different from those used in Table 1.
na = not available

The relative shortage of qualified minority professionals is translated into additional under-representation in leadership positions that are normally occupied by seasoned professionals. In 2003, for example, minorities accounted for only 8.8% of the nearly 7,500 director seats among the Standard & Poor 1500 companies.[2] Public universities such as The University of Texas at Austin bear a special responsibility in ensuring that "the path to leadership be visibly open to talented and qualified individuals."

DIVERSITY BROADLY CONSIDERED

The Court did not approve the pursuit of racial diversity alone, but only as part of a broader conception that values many forms of diversity. "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Grutter*, 123 S.Ct. at 2328-29 (quoting Justice Powell's opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978)). Therefore, as the recommendations below will demonstrate, consideration of race and ethnicity will serve as but one component of many in a holistic admission review of applicants to be graduate students, law students, or undergraduates.

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[2] Chris Luna, "Companies need to do more to create diverse boardrooms," Dallas Morning News (27 April 2004): 11a.

II. ADMISSIONS PROGRAMS TO BE NARROWLY TAILORED

A. INDIVIDUAL CONSIDERATION

Universities may *not* set aside a fixed number of seats for minority applicants. *Bakke*; *Grutter*, 123 S.Ct. at 2342. They may *not* award a fixed number of points to minority applicants. *Gratz*, 123 S.Ct. at 2427-28. They may *not* put minority applications "on separate admissions tracks." *Grutter*, 123 S.Ct. at 2342. They may *not* consider race in a "mechanical" way. *Id.* at 2343. "Outright racial balancing" remains "patently unconstitutional." *Id.* at 2339. This proposal does not involve any of these proscribed methods.

What universities *may* do is "consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." *Id.* at 2343. The Court emphasized that the law school admission process was "highly individualized and holistic" for all races. *Id.* Any part of the admissions process that considers race must be individualized. But the Court clearly implies that a school could have color-blind admissions at the top and bottom of the distribution, and consider race on an individualized basis only in a discretionary zone in middle of the applicant pool. Gratz, 123 S.Ct. at 2429 n.21. In this proposal, individualized consideration will be used whenever a race-neutral method, such as the admission of the top decile of high school graduates, is not used.

B. THE WEIGHT GIVEN TO RACE/ETHNICITY

The Court never specified how much weight can be given to race. It stated that race cannot be a guarantee of admission for all minimally qualified minority candidates. But it acknowledged that in "any plan that uses race as one of many factors," "race is likely outcome determinative for many members of minority groups." *Grutter*, 123 S.Ct. at 2371. The Court rejected the argument that race can be given no more weight than other diversity factors. It recognized that the Law School plan gave special attention to underrepresented minorities as "one particular type of diversity." *Id.* at 2342. It said that universities must consider "all pertinent elements of diversity, . . . although not necessarily according them the same weight." *Id.* at 2342, quoting Justice Powell in *Bakke*. The Court noted that the Harvard plan of the 1970s, which it endorsed, "gave greater weight to race than to some other factors."[3] *Id.* at 2342.

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[3] Beyond that, the best evidence of what the Court is prepared to approve is what it actually did approve at Michigan's law school. The Court quoted the testimony of plaintiff's expert witness that race "is an extremely strong factor in the decision for acceptance," and that minority applicants "are given an extremely large allowance." *Id.* at 2334. But this expert also conceded "that race is not the predominant factor in the Law School's admissions calculus." *Id.* (Court's paraphrase). The Law School's expert testified that in 2000, 35% of underrepresented minority applicants were admitted, and that if race had not been

The Court requires that all admitted students be qualified, but also recognizes that who is qualified depends on standards that vary from school to school. The Court emphasized that the law school's "policy stresses that 'no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems'."*Id.* at 2332.

In this proposal, there is no intention that an unqualified applicant would ever be admitted. The position faced by The University of Texas at Austin is that for every degree program, there are many more qualified applicants than there are spaces, and there must be procedures in place to choose among many applicants who could be successful in their degree programs. None of the admissions programs described in this proposal assigns a specific weight to be given to race or ethnicity.

C. QUOTAS AND GOALS

The Court rejected quotas but approved of goals. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups." *Id.* at 2342, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (plurality opinion). "In contrast, 'a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself.'" *Grutter*, 123 S.Ct. at 23, quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1987) (O'Connor J., concurring in part). The Court noted that the proportion of underrepresented minorities in the law school's entering class had varied from 13.5% to 20.1%, "a range inconsistent with a quota." *Grutter,* 123 S.Ct. at 2343.

Michigan's law school defined its goal as a "critical mass," and refused to specify a number. One official testified that "critical mass" meant "meaningful representation," and enough minority students to encourage minority participation in classroom discussion and to avoid feelings of racial isolation. *Id.* at 2333-2334. Justice Kennedy asserted that the law school had historically defined "critical mass" as at least 12% of the student body. The Court emphasized that minority enrollment varied from year to year and differed significantly from minority percentages in the applicant pool. *Id* at 2371. In her separate opinion in *Gratz*, Justice O'Connor added that "the weight attributed to a particular quality may vary from year to year depending on the 'mix' both of the student body and the applicants for the incoming class," again quoting Justice Powell. *Gratz,* 123 S.Ct. at 2432 (O'Connor J., concurring). The Court rejected the claim that commitment to "critical mass," however defined, turned the law school's plan into a quota.

Further, the Court's discourse makes clear that the goal (or critical mass), and the weight given to race, can take some account of the relative size and qualifications of different minority groups in the applicant pool.

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considered, only 10% would have been admitted. *Id.*. Underrepresented minorities constituted 14.5% of the entering class; if race had not been considered, they would have been only 4% of the entering class. *Id.*

D. CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES

The Court said that narrow tailoring requires "serious, good faith consideration of workable, race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 123 S.Ct. at 2344. University of Texas administrators have been struggling with these issues for many years, and in Texas, they have been experimenting with race-neutral alternatives for seven years. Administrators already have a good idea of what has worked and what has not, and with what side effects and costs. What is presented below, in condensed form, is a record of these judgments.

"Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.* The Court indicates that an institution must use race-neutral alternatives only if they "serve the interest about as well." *Id.* An institution is not required to use race-neutral alternatives that would significantly lower admission standards, admit unqualified students, or impede other important educational objectives.

E. PERIODIC REVIEW

The Court also said that "race-conscious admissions policies must be limited in time." *Id.* at 2346. But it did not require universities to announce an arbitrary time limit in advance, nor did the Court set such a time limit. Its much publicized reference to what might happen in 25 years is a prediction, not a time limit or a rule of law:

> Since [1978], the number of minority applicants with high grades and test scores has indeed increased. We *expect* that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Id. at 2347 (emphasis added).

What the Court did require is periodic review of our policies. "[T]he durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id* at 2346. The Court also said that schools "should draw on the most promising aspects" of race-neutral alternatives developed in other states. *Id.*

This proposal establishes a schedule for periodic reviews to assess whether, and to what extent, consideration of race/ethnicity is still needed.

F. THE TOP 10% LAW

The constitutionality of percentage plans was not at issue in these cases, but they were offered as race-neutral alternatives that ended the need for consideration of race. The Court squarely rejected that argument, noting that percentage plans do not work for graduate and professional schools and that they preclude individualized consideration of applicants, and hinting that they may not be race neutral. *Id.* at 2345. The University of Texas at Austin will comply with state laws affecting admissions, including the current requirement for automatic admission of students graduating in the top decile of an accredited high school.

The Top Ten Percent legislation affects only freshman undergraduate admissions. Because the admission processes for graduate students, law students, freshmen, and transfer are independent of one another, the present document is organized according to categories of students. However, officials responsible for implementation in each category will consult with University's attorneys to assure full compliance with the law.

III. GRADUATE PROGRAMS (EXCLUDING LAW)

A. RATIONALE

An undergraduate education provides the foundation on which many students build and continue their intellectual development. Graduate training is essential to become proficient in a specific discipline, conduct advanced research, and contribute to the development of new knowledge. The objectives of graduate study are to develop intellectual breadth, to obtain specialized training, and to develop the skills necessary to assume a role of leadership in the academic field of study and in society. Emphasis is placed on the acquisition and development of knowledge, problem solving, methodologies for pursuing original research, teaching skills, intellectual leadership, and creative expression in the student's discipline.

To meet the objectives of graduate study, the educational environment must foster a robust exchange of ideas and provide exposure to differing perspectives. In the absence of a diverse environment, graduates will not be prepared to meet the challenges of creating knowledge and becoming leaders in an increasingly diverse workforce and academy. Conversely, creating a dynamic and diverse environment will help ensure that graduates are prepared to succeed, to prosper, to lead, and to shape the future. Graduate degree programs produce the leaders in business (M.B.A.), education (Ed.D.), social work (M.S.S.W.), information (M.S.I.S.), research institutions and universities (Ph.D.). To have a visibly diverse class of leaders, it is important that graduate programs across the board educate a diverse group of students.

B. DIVERSITY BROADLY CONSIDERED

A diverse student body is not only racially and ethnically diverse, but also diverse in work experience, family and socioeconomic background, cultural background, language, leadership experience, creative experience, and artistic talent, to cite just a few examples. The section below lists a number of aspects of diversity that will be considered in the holistic, full-file review.

C. ADMISSION PROGRAM TO BE NARROWLY TAILORED

1. INDIVIDUAL CONSIDERATION

The Graduate School sets general policies and guidelines for admission and endorses the admission of students who meet both departmental and Graduate School admission criteria. Although responsibility for graduate admissions ultimately rests with the Vice Provost and Dean of Graduate Studies, admission decisions are made by admissions committees at the graduate program and departmental levels. These admission decisions are already holistic and based on the review of the full file. Specifically, the decisions are based on (1) an assessment of the academic strength of the applicant's record and potential for advanced study and (2) an individualized, holistic review of each application that considers how the applicant might contribute to, and benefit from, the diversity of educational environment of the department of choice as well as the broader university. Some departments also consider factors based on mandates and standards dictated by their fields and professions. However, graduate programs and departments will not use any mechanical means to sort their applications. For example, there will be no cutoff scores on standardized examinations such as the Graduate Record Examination.

The following basic criteria and additional personal factors are currently considered in making graduate admission decisions. It must be emphasized that this list is not exhaustive and that certain graduate programs may weigh factors differently. Indeed, for some programs, certain of these criteria might be deemed more important than others. This proposal would add consideration of race and ethnicity to the other "special circumstances" under Additional Personal Factors.

Basic Admission Criteria

- Applicant's upper-division undergraduate grade point average
- Applicant's undergraduate education transcript(s)
- Applicant's GRE (or GMAT) scores
- Letters of reference
- Personal statement

Additional Personal Factors

- Personal statement (essay) and portfolio (if required)
    - Evidence of commitment to the field
    - Professional goals
    - Specific research interests (if pertinent to degree program)
- Publications or writing sample (if pertinent to degree program)
- Leadership
- Interviews
- Auditions (if pertinent to degree program)
- Extracurricular activities
- Professional memberships, awards, and honors
- Work experience
- Laboratory experience (if pertinent to degree program)
- Service to undergraduate institution or community
- Special circumstances, such as
    - Socioeconomic status of family

- Single parent
- Language spoken at home
- Family responsibilities
- Overcoming adversity, including disabilities
- Cultural background
- Other information in the file

2. THE WEIGHT GIVEN TO RACE/ETHNICITY

Race or ethnicity would be added as one among the many factors considered as part of a holistic, full-file review. No particular weight would be assigned to this factor, and the significance of this factor might vary from program to program.

3. QUOTAS AND GOALS

Consideration of race and ethnicity in the admission process does not mean that members of particular racial or ethnic groups will be admitted automatically. There will be no separate tracks for minority groups in the admission process. Moreover, because the Supreme Court decision specifically excludes any automatic admission based on race or ethnicity, graduate programs will not participate in any arrangements or consortia that require automatic admission.

4. CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES

Graduate admissions policies and guidelines have been race-neutral since 1997, as a result of the court decision in the case of *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) in 1996. Following that decision, the Graduate School of The University of Texas at Austin attempted to achieve racial diversity by increasing its recruiting efforts and by initiating two race-neutral fellowship programs: The McNair Scholars Fellowship Program and the South Texas Graduate Fellowship Program.

McNair Scholars Fellowship Program

The Ronald McNair Program is a national, race-neutral program that assists low-income and first-generation undergraduate college students who wish to prepare for graduate school. Funded by the U.S. Department of Education, this program, named for the African American scientist and astronaut who was killed in 1986 accident of the space shuttle *Challenger*, offers selected undergraduates access to research opportunities, faculty mentors, opportunities to publish and present research findings, and preparation for the Graduate Record Examination and graduate-level coursework. It is an excellent undergraduate preparation for attending graduate school.

The McNair Scholars Fellowship Program was initiated by the Graduate School in 1999 to encourage undergraduate McNair participants to pursue a graduate education at The University of Texas at Austin. To be eligible for the McNair Scholars Fellowship Program, applicants must be admitted to a graduate program at The University of Texas at Austin and must be nominated by the graduate adviser of the program of study. The McNair Scholars Fellowship Program covers tuition and required fees for the first year of study at the University. This fellowship may be held in combination with any other appointment or fellowship. McNair Fellows are also eligible for an application fee waiver when applying for admission to the Graduate School.

A total of 35 McNair Fellows have received first-year graduate school support since the program's inception in 1999. Table 3 indicates that the largest portion of McNair Fellows are Hispanics (43%), followed by whites (26%), and African Americans (17%).

Table 3
McNair Fellowships

	1999		2000		2001		2002		2003	
	N	%	N	%	N	%	N	%	N	%
White	1	33.33			1	14.28	3	37.5	4	40
Native American			1	14.28						
African American	1	33.33	1	14.28	2	28.57	1	12.5	1	10
Asian American			2	28.57						
Hispanic	1	33.33	2	28.57	3	42.86	4	50	5	50
International					1	14.28				
Unknown			1	14.28						
Total	3	100	7	100	7	100	8	100	10	100

SOURCE: Office of Graduate Studies, The University of Texas at Austin

South Texas Graduate Fellowship Program

The South Texas Graduate Fellowship Program is a race-neutral program instituted at the University in Fall, 2002. It offers first-year fellowships to students who have graduated, or who are graduating, from a public university in South Texas (including Bexar County) and who enter a master's or doctoral program at The University of Texas at Austin. These merit-based fellowships are awarded to outstanding incoming graduate students, allow recipients who are not Texas residents to pay in-state tuition, may be held in combination with any other appointment or fellowship, and require recipients to register as full-time students for the duration of the award.

To be eligible, an applicant must be nominated by the graduate adviser of a particular graduate program, must be a full-time graduate student in good academic standing, and must have received an undergraduate degree from one of the following institutions:

The University of Texas at Brownsville
The University of Texas - Pan American

The University of Texas at San Antonio
Texas A&M University - Corpus Christi
Texas A&M University - Kingsville
Texas A&M International University - Laredo

A total of 40 South Texas Graduate Fellows have been funded at The University of Texas at Austin since the program's inception in 2002. Table 4 indicates that the largest portion of South Texas Graduate Fellows are Hispanics (63%), followed by whites (35%).

Table 4
South Texas Graduate Fellows

	2002		2003	
	N	%	N	%
White	9	45	5	25
Native American				
African American				
Asian American			1	5
Hispanic	11	55	14	70
International				
Unknown				
Total	20	100	20	100

SOURCE: Office of Graduate Studies, The University of Texas at Austin

No other race-neutral alternatives have appeared to be feasible for graduate programs. There is no workable equivalent to a percentage plan that would work for graduate studies. Moreover, the competition for good graduate students is especially intense, and most of the nation's excellent graduate schools were neither limited to race-neutral methods nor were as limited in graduate fellowship funding as The University of Texas at Austin has been. The result is that the Graduate School has not been successful in achieving racial diversity.

Prior to the *Hopwood* decision, enrollment percentages for African Americans and Hispanics in graduate programs were marginal at best. Since that time, these percentages have decreased substantially and remain below the 1996 levels, demonstrating that the current race-neutral admission model has failed to yield a racially diverse student body or to achieve "critical mass."

Table 5 shows the characteristics of entrants to graduate programs for Fall, 2003, compared with earlier years. The 2003 data indicate that of the entrants, 0.3% were

Native Americans, 2.2% were African Americans, and 8.1% were Hispanics. By comparison, the 1996 data indicate 0.3% enrollment for Native Americans, 3.6% for African Americans, and 8.1% for Hispanics. (See Table 5.) Over this period of time, the absolute number of African American entrants declined from 103 to 76. The absolute number of Hispanic entrants rose from 243 to 276, but this was not so large an increase as that of the entering graduate population.

Table 5
Graduate Fall and Summer Entrants Combined
1996-2003

	1996		1997		1998		1999		2000		2001		2002		2003	
	N	%	N	%	N	%	N	N	%	%	N	%	N	%	N	%
White	1,803	63.0	1,829	63.0	1,685	58.1	1,673	54.5	1,722	55.7	1,685	54.1	1,853	53.3	1,946	57.3
Native American	10	3	10	.3	16	.6	12	.4	9	.3	9	.3	7	.2	10	3
African American	103	3.6	69	2.4	63	2.2	63	2.1	76	2.5	56	1.8	78	2.2	76	2.2
Asian American	142	5.0	129	4.4	148	5.1	187	6.1	167	5.4	178	5.7	238	6.9	233	6.9
Hispanic	243	8.5	206	7.1	169	5.8	197	6.4	190	6.1	226	7.3	270	7.8	276	8.1
International	561	19.6	662	22.8	779	26.8	876	28.5	873	28.2	871	28.0	916	26.4	753	22.2
Unknown					42	1.4	63	2.1	54	1.7	87	2.8	112	3.2	105	3.1
Total	2,862	100	2,905	100	2,902	100	3,071	100	3,091	100	3,112	100	3,474	100	3,399	100

SOURCE: Office of Institutional Research, The University of Texas at Austin, Statistical Handbook, 2002-2003 edition

The failure of race-neutral strategies is also apparent in the total enrollment among the thirteen colleges and schools at The University of Texas at Austin with graduate programs (excluding the School of Law, which is covered separately in Section IV). Thus for Fall, 2002, five of the colleges and schools had one or no Native Americans enrolled in graduate programs, two had one or no Hispanic students enrolled in doctoral programs, and six had one or no African Americans enrolled in doctoral programs. Table 6 indicates that the educational benefits of racial diversity are not available for the graduate students in many of the graduate programs at U.T.-Austin.

Within the colleges and schools, the lack of minority student representation at the program level is even more revealing. For the same period (Fall, 2002), 95% of the 127 graduate programs (excluding Law) at The University of Texas at Austin had one or no Native American students, 77% had one or no African American, and 45% had one or no Hispanics. The situation was similar in Fall, 2003, when 97% of the graduate programs had one or no Native Americans, 73% had one or no African Americans, and 47% had one or no Hispanics. Many of The University of Texas at Austin graduate programs, therefore, approach what the Supreme Court has called "the inexorable zero." *Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

Table 6
Graduate Fall 2002 Enrollment by College, Level, Ethnicity, and Gender

		White	Native American	African American	Asian American	Hispanic	International*	Unknown	Total
COLLEGE	LEVEL	N	N	N	N	N	N	N	N
ARCHITECTURE	M	127		5	9	13	43	3	200
	D	6			1	1	6		14
	Total	133		5	10	14	49	3	214
BUSINESS ADMIN	M	826	5	20	177	80	324	56	1,488
	D	31	1	1	3	2	72	2	112
	Total	857	6	21	180	82	396	58	1,600
COMMUNICATION	M	217	1	6	16	36	66	13	355
	D	111	1	14	12	16	65	5	224
	Total	328	2	20	28	52	131	18	579
EDUCATION	M	353	1	26	13	74	85	13	567
	D	455	6	64	20	106	119	10	778
	Total	808	7	90	33	180	204	23	1,345
ENGINEERING	M	363	1	8	65	31	449	9	926
	D	243	3	5	37	20	651	8	967
	Total	606	4	13	102	51	1,100	17	1,893
FINE ARTS	M	252	1	5	4	24	50	10	346
	D	147			12	17	86	6	268
	Total	399	1	5	16	41	136	16	614
INFORMATION**	M	179		2	4	27	30	9	251
	D	26			1	3	10		40
	Total	205		2	5	30	40	9	291
LAW		1,070	7	54	87	150	49	69	1,486
LIBERAL ARTS	M	360	1	7	22	65	95	15	565
	D	710	6	32	30	97	271	20	1,166
	Total	1,070	7	39	52	162	366	35	1,731
NATURAL SCIENCES	M	300	1	2	21	22	183	19	548
	D	440	2	1	37	14	494	12	1,000
	Total	740	3	3	58	36	677	31	1,548
NURSING	M	120		8	7	19	4	6	164
	D	21		3	2	4	8		38
	Total	141		11	9	23	12	6	202
PHARMACY	M	17				3	3	1	24
	D	23		4	6	8	46		87
	Pharm D	121	1	7	58	44	1	3	235
	Total	161	1	11	64	55	50	4	346
PUBLIC AFFAIRS	M	130	2	10	11	18	35	5	211
	D	9		1		1	12	1	24
	Total	139	2	11	11	19	47	6	235
SOCIAL WORK	M	211	2	11	9	42	13	14	302
	D	29		6	3	4	17	2	61
	Total	240	2	17	12	46	30	16	363
INTERCOLLEGIAL PROGRAMS	M	46			6	5	8	3	68
	D	18				1	24	2	45
	Total	64			6	6	32	5	113
TOTAL UT AUSTIN	M	3,503	15	110	364	459	1,388	176	6,015
	D	2,307	19	131	164	244	1,891	68	4,824
	Pharm D	121	1	7	58	44	1	3	235
	Law	1,070	7	54	87	150	49	69	1,486
	Total	7,001	42	302	673	897	3,310	316	12,560

M: Master's D: Doctoral PharmD: Doctor of Pharmacy T: Total

* International student figures include foreign exchange students

** In Fall 2002, the Graduate School of Library and Information Science was renamed the School of Information

Note: Intercollegial Programs are administered by the Graduate School, as opposed to one of the academic colleges/schools

SOURCE: Office of Institutional Research, The University of Texas at Austin, Statistical Handbook, 2002-2003 edition

Using 1997-2002 data from the Office of Graduate Studies, Table 7 provides further evidence of the failure of race-neutral policies at the graduate level. The table reveals that the doctoral degrees awarded to African Americans during those years are concentrated in just a few colleges. Essentially, four colleges have graduated 90% (n=93) of all African American students earning PhDs and EdDs during those five years. This is a compelling example of how, under race-neutral policies, there is a lack of African American doctoral students across the disciplines and a corresponding lack of opportunity for students in all disciplines to engage in learning in the context of diverse points of view, experiences, and values.

Table 7
PhDs and EdDs Awarded to African Americans, 1997-2002

College/School	Number	Percent
School of Architecture	0	0.0
McCombs School of Business	0	0.0
LBJ School of Public Affairs	0	0.0
School of Nursing	0	0.0
College of Fine Arts	1	1.1
School of Information	1	1.1
College of Pharmacy	1	1.1
School of Social Work	2	2.2
College of Natural Sciences	4	4.3
College of Engineering	6	6.5
College of Communication	9	9.7
College of Liberal Arts	19	20.4
College of Education	50	53.8
Total	93	

SOURCE: Office of Graduate Studies, The University of Texas at Austin

While the University cannot claim to have achieved racial diversity in graduate programs prior to the *Hopwood* decision, student data from the seven race-neutral years since *Hopwood* indicate even less diversity. Race-neutral admission policies have not only failed to increase racial diversity, they have also exacerbated the appearance that the University is largely closed to nonwhite applicants and does not provide a welcoming, supportive environment to underrepresented minority students. The Graduate School is committed to continuing race-neutral programs such as the McNair and South Texas initiatives in order to build upon their strengths. However, such race-neutral programs cannot by themselves bring the University to "critical mass."

5. PERIODIC REVIEW

The proposed policy will be reviewed every five years, with the next review beginning in Fall, 2009.

6. CONCLUSION

In *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Supreme Court upheld the constitutionality of race-conscious admission policies designed to promote diversity in higher education. The decisions are supported by the following statements:

> "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 123 S.Ct. at 2340-41.
>
> "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society . . . For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity." *Id.* at 2340.
>
> [Higher education] "must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America." *Id.* at 2341.

Together, these Supreme Court decisions affirm the importance of achieving racial diversity. The major requirement of the Court is that students be considered individually and holistically. In addition, the Court's decisions validate a university's need to seek more than token numbers of minority students and to reach instead an appropriate "critical mass" in order to achieve educational objectives.

Instituting race-conscious graduate admission policies is not only a legitimate goal for The University of Texas at Austin, it is a societal imperative, especially in the State of Texas. Employers both want and need graduates who can function effectively in an environment that is increasingly global and multicultural in almost all fields. Population projections indicate that racial diversity in Texas and across the United States will continue to grow, and that eventually most large urban populations will have a majority of people of color. Given these inevitabilities, it is critical that graduate students at The University of Texas at Austin experience a learning environment that provides exposure to diverse ideas and cultures, in addition to an opportunity for leadership development in a complex, multifaceted world.

The enrollment data presented with this proposal demonstrate emphatically that the Graduate School has not reached the "effective participation" or "critical mass" referred to in recent Supreme Court decisions. Not only have the percentages of Native Americans, African Americans, and Hispanics in the total graduate enrollment decreased in the years since race-neutral polices were mandated by the courts, but in a preponderance of the graduate programs at the University, representation of Native Americans, African Americans, and Hispanics is either negligible or absent.

The Graduate School of The University of Texas at Austin should keep the best of what it has developed in the years since *Hopwood*. However, based on recent Supreme Court decisions, the Graduate School should also resume consideration of race and ethnicity to ensure the creation of a diverse graduate student body.

Proposed Race-Conscious Graduate Admission Policy

As authorized by the Board of Regents, The University of Texas at Austin has reviewed its graduate admission policies to determine the success of race-neutral alternatives to affirmative action. Having completed that review, the University submits the following proposal to add race and ethnicity as considerations in the current holistic review of applications for admission to all graduate programs administered by the Office of Graduate Studies at The University of Texas at Austin.

IV. SCHOOL OF LAW

A. RATIONALE

Grutter v. Bollinger, 123 S.Ct. 2325 (2003), and *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003), hold that public universities and their components (which include the Law School) have a compelling interest in diversity in their student bodies, including but not limited to racial and ethnic diversity.

The Court recognized diversity in two distinct senses. One is diversity in the classroom, which requires sufficient numbers of minority students to reveal the diverse viewpoints among them. See *id.* at 2341. With respect to African Americans, even the 2003 experience is marginal for this purpose. The first-year Law School class at The University of Texas at Austin is divided into four sections, each of which is further divided into three or four small sections for one class. These small-section classes are a hugely expensive investment in first-year instruction; the Law School makes this investment because of the faculty's judgment that the small sections are such an important part of first-year instruction that the investment is justified. Thirty African American students divided among twelve to sixteen small sections means one or two, occasionally three, African American students in each small section. Such numbers do not serve the pedagogic purposes of a critical mass.

The Court's second meaning of diversity is that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* On this criterion, a critical mass in Texas is necessarily larger than a critical mass in Michigan. A majority of the college-age population in Texas is African American or Hispanic, and this percentage has increased sharply in the years since *Hopwood*. (These data were computed from www.census.gov.) Even if the Law School believed that its 2003 minority numbers were sustainable, those numbers in 2003 left minority students much more underrepresented than they were with similar numbers in 1990 or 1992. As the state's minority population grows, the numbers needed to create the visible appearance of openness in the Law School also grows. Tables 1 and 2, above, show that Black and Hispanic minority groups remain substantially underrepresented among attorneys in Texas and in the nation.

B. DIVERSITY BROADLY CONSIDERED

Historically, the Law School gave special consideration to African Americans and Mexican Americans. The rationale was that these were the two groups with an historic claim on Texas. These groups had lived in the state and been the targets of discrimination in the state for a very long time. That is a past-discrimination rationale; it is not *Grutter*'s rationale.

Grutter's rationale is diversity, very broadly defined. On *Grutter*'s rationale, any identifiable and underrepresented group contributes to diversity and is as much deserving of affirmative action as African Americans and Mexican Americans. The most important implication of this rationale is that an ethnicity classification should now extend to all Hispanics, not just Mexican Americans.

In addition, the School of Law, through its holistic, full-file review, will consider a variety of characteristics besides race and ethnicity that may fairly be considered contributors to diversity.

C. ADMISSIONS PROGRAMS TO BE NARROWLY TAILORED

1. INDIVIDUAL CONSIDERATION

The Supreme Court requires that any consideration of race or ethnicity take place in the context of a selection process that is "highly individualized" and "holistic." *Grutter*, 123 S.Ct. at 2343. The Law School may consider race or ethnicity more flexibly "as a 'plus' factor in the context of individualized consideration of each and every applicant." *Id.* at 2342. This individualized review must give each applicant an opportunity to explain the ways in which he or she might contribute to diversity, and all those diverse contributions must be considered--not just racial diversity, but all forms of intellectual and experiential diversity. The Law School's existing essays and full-file review appear to satisfy these requirements.

a. Evidence of individualized consideration

In upholding the admission process at the University of Michigan Law School, the Court relied on evidence that "the Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are selected." *Id.* at 2330. Such evidence may be the most effective and objective way to prove that diversity factors other than race and ethnicity genuinely matter. As a consequence of the Law School's serious commitment to the Court's broad conception of diversity, there will be white and Asian applicants admitted from the same range of grades and test scores as underrepresented minority candidates benefiting from affirmative action.

b. No guarantees

The Law School cannot make decisions in a way that guarantees admission to all or generally all minority applicants with at least minimum qualifications. This means that some qualified minority applicants must be rejected. This may also mean slower progress in terms of racial diversity, but to the Court, it is essential evidence that underrepresented minority candidates are in genuine competition with white and Asian candidates.

c. Separate admission tracks

The rule against separate admission tracks does not preclude separate tracks if applicants are sorted into the tracks on a completely color-blind basis. For example, as a matter of federal law the Law School could have a portion of the process at the top or bottom of the applicant pool that is color-blind and mechanical. (At the undergraduate level, the Texas Top 10% Plan is a color-blind and mechanical separate track.) The Law School, however, does not desire to create such a separate track. Therefore, the Law School will abandon the process in which some admission application files were diverted to review by faculty panel. All files will be reviewed in one unified administrative process.

2. THE WEIGHT GIVEN TO RACE/ETHNICITY

It is impossible to specify with any precision how much weight should be given to race. It is even difficult to measure how much weight has been given to race in any given year. The Court is clear in *Grutter* that race may carry more weight than other diversity factors. The Court is equally clear that race cannot effectively guarantee admission to all qualified minority applicants, or have a fixed or mechanical weight in the process.

A principal justification for renewed consideration of race is that, by considering race directly, the Law School will be able to admit stronger minority candidates and fewer minority candidates who are weaker but fit some proxy. This implies a floor under affirmative action: as compared to 2002 and 2003, the Law School should admit fewer applicants with academic credentials well below the main body of the entering class. (*Texas Education Code* §51.822 precludes rejecting any applicant wholly or principally because of his or her LSAT score, but it does not preclude rejection of candidates who still appear weak after full-file review.)

Of course, the Law School should also keep the benefit of what has been learned in the seven years since *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). It has honed its recruiting skills and its prelaw institutes are expanding the applicant pool. It seems reasonable to expect that the Law School can increase minority enrollment while giving race somewhat less weight than in the era before *Hopwood*.

3. QUOTAS AND GOALS

No part of this review will be mechanical. The Law School will *not* set aside a fixed number of seats for minority applicants. It will *not* award a fixed number of points to minority applicants. It will *not* put minority applications "on separate admissions tracks." It will *not* consider race in a "mechanical" way. "Outright racial balancing" remains "patently unconstitutional." *Id.* at 2339.

4. CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES

Before considering race in admission, a school must give "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 123 S.Ct. at 2345. However, a school need not use race-neutral alternatives that sacrifice academic excellence or that do not work "about as well" as considering race. *Id.* at 2344. Thus, the Law School may consider both the degree of diversity achieved with race-neutral alternatives and the academic cost of achieving diversity with those methods as compared to direct consideration of race. The resolution at the meeting of the Board of Regents on August 7, 2003, directs The University to consider both costs and benefits.

The Law School has used a variety of race-neutral alternatives for the seven years, from 1997 to 2003, since *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In 1996, the school considered race for part of the admission season, before *Hopwood* was decided and again after the court issued a stay. Below is a summary of the costs and benefits of race-neutral alternatives experienced by the Law School over the seven race-neutral years.

The Extent of Diversity Achieved

The district court opinion in *Hopwood*, 999 F.Supp. 561 (W.D. Tex. 1994), reports enrollment data for African Americans and Mexican Americans back to 1983. The Law School has similar data for the years since the opinion. Thus enrollment data for over fourteen years are available. Enrollment of these two minority groups fluctuated widely during these fourteen years. Despite aggressive efforts with race-neutral alternatives, for six of the seven race-neutral years (1997 to 2002), enrollment did not reach the lowest levels achieved in any of the fourteen affirmative-action years for either group. In 2003, the Law School re-entered that range. African American enrollment at 6% remained below the mean for the affirmative action years. Mexican American enrollment at 13.9% was, at least for 2003, near the high end of the range of the affirmative action years.

The experience of 2003 does not appear to represent a new status quo that can reliably be replicated. Nonfarm employment peaked in February, 2001, and total employment declined more or less continuously from then until the arrival of the 2003 entering class. (These data are available at http://data/bls.gov/cgi-bin/surveymost.) Such weak economic conditions limit the job opportunities of new college graduates, reduce the opportunity costs of continued education, and thus lead to higher application rates and higher yield rates. The number of applications from whites and African Americans increased sharply in 2002, and modestly further in 2003 (although African American applications still remained well below their range for the affirmative action years). The number of applications from Mexican Americans increased sharply in 2003. Yield (the percentage of offers of admission that are accepted) increased for all ethnic groups, but most dramatically for underrepresented minorities. The 2003 yields for African Americans and Mexican Americans exceeded any levels seen in the sixteen years for which the Law School has yield records; in the case of African Americans, the 2003 yield exceeded the previous high by a large margin. These very high yields presumably reflect the economy; there is no reason to believe that either the application rate or the yield rate will continue at these high levels once the economy improves.

High yields can also result from making offers to applicants deeper in the applicant pool. Such offers are a cost of relying on race-neutral alternatives, as explained below. The one point to make here is that in 2002, the Law School went even deeper into the pool than in 2003 but enrolled many fewer minority students. This is further evidence that aggressive use of race-neutral alternatives does not necessarily produce diverse enrollment, and that the continuing weak economy played a major role in The University's 2003 enrollment.

The Costs of Race-Neutral Alternatives

Over the past seven years, the Law School has developed an array of race-neutral alternatives. The most important of these are the prelaw programs at University of Texas System institutions in El Paso, San Antonio, and the Rio Grande Valley, which help to strengthen the pool of minority applicants. The University of Texas at El Paso, The University of Texas at San Antonio, and The University of Texas-Pan American each conducts a pre-law program ("Institute") to assist students with law school preparation. The institutes provide an intensive pre-law curriculum that includes the study of legal research and writing and LSAT preparation. In addition, students are given an introduction to first-year law courses such as "Contracts" and "Torts" to enhance the analytical skills of the students and to improve their written and oral communication skills. The Law School of The University of Texas at Austin has partnered with these institutes by offering instruction from its faculty and by providing financial support. The dean and other administrative staff visit each campus each year. These schools were selected because they serve regions of the state that produce few law students and few lawyers. However, the Law School has no similar program to serve African Americans because there is no similar race-neutral criterion to justify such a program in race-neutral terms. To create such a program that targets African Americans, race would have to be considered explicitly.

A second important part of the Law School's effort has been ever-more-intense recruiting of minority students. There is broad agreement that this should continue.

A third and critical feature of any race-neutral pursuit of diversity is the identification of proxies for minority status. In Texas, the most important such proxy has been geography. Preferring applicants from certain regions of the state increases the number of minority students, especially Mexican Americans.

Affirmative action by proxy has a large cost that has been little understood. In such a system, the Law School must pass over strong minority applicants who do not fit the proxy and admit weaker applicants of all ethnicities who do fit the proxy. Once this is understood, one would predict that effective use of any strong proxy for minority status would result in a somewhat weaker class, with a larger gap between white and minority students, as compared to admission based principally on academic criteria and ethnicity. This prediction is confirmed by enrollment data.

The *Hopwood* trial focused on the class admitted in 1992. At that time, the Law School considered applicants in light of the Texas Index, calculated as LSAT score plus ten times undergraduate grade point average (GPA). The coefficients in the Texas Index changed over the years, and the Law School no longer uses it in the admission process, but the data for calculating it are still available. In the study undertaken to support the present proposal to change the Law School admission process, the 1992 formula was used to recalculate the Texas Index for the lower ranges of more recent enrolled classes. Data for four groups of years were compared: 1992-96 (when the Law School considered race in admission); 1997-99 (the years with the fewest minority students); 2000-02 (years with somewhat more minority students, but still fewer than the lowest years of affirmative action); and 2003. Although there appeared to be some random fluctuation year-by-year, clear patterns emerged in comparing the groups of years.

Achieving diversity by race-neutral means requires a longer "tail," with more students in the tail. Even though the applicant pool tends to get stronger over time, and even though in 2002 and 2003 the Law School had an unusually large number of applications and offered admission to a smaller percentage of applicants, the school enrolled more students with low and very low Texas Indexes than eight to twelve years ago when race was explicitly considered. And inevitably (because decisions were made on a race-neutral basis), a notably higher percentage of students admitted with low Texas Index scores were white.

The gap in entering credentials between white and underrepresented minority students was larger in 2003 than in the affirmative action years. The growth in the gap was modest on some measures and larger on other measures, but the direction was uniform. On every measure--every combination of means, medians, LSAT scores, GPAs, African Americans, Mexican Americans--the gap increased. It has increased because many of the strongest minority students could not be admitted. If they were not strong enough to be admitted without consideration of race and they did not fit a race-neutral proxy, they could not be admitted.

For nearly fifteen years, from the early 1980s to the *Hopwood* decision in 1996, the central goal of the Law School admission policy was to maintain diversity while gradually shrinking the credential gap between white and minority students. Shrinking the gap produces a better educational experience, better race relations within the Law School, and more successful minority students and minority lawyers. Reversing that trend and expanding the gap is a high cost to pay for the use of alternatives that are formally race-neutral.

Another adverse consequence of using race-neutral admission has been the negative effect on the admission of out-of-state minority students. In the affirmative action years, African American students came to the Law School from Texas and from out-of-state, both in substantial numbers; since *Hopwood*, the Law School has had very few nonresident African American students. In 2003, it had only one. This was a loss of an important source of diversity, especially in the broad sense in which the Supreme Court defines the concept.

Another formally race-neutral method that has been essential to success is that the Law School privatized a large portion of its financial aid effort. Friends of the Law School raised and administered funds for minority scholarships. Of course, this is race-neutral only at the level of state action. Privatization has the significant cost that the Law School surrenders control of an important part of its mission. Financial aid affects recruiting and matriculation; it affects students' satisfaction and ability to succeed after they come to the Law School; and it affects their debt load and prospects after they graduate. If the Law School resumes consideration of race, it can resume responsibility for an important part of its obligation to its students.

Adequate Levels of Diversity

If the Law School believed that 2003 levels of diversity were sustainable, and if it believed that these levels of diversity had been achieved at acceptable cost, should it claim success and conclude that race-neutral alternatives are adequate? The answer is "No." Recovering to what the Law School achieved eight to twelve years ago is not a reasonable measure of success.

The Supreme Court in *Grutter* approved pursuit of what the University of Michigan called a "critical mass" of minority students. The Court did not define "critical mass." The Court's emphatic rejection of quotas necessarily implies that a critical mass cannot be defined in terms of a specific number. 123 S.Ct. at 2339. The Court approved the affirmative action effort at Michigan's Law School, which in practice had produced enrollment of underrepresented minorities ranging from 13.5% to 20.1% of the entering class. The Law School at The University of Texas at Austin did not reach even the bottom of that range in any post-*Hopwood* year before 2003; it was within that range in 2003.

It is of course unconstitutional to use affirmative action in pursuit of racial balance. Racial balance is not at issue in the Law School; the school has never come close to racial balance, and it has never sought racial balance as a goal to be achieved with affirmative action. But the magnitude of underrepresentation matters. To be "visibly open" is in part a matter of appearances. When minority population grows steadily but minority enrollment in the Law School does not, the school does not appear to be visibly open. To the minority community, the Law School may even appear to have a cap on minority enrollment. A critical mass of minority students at Texas would be a somewhat higher percentage than has been achieved to date.

5. PERIODIC REVIEW

Both the Court's opinions and the Regents' resolution require periodic review of any program that considers race. The Law School will continue to monitor its experience, along with population data and experience elsewhere, and will be prepared to abandon consideration of race if diversity can be achieved at reasonable cost by some race-neutral means. The proposed policy will be reviewed every five years, with the next review beginning in Fall, 2009.

6. CONCLUSION

Minority enrollment levels of 2003 are probably not sustainable by the Law School, were achieved at high academic cost, and did not yet represent a critical mass. The Law School should keep the best of what it has developed, especially the prelaw programs and its more intensive recruiting efforts. Success in these efforts should reduce the extent to which race must be considered. Resumption of modest consideration of race and resumption of the goal of reducing the gap between minority students and white students should enable the Law School to reduce the number of offers to marginal applicants and increase the strength of the class.

Proposed Race-Conscious Admission Policy for the School of Law

The following admission plan is proposed for the School of Law ("Law School") at The University of Texas at Austin.

1. The Law School will continue full-file review of each admission application as described in the 2004 *Admissions Bulletin*.
2. The Law School will add "race and ethnicity" to the list of factors to be considered.
3. The Law School will end the traditional procedure by which some admission application files are diverted to review by panels of faculty members. All files will be reviewed in one unified administrative process.

V. UNDERGRADUATE ADMISSIONS

A. RATIONALE

A comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders. This type of academic environment is a goal of The University of Texas at Austin and admission decisions must take into account this goal. The University of Texas at Austin handles a very large number of undergraduate applications and must select from among a highly qualified pool only the number of students it can accommodate. In light of the institutional goal, admission decisions result from both an assessment of the academic strength of each applicant's record and an individualized, holistic review of each applicant, taking into consideration the many ways in which the academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University.

Following the decision made in *Hopwood v. Texas*, 78F.3d 932 (5th Cir. 1996), The University of Texas at Austin has made good faith efforts to achieve racial and ethnic diversity through a three-pronged, race-neutral process for freshman admission: the holistic evaluation of individual applications, the aggressive implementation of the Texas "Top 10% Law" (House Bill 588 of the 75th Regular Session of the Texas Legislature), and the Longhorn Opportunity Scholarship program. Pre-*Hopwood* diversity levels were not restored until 1999, when all three of the admission initiatives had been fully implemented. But restoration to pre-*Hopwood* levels is not sufficient.

In the case of *Grutter v. Bollinger*, the Supreme Court gave institutions of higher education direction as to when race-conscious admission policies are appropriate: considering race and ethnicity is acceptable if doing so is consistent with the institution's mission and there is a compelling educational reason for achieving a more diversified student body. The Court accepted the principle of a "critical mass" of underrepresented minority students. The ruling instructed institutions not to use what has been called "racial balancing" or to try to match campus racial and ethnic representation with that of a political entity such as a city or state. Instead, the Court allowed for an investigation into whether there is a critical mass of minority students in the educational setting.

In *Grutter*, the Court clearly recognized the educational value of diversity at the classroom level (e.g., robust exchange of ideas, more spirited discussions, etc.). This renewed and Court-sanctioned emphasis on educational benefits prompted the University to examine minority representation in undergraduate courses. Results indicate that, in a large percentage of those courses, some minority groups are represented by only one student or by none at all. The University of Texas at Austin did not have a critical mass of minority students sufficient to provide an optimal educational experience in 1996 (the pre-*Hopwood* period), and after seven years of good faith race-neutral admission policies, the University still has not reached a critical mass at the classroom level.[4]

If The University of Texas at Austin is to accomplish its mission and fulfill its flagship role, it must prepare its students to be the leaders of the State of Texas. In the near future, Texas will have no majority race; tomorrow's leaders must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate. The University has a compelling educational interest to produce graduates who are capable of fulfilling the future leadership needs of Texas.

Because the University's educational mission includes the goal of producing future educational, cultural, business, and sociopolitical leaders, the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds. The proposal to consider race in the admission process is not an exercise in racial balancing but an acknowledgment that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission. In short, from a racial, ethnic, and cultural standpoint, students at the University are currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow. For the University adequately to prepare future leaders, it must include a critical mass of students from traditionally underrepresented backgrounds.

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[4] Moreover, while the number of minorities at the University in 2003 was higher than in 1996, this was a result of the decision to increase the size of entering freshman classes to accommodate growing numbers of students admitted because of their top 10% high school rank. Such increases in enrollment cannot be sustained by an already overcrowded campus. It must also be stated that the percentage of underrepresented minorities in the entering freshman class for 2003 was the same as in 1996.

Critical mass, which is an adequate representation of minority students to assure educational benefits deriving from diversity, affects in a positive way all students because they learn that there is not "one" minority or majority view. In addition, the Court recognized that critical mass is essential in order to avoid burdening individuals with the role of "spokespersons" for their race or ethnicity. Thus, there is a compelling educational interest for the University not to have large numbers of classes in which there are no students--or only a single student--of a given underrepresented race or ethnicity

The use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin. While the number of African American and Hispanic students has risen slightly above 1996 levels, these students still represent only 3% and 14%, respectively, of the entering freshman class. (See Table 9) The race-neutral efforts have also failed to improve racial diversity within the classroom. In fact, Table 8 demonstrates that for Fall, 2002, there were *more* classes with no or only one African American or Hispanic student than there had been in Fall, 1996. With so few underrepresented minorities in the classroom, the University is less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.

Table 8
Representation of Racial and Ethnic Groups in UT Austin Undergraduate Classes Fall 1996 Compared to Fall 2002

Fall 1996	**Fall 2002**
In classes of 5 or more students (n=4,742):	**In classes of 5 or more students (n=5,631):**
• 46% had no African Americans; 73% had one or none;	• 52% had no African Americans; 79% had one or none;
• 10% had no Hispanics; 25% had one or none;	• 12% had no Hispanics; 30% had one or none;
• 19% had no Asian Americans; 38% had one or none;	• 16% had no Asian Americans; 33% had one or none;
• <1% had no whites; 1% had one or none.	• <1% had no whites; <1% had one or none.
In classes of 5-24 students (n=2,880):	**In classes of 5-24 students (n=3,616):**
• 59% had no African Americans; 86% had one or none;	• 65% had no African Americans; 90% had one or none;
• 16% had no Hispanics; 38% had one or none;	• 18% had no Hispanics; 43% had one or none;
• 27% had no Asian Americans; 52% had one or none;	• 23% had no Asian Americans; 46% had one or none;
• <1% had no whites; 1% had one or none.	• <1% had no whites; 2% had one or none.

In keeping with its experience, the University proposes to retain its race-neutral policies (automatic admission of some students based on class rank, the individual review of student applications, and intensive recruiting from Longhorn Opportunity Scholarship schools) and to supplement these policies with the consideration of race and ethnicity as a special circumstance during individual review.

B. DIVERSITY BROADLY CONSIDERED

In the freshman admission process of The University of Texas at Austin, the concept of merit is necessarily broad in order to honor the aforementioned principles that guide the decision process. In the section below, there is a detailed discussion of the many factors that are taken into account in the holistic, full-file review.

C. ADMISSIONS PROGRAMS TO BE NARROWLY TAILORED

1. INDIVIDUAL CONSIDERATION

The individual consideration of freshman applicants takes account of two vectors of information: a summary of their academic records, called the academic index, and a summary of their personal achievement.

The Academic Index (AI) is based on the following elements of the student's high school record.

- High school class rank
- Completion of the high school curriculum required by the University
- Strength of high school course selection
- SAT/ACT score

The Academic Index (AI) is determined by a multiple regression equation using a high school percentile ("HSR") derived from an explicit class rank [1-(class rank/class size) *100], and verbal and math test scores from the ACT Assessment or the SAT I: Reasoning Test. The equation produces a predicted freshman-year grade point average (GPA).[5] After a review of the high school transcript, an applicant may be assigned a tenth of a predicted grade point for exceeding the University's required high school curriculum. Thus, the value of the AI ranges from 4.10 to 0.00.

The personal achievement of each applicant is judged on the basis of the following elements. Race and ethnicity are proposed additions to this list.

- Scores on two essays

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[5] The equations vary by area of intended major as follows.

For Liberal Arts, Communication, Fine Arts, Social Work, and Education:

Predicted Freshman GPA = -0.19949 + (SAT Verbal * 0.00142) + (SAT Quantitative * 0.00191) + (HSR * 0.01459)

Predicted Freshman GPA = 0.09689 + (ACT English * 0.02513) + (ACT Math * 0.04577) + (HSR * 0.01351)

For Nursing, Natural Sciences, and Architecture:

Predicted Freshman GPA = -1.10339 + (SAT Verbal * 0.00088166) + (SAT Quantitative * 0.00230) + (HSR * 0.02416)

Predicted Freshman GPA = -0.51242 + (ACT English * 0.00824) + (ACT Math * 0.05007) + (HSR * 0.02199)

For Engineering:

Predicted Freshman GPA = -1.53545 + (SAT Verbal * 0.00072937) + (SAT Quantitative * 0.00313) + (HSR * 0.02285)

Predicted Freshman GPA = -1.78910 + (ACT English * 0.01074) + (ACT Math * 0.07335) + (HSR * 0.02708)

For Business:

Predicted Freshman GPA = -2.31253 + (SAT Verbal * 0.00157) + (SAT Quantitative * 0.00229) + (HSR * 0.03419)

Predicted Freshman GPA = -2.14521 + (ACT English * 0.02892) + (ACT Math * 0.05405) + (HSR * 0.03409)

- Leadership
- Extracurricular activities
- Awards and honors
- Work experience
- Service to school or community
- Special circumstances:
    - Socioeconomic status of family
    - Single parent home
    - Language spoken at home
    - Family responsibilities
    - Overcoming adversity
    - Cultural background
    - Other information in the file

Personal achievement is determined through a holistic approach to the reading of application files. To ensure fairness and consistency, readers receive training in holistic reading. No reader is exempt from this training, which is intended to calibrate the readers so that scores are reflective of the students' records rather than the readers' personal preferences.

Readers are trained by a specialist in holistic scoring. The trainer is a faculty member at The University of Texas at Austin with extensive national experience in holistic scoring and training of readers. All readers must go through training every year regardless of how many years they have read files in the admission process. This annual training helps establish consistency.

All applicants are required to submit two essays. Each essay is read and scored on a scale of 1 to 6 (6 being high) by a trained admission officer. The application, including any attachments an applicant chooses to provide, is then reviewed by the same reader. A "personal achievement" score on a scale of 1 to 6 is assigned to the application.

The personal achievement score determined through holistic reading is assigned to the applicant and considered along with the academic information when determining an admission decision. Staff members seek to admit those students whose academic and personal achievement record indicates a good match for The University of Texas at Austin. Invariably, there will be applicants on the "cusp," i.e., at the margin of being admitted or rejected. In fact, there are several hundred such applicants in a large applicant pool. In the process that is herein being proposed, senior members of the admissions staff will conduct a second review of the files of applicants who are at this margin to determine which applicants will be admitted to fill the remaining spaces. The consideration of both academic and personal achievements assures the selection of an admitted class consisting not only of academically qualified individuals with a high probability of success, but also individuals who can enrich classroom discussions with their unique experiences. In a class where all are academically qualified, some individuals may have been admitted primarily on the strength of their academic record, others on their personal achievements. In this process, the first to be selected will have demonstrated excellence in both--rather than one.

Due to state law, some applicants are admitted automatically by virtue of being in the top 10% of their graduating class; for them, Personal Achievement is not used for determining admission to The University of Texas at Austin. However, Personal Achievement may be used for determining whether a "top 10%" student will be admitted into a specific college, such as Business or Communication.

2. WEIGHT GIVEN TO RACE/ETHNICITY

The factors that are included in personal achievement are not given individual weights. Each forms a piece of the whole of the personal achievements of the student. The intent is to sort the applicant pool on the strength of personal achievement from "most impressive" (6) to "least impressive" (1). Or, said another way, from "who will add the most to The University of Texas at Austin campus" (6), to "who has the least to offer The University of Texas at Austin campus" (1). Race, ethnicity, and cultural background, while important, are only three of many factors to be considered by the reader when establishing a contextual background for the student's achievements and in determining potential contributions to The University of Texas at Austin campus.

3. QUOTAS AND GOALS

No specific goal will be established in terms of the numbers of students with specific characteristics who are admitted.

4. CONSIDERATION OF RACE-NEUTRAL ALTERNATIVES

Since the *Hopwood* decision in 1996, The University of Texas at Austin has had a race-neutral admission process. The comparison year for the effectiveness of race-neutral policies has traditionally been 1996, the last year in which the University was able to consider an applicant's race. (See Table 9) The United States Supreme Court in *Grutter v. Bollinger* has determined that the use of race is permissible in college admission if race-neutral alternatives are found to be ineffective or unworkable substitutes for race-conscious policies in enrolling a "critical mass" of minority students. The Court also acknowledged that the quality of an education need not be sacrificed in order to implement race-neutrality in an admission process.

Table 9
Entering Freshmen
Summer and Fall Combined
1996-2002

	Enrolled													
	1996		**1997**		**1998**		**1999**		**2000**		**2001**		**2002**	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
White	4,159	**65**	4,730	**67**	4,399	**65**	4,447	**63**	4,801	**63**	4,447	**61**	4,882	**62**
Native American	34	**<1**	36	**1**	37	**<1**	28	**<1**	32	**<1**	34	**<1**	35	**<1**
African American	266	**4**	190	**3**	199	**3**	286	**4**	296	**4**	242	**3**	272	**3**
Asian American	942	**15**	1,130	**16**	1,133	**17**	1,221	**17**	1,325	**17**	1,413	**19**	1,452	**18**
Hispanic	932	**14**	892	**13**	891	**13**	976	**14**	1,011	**13**	1,024	**14**	1,137	**14**
International	97	**2**	107	**2**	83	**1**	82	**1**	217	**3**	139	**2**	157	**2**
Unknown	0	**0**	0	**0**	2	**<1**	0	**0**	4	**<1**	38	**<1**	0	**0**
Total	**6,430**	**100**	**7,085**	**100**	**6,744**	**100**	**7,040**	**100**	**7,686**	**100**	**7,337**	**100**	**7,935**	**100**

SOURCE: The University of Texas at Austin, Office of Institutional Research, Statistical Handbook, 1996-2002 editions.

The race-neutral processes that the University has used since the court decision in the *Hopwood* case are described below.

a Individual Holistic Review of Freshman Applications

Beginning with 1997, the University implemented the race-neutral alternative of holistically reading files and broadening the factors used to make admission decisions to include subjective criteria (e.g., essays, awards and honors, service, work experience) and special circumstances that put an applicant's achievements into context. Admission of African American and Hispanic freshmen declined in real numbers and as percentages of the class until other measures were subsequently implemented.

b The Texas Top 10% Automatic Admissions Law (HB 588)

Since 1998, the University's freshman admissions have largely been governed by the Texas Top 10% Automatic Admissions Law (*House Bill* 588 of the 75th Texas Legislature, 1997). The law is race-neutral insofar as any student graduating in the top 10% of his or her high school class must be admitted as a first-time freshman.

The combination of the automatic admission of top 10% students and holistic review for those not in the top 10% resulted in only a slight improvement in racial diversity from 1997 to 1998. African American enrollment increased by 9 students, but was still below the 1996 level. And the number of Hispanic freshmen declined by 1 while also remaining below the 1996 level.

Moreover, the Texas Top 10% Plan now threatens the quality of the educational experience at The University of Texas at Austin. In 2002, as a result of an attempt to accommodate growing numbers of automatically admitted top 10% students, the entering freshman class size rose to an historic high of 7,935. Table 10 illustrates the growth of top 10% admission since 1998.

Table 10
Growth in the Number and Percentage of
Automatically Admitted Top 10% Students, 1998-2003

Year	**Top 10% Enrolled**	**Total Enrolled**	**% Who Were Top 10%**
1998	2,513	6,744	**37%**
1999	2,925	7,040	**42%**
2000	3,346	7,686	**44%**
2001	3,423	7,337	**47%**
2002	3,932	7,935	**50%**
2003	4,279	6,544	**65%**

SOURCE: Office of Admissions, The University of Texas at Austin

From 1998 through 2003, the number of top 10% students enrolling in the freshman class at The University of Texas at Austin through automatic admission increased by 70%. The number will continue to rise as more students seek the top 10% entitlement to the flagship university. The University of Texas at Austin cannot sustain this growth. The 2002 academic year was a critical one in which total enrollment of more than 52,000 stretched the capacity of the faculty, staff, and facilities to a degree that negatively affected the educational experience of students.

c Longhorn Opportunity Scholarships (LOS)

A third race-neutral alternative was introduced for the 1999 entering class. Longhorn Opportunity Scholarships (LOS) were added as incentives for top 10% students in high schools with no history of sending students to The University of Texas at Austin and with an average parental income of $35,000 or less. This effort serves underrepresented, low-income, first-generation students. There were 39 LOS schools in the first year. The entering class of 1999 illustrates the combined use of automatic admission of top 10% students, LOS offers, and the use of holistic reading for those not in the top 10% (see Table 9) Both African American and Hispanic representation returned to their 1996 levels. The actual numbers of minorities were higher, an increase accomplished by enlarging the class size by 610 students above the 1996 level. This larger class size also allowed for the growth in the number of automatically admitted top 10% students.

Since implementation of the Longhorn Opportunity Scholarship program, the number of schools to which LOS scholarships are allocated has increased to 70. The University also implemented a special program to help ensure the success of LOS students who enrolled. But as the number of LOS schools has increased, both initiatives have required additional resources.

The holistic review of applications, the Top 10% Law, and the Longhorn Opportunity Scholarship program represent many years of good faith race-neutral efforts to enroll a diverse undergraduate student body. However, increasing the size of the entering freshman classes, as has been done in the past, can no longer be used as a strategy to sustain race-neutral alternatives. The University is already the largest single-campus institution of higher education in the United States. Severe and well-publicized budget constraints preclude the required growth in the faculty and facilities needed to accommodate continued growth in the student population. And the University's budget does not allow for an unlimited increase in the number of Longhorn Opportunity Scholarships or an unlimited increase in the capacity of its support program.

3. PERIODIC REVIEW

The undergraduate admission process will be reviewed annually to ensure that it is effective in admitting academically qualified individuals who contribute to a rich, diverse, and challenging educational environment at The University of Texas at Austin. In addition, the admission process will be reviewed every five years to assess whether consideration of an applicant's race is necessary in order to create a diverse student body, or whether race-neutral alternatives exist that are able to achieve the same results. The next review will begin in Fall, 2009.

4. PROPOSED POLICY

The proposed policy is to include race and ethnicity among the factors in the assessment of personal achievement, and then proceed as described above. This procedure will be used only for applicants who are not guaranteed admission by the race-neutral, automatic means of the Top Ten Percent law.

VI. TRANSFER ADMISSIONS

A. RATIONALE

The use of race-neutral policies has not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin. This failure has been reflected as much among entering transfer students as it has been among entering freshman. In 1996, the percentage of African Americans in the entering transfer class was 2.3% and the percentage of Hispanics was 14.3%. By 2003, the percentage of entering transfers who were African Americans had risen to only 2.9% while the percentage of entering transfer Hispanics had dropped to 13.7%. Even more telling is the fact that in 2003 the percentage of entering African American transfer students (2.9%) was lower than the percentage of entering African American freshmen (4.1%), and the percentage of entering Hispanic transfer students (13.7%) was lower than the percentage of entering

Hispanic freshmen (14.6%). To this may be added the observation that the percentage of Hispanic transfers has dropped in each of the past two years. The low percentages of African American and Hispanic transfer students also contribute to the situation demonstrated in Table 8 and discussed above, viz., for Fall, 2002, there were more classes with no or only one African American or Hispanic student than there had been in Fall, 1996. Transfer admissions are currently succeeding neither in the objective of providing additional educational diversity nor in developing a visibly diverse leadership class.

B. DIVERSITY BROADLY CONSIDERED

To be eligible for transfer admission, an applicant must have graduated from high school or earned a diploma through the General Educational Development (GED) Test, and must have completed at least 24 semester hours of transferable credit. Any student who is not eligible to continue studies at another college or university because of academic or disciplinary reasons is not eligible for admission to The University of Texas at Austin. The applicant may have to meet additional requirements to transfer into specific areas of study. (Students interested in studying pharmacy must first be admitted by the director of admissions to the pre-pharmacy program in the College of Natural Sciences. Once the student has been admitted and has satisfied the pre-pharmacy requirements, he or she may apply to the professional program in the College of Pharmacy. See the section, below, concerning "Admission to the College of Pharmacy.")

A completed application includes the application itself, the application fee, and official transcripts of all work at all colleges attended, including enrollment in concurrent course work while in high school. In order to receive consideration, the application must be received by the Office of Admissions by the published deadline.

The following academic achievement factors are considered in transfer admissions:

- Grade point average (GPA) earned in all college work
- Number of courses taken
- Courses required for admission into specific areas of study, including the GPA earned in those courses
- Educational goals
- Exceptional achievement or special talents
- Audition (where required)
- Portfolio (where required)
- Test of English as a Foreign Language (TOEFL) scores (where required)
- Essay(s)

The following characteristics are considered to put the academic achievements into context:

- Socio-economic standing
- Educational level of parents
- Demonstrated ability to overcome past educational deficiencies
- Cultural background

- Employment, internship, other educational experiences
- Personal experience or hardships that have helped shape one's life
- Personal responsibilities

C. ADMISSIONS PROGRAMS TO BE NARROWLY TAILORED

1. INDIVIDUAL CONSIDERATION

Transfer admission decisions will be reached through a holistic approach to the reading of application files. In order to ensure fairness and consistency, all readers will receive special training in holistic reading. No reader will be exempt from this training, which is intended to calibrate the readers so that scores are reflective of the students' records rather than the readers' personal preferences.

Readers will be trained by a specialist in holistic scoring. The trainer is a faculty member at The University of Texas at Austin with extensive national experience in holistic scoring and training of readers. All readers will be required to go through training every year regardless of how many years they have read files in the admission process. This annual training will help establish consistency.

The application files of transfer students will be read individually to select the applicants whose prior academic performance, educational goals, aspirations, background, and personal characteristics indicate a good match for The University of Texas at Austin. Readers will consider the preparation of the applicant for the intended major as well as the contribution that the applicant will make to the classroom and community life of the University. The original readers will make an admission decision or forward a file to the Associate Director with a recommendation. Upon reviewing the file, the Associate Director will make the final admission determination.

2. THE WEIGHT GIVEN TO RACE/ETHNICITY

Race/ethnicity would be added as one factor among the other factors considered as part of the contextual factors that are listed above. No particular weight would be given to race or ethnicity.

3. QUOTAS AND GOALS

No numerical goal or quota will be set for specific racial or ethnic groups among the transfer applicants.

4. CONSIDERATION OF ALTERNATIVES

The race-neutral methods previously used for the admission of transfer students have not produced the level of diversity that is educationally desirable nor the level that adequately produces a visibly diverse leadership class.

5. PERIODIC REVIEW

The proposed holistic, full-file procedure will be reviewed in five years, with the next review occurring in 2009.

6. PROPOSED POLICY

The proposed policy is to add race and ethnicity among the many factors that are already considered in admission.

VII. PHARMACY ADMISSIONS

A. RATIONALE

The proposed change to a holistic review process for transfer students that includes race and ethnicity among the elements to be considered for admission affects the College of Pharmacy. In the procedure described below, race and ethnicity would be added to the "additional personal factors" considered in a holistic review of pharmacy applicants. The entry-level professional degree in Pharmacy is the Pharm.D., and both transfer and continuing students are admitted to the Pharm.D., at the beginning of their junior year.

Pharmacists are important professionals in health-care delivery, and producing pharmacists from diverse backgrounds is integral to producing a visibly diverse leadership class. Using race-neutral methods, the Pharm.D. program has not been as successful as The University would like in diversifying its class, especially with African American students. In 1997, the percentage of African Americans in the Pharm.D. program was 6% and by 2003 the percentage had dropped to 2%.[6] With Hispanic students the program was more successful, partly because the Pharmacy Scholars Program (see details below). The percentage of Pharm.D. students in 1997 who were Hispanic was 7% and by 2003 the percentage was 19%, with some fluctuations up and down in the intervening years.

B. DIVERSITY BROADLY CONSIDERED

The admission to the university and the College of Pharmacy are separate and independent processes. Students must first be admitted to the University by the director of admissions according to the normal undergraduate procedures. Generally a student then applies for admission to the College of Pharmacy during the student's sophomore year. A student is admitted to the professional curriculum in Pharmacy by the dean, following recommendation by the Admissions Committee of the College of Pharmacy, according to the procedures indicated below. If the number of eligible applicants for the professional curriculum exceeds the number that available facilities can accommodate, final selection is made by the College of Pharmacy Admissions Committee and the dean.

As a condition of admission to the College of Pharmacy, each student must sign a statement that he or she agrees to accept assignment to any one of the college's internship regions throughout the state. Cooperative arrangements for pharmacy education exist with academic units and health care institutions in the following internship regions: Austin/Temple, Dallas/Fort Worth, El Paso, Galveston/Houston, the Rio Grande Valley, and San Antonio. Internship regions may be added or deleted at any time based on the availability of resources. Elective regions, which provide limited internship experiences for a specified period of time (less than four months), may also be available.

Students assigned to San Antonio and Pharmacy Scholars students from The University of Texas at El Paso and The University of Texas - Pan American in Edinburg must spend approximately a year and a half to two years in those regions; students assigned to the other regions spend only the final year of the program (the internship year) in their assigned region.

Students are assigned to internship regions through a computer-generated random lottery number system that takes students' ranked preferences into account. Since most students relocate to internship regions outside the Austin area, region assignment occurs during the latter part of the second professional year to allow students adequate time to make personal and financial arrangements. There are no exceptions to the region assignment process. If a student fails to agree to accept assignment to any region, he or she will not be admitted to the College of Pharmacy.

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[6] The starting date of 1997 is used here rather than 1996 because of a discontinuity in the location of the Pharm.D. program at The University. Before 1997, the Pharm.D. program was a part of the Office of the Graduate Studies. After 1997, the Pharm.D. program was reorganized and its admission process was substantially changed.

C. ADMISSIONS PROGRAMS TO BE NARROWLY TAILORED

1. INDIVIDUAL CONSIDERATION

Admission to the professional curriculum in Pharmacy is competitive. Each file is individually assessed for the following factors.

1. Basic Admission Criteria

    - Scholarship as indicated by grade point average and Pharmacy College Admission Test (PCAT) scores. In evaluating the applicant's academic record, the committee pays particular attention to the courses required for admission.[7]

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[7] The applicant should have completed at least sixty-three semester hours and must have completed the following forty-five semester hours:

a. Nine hours of biology, including cellular and molecular biology, structure and function of organisms, and genetics
b. Eight hours of general chemistry with laboratory
c. Three hours of freshman-level rhetoric and composition
d. Three hours of sophomore-level survey of literature
e. Three hours of mathematics (differential and integral calculus)
f. Three hours of statistics
g. Eight hours of organic chemistry with laboratory
h. Four hours of microbiology with laboratory
i. Four hours of physics with laboratory

2. The remaining semester hours should include

a. Six hours of American history
b. Six hours of American government, including Texas government
c. Three hours of fine arts or humanities coursework chosen from archaeology, architecture, art (including art education, art history, design, studio art, visual art studies), classics (including classical civilization, Greek, Latin), fine arts, humanities, music (including music, instruments, ensemble), philosophy (excluding courses in logic), or theatre and dance
d. Three hours of social and behavioral sciences coursework chosen from anthropology, economics, geography, linguistics, psychology, sociology, and social work

3. The applicant must fulfill the foreign language requirement as given under the "Basic Education Requirements" in the College of Pharmacy section of the current *Undergraduate Catalog* before seeking admission to the professional curriculum.

- Personal statement
- Letters of recommendation

4. Additional Personal Factors

    - Extracurricular activities that demonstrate community involvement and leadership potential
    - Honors and awards
    - Interview. Applicants are screened for interview based on academic record, exposure to the profession, special life circumstances, and any other compelling factors. If invited for an interview, then other factors are considered such as, but not limited to:
        - On-site written essay
        - Knowledge of, and motivation for, pharmacy as a career
        - Life-long learning strategies
        - Critical thinking skills
    - Special life circumstances, such as, but not limited to:
        - Single parent
        - Socioeconomic status of family
        - First generation attending college
        - Overcoming adversity
        - Resident of an underserved and/or health professions shortage area of the state
        - Cultural background
        - Other information in the file
    - Because the University is a public institution, preference is given to applicants who are legal residents of Texas and to applicants from states without colleges of pharmacy.

2. THE WEIGHT GIVEN TO RACE/ETHNICITY

Race/ethnicity would be added as one factor among the other factors considered as part of the contextual factors that are listed above. No particular weight would be given to race or ethnicity.

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4. The applicant must remove all deficiencies in high school units by the means prescribed in General Information before seeking admission to the professional curriculum.

3. QUOTAS AND GOALS

No numerical goal or quota will be set for specific racial or ethnic groups among the transfer applicants.

4. CONSIDERATION OF ALTERNATIVES

The Pharmacy Scholars Program is available to highly qualified high school seniors entering the University of Texas at El Paso (UTEP) or The University of Texas - Pan American (UT Pan Am). It offers these students conditional admission to The University of Texas at Austin College of Pharmacy once they complete the prepharmacy requirements of the program at The University of Texas at El Paso or The University of Texas - Pan American. Although a valuable race-neutral method, the Pharmacy Scholars Program has not been adequate to produce a level of diversity that is educationally desirable nor the level that adequately produces a visibly diverse leadership class.

5. PERIODIC REVIEW

The proposed holistic, full-file procedure will be reviewed in five years, with the next review occurring in 2009.

6. PROPOSED POLICY

The proposed policy is to add race and ethnicity among the many factors that are already considered in admission to the College of Pharmacy.

GENERAL CONCLUSION

Since 1997, no other university in the United States has had more experience with race-neutrality in admission or made greater good-faith attempts to achieve critical mass and diversity than The University of Texas at Austin. Experience has shown that there is no single way to achieve classroom diversity consistent with a high-quality educational experience. The race-neutral strategies used by the University and described above have not produced a critical mass of underrepresented minority students at the classroom level. There is no reason to believe that they will do so in the future unless enrollment is allowed to increase to unmanageable and irresponsible levels.

Race-neutral policies have been very useful in producing a student body of strong academic ability and should not be abandoned entirely. Therefore, The University seeks to continue these or similar policies and to combine them with a consideration of race and ethnicity in the admission process. This race-conscious consideration will be integrated into aholistic, individual assessment of each student's background and record.

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF ADMISSIONS

IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588)
at
THE UNIVERSITY OF TEXAS AT AUSTIN

DEMOGRAPHIC ANALYSIS OF ENTERING FRESHMEN
FALL 2006

ACADEMIC PERFORMANCE OF TOP 10% AND NON-TOP 10% STUDENTS
ACADEMIC YEARS 1996-2005

Prepared by:

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Introduction to Volume I

This is the ninth in a series of reports on the demographic makeup of Top 10% students entering The University of Texas at Austin. These reports were developed to provide easy access to understandable data for the press, the general public, policy analysts, political decision-makers, and fellow academicians.

The Texas Top 10% Law (HB 588) requires the automatic admission of any student graduating in the top 10% of an accredited Texas high school.

As in past reports, the entering summer/fall class of 1996 is a comparison group. It was the last year in which students were admitted under a classic admissions model using affirmative action to assist in the accomplishment of the University's diversity goals.[1] (Affirmative Action was re-introduced to the admissions process with the entering class of 2005.) The continuation and graduation rates of these students are illustrated in a companion to this report.

This paper is designed to present simple, descriptive statistics relative to graduates of Texas high schools matriculating as entering freshmen from 1996-2006. This is not a position paper. It is not an evaluation of past or present affirmative action policies. It is not a proposed blueprint for other universities or public institutions seeking diversity. It is not representative of the higher education experience in all of Texas. It is merely another chapter about what has happened at The University of Texas at Austin the year before the interruption of affirmative action (1996), the years in which there was no affirmative action (1997-2004), and its return (2005 and 2006).

Admissions at The University of Texas at Austin

During the years immediately preceding *Hopwood*, The University of Texas used what has been described as a "Classic Model" for making admissions decisions. It included factors that allowed for the easy and efficient processing of very large numbers of applications. Decisions were made after distributing students in descending order based on a predicted freshman grade point average. The prediction formula, a multiple regression equation, relied on the combined SAT score (or a concorded ACT score) and high school class rank. The ACT/SAT, like virtually all standardized tests at all levels of education, has a well-documented history of differential performance gaps among socio-economic, gender, and racial-ethnic groups.[2] Strict adherence to such a mechanical procedure would have produced classes with unacceptably low diversity levels, and thus, adversely impacting the educational experience for all students. At the time, in order to enroll a freshman class bearing some resemblance to the state itself, the University used affirmative action. This policy was in place until *Hopwood* forced its removal in 1997. The last freshman class admitted to UT Austin under such a classic model was for summer/fall of 1996.

With the entering class of 1997, the University's admission policy expanded to include the following factors:

1. **The Academic Index (AI)**
   High School Record:
      - Class rank
      - Completion of UT required high school curriculum
      - Extent to which students exceed the UT required units
      - SAT/ACT score

2. **The Personal Achievement Index (PAI)**
      - Scores on two essays
      - Leadership
      - Extracurricular Activities
      - Awards/honors
      - Work experience
      - Service to school or community
      - Special circumstances:
         - Socio-economic status of family
         - Single parent home
         - Language spoken at home
         - Family responsibilities
         - Socio-economic status of school attended
         - Average SAT/ACT of school attended in relation to student's own SAT/ACT

Beginning with the entering class of 2005, race/ethnicity was added to the list of special circumstances. Test scores and class rank are still considered, but the ambition to tackle rigorous high school coursework, the production of quality prose, the desire to make a difference in one's school, home, or community, evidence of employability (work), and some sense of having excelled in any number of areas are also considered. Moreover, admissions officials place these attributes in the context of the circumstances under which the student lived. Since 1997, the rational, thoughtful, and reasoned judgments of people complemented prediction formulas. Throughout the United States this is called the "holistic approach." The University of Texas implemented an admissions routine that analyzes the qualities each applicant would bring to an entering freshman class.

Demographic Analysis—1996-2006

Table 1 below illustrates the numbers of applicants, admits, and enrolled students from 1996 through 2006. Throughout this report, n-counts include first-time freshmen for the fall plus those entering during the preceding summer and continuing into the fall. Since the size of the entering classes ranges from 6430 to 7935 it is most appropriate to focus on percentages.

***Important note:* Table 1 and Table 2 are the only tables illustrating *all* first-time freshmen. Table 1a, 2a, 3 and those that follow illustrate the graduates of Texas high schools only. Graduates of Texas high schools are isolated because HB 588 grants an automatic admission entitlement only to graduates of public and accredited non-public high schools in Texas. For this reason, the n-counts and other data reported here will not match official first time freshman data reported by the Office of Institutional Research in its Statistical Handbook.**

Notes to researchers:

Concise descriptions of UT Austin's admissions policies by year are as follows:

- 1996—The Classic Admissions model (as described above) including ACT/SAT/class rank with an affirmative action plan.
- 1997—Use of the "AI" (as described above), the "PAI" (as described above), with an institutional policy admitting the top 10%, and no affirmative action policy—the result of the *Hopwood* decision.
- 1998-2004—Use of the "AI", the "PAI", with HB 588 mandated automatic admission of the top 10%, and no affirmative action policy—the result of the *Hopwood* decision.
- 2005—Use of the "AI", the "PAI", with HB 588 mandated automatic admission of the top 10%, and the reinstatement of affirmative action (as described above)—the result of the *Grutter* decision.

Drops in SAT averages from 2005 to 2006 were common throughout the US, especially for large institutions, and was due in part to changes made on the SAT 1: Reasoning Test. Students in the 2006 cohort were the first class to take the "New SAT," which was 40 minutes longer, included a 25-minute writing sample, and much more expensive (from $25 to $41). The College Board reports that nationwide and institution-level score declines are likely the result of dramatically reduced multiple test-taking by students. Multiple test-taking usually results in higher scores for an individual. The average ACT Composite score, a test that did not change or see any change in test-taking behaviors in its population, remained steady at 26.[3]

Office of Admissions
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[1] See the text of HB 588 on the University of Texas Admissions Research website at http://www.utexas.edu/student/research/reports/admissions/HB588Law.htm. For a more in depth discussion of the Classic Model of Admissions see Bruce Walker and Gary Lavergne, "Affirmative Action and Percentage Plans". *College Board Review*, May 2001 no. 193, p. 18-23.

[2] Throughout their histories, both the SAT and the ACT have recorded gaps in mean scores among different racial/ethnic groups and by household incomes. The annual report for the SAT is called the *College-Bound Senior Report* and the ACT is called the *ACT Profile*. These reports are issued nationally and by state.

[3] See http://www.collegeboard.com/satscores/letter.html

Table 1
Applicants/Admits/First-Time Enrolled Freshmen
Summers and Falls Combined
1996-2006

THE UNIVERSITY OF TEXAS AT AUSTIN
Volume I

Revised December 6, 2007

All Freshman Applications

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1996	10584	61%	119	1%	809	5%	2363	14%	2492	14%	896	5%			17263	100%
1997	9134	61%	67	0%	639	4%	2184	15%	1955	13%	946	6%	57	0%	14982	100%
1998	10138	60%	94	1%	660	4%	2491	15%	2338	14%	958	6%	118	1%	16797	100%
1999	11051	58%	87	0%	1030	5%	2868	14%	2831	15%	1199	6%	64	0%	18930	100%
2000	12737	59%	107	0%	1186	6%	2939	14%	3087	14%	1404	7%	79	0%	21539	100%
2001	11723	56%	127	1%	1053	5%	3123	15%	3164	15%	1673	8%	123	1%	20986	100%
2002	12603	57%	110	0%	1159	5%	3259	15%	3487	16%	1447	7%	114	1%	22179	100%
2003	13944	57%	111	0%	1351	6%	3439	14%	4101	17%	1477	6%	98	0%	24519	100%
2004	12417	54%	127	1%	1456	6%	3262	14%	4035	18%	1571	7%	140	1%	23008	100%
2005	12552	52%	124	1%	1552	6%	3483	15%	4457	19%	1700	7%	57	0%	23925	100%
2006	14301	52%	178	1%	1915	7%	4005	15%	5148	19%	1741	6%	27	0%	27315	100%

All Freshman Admits

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1996	7167	63%	63	1%	501	4%	1654	14%	1761	15%	310	3%			11456	100%
1997	7964	65%	54	0%	419	3%	1938	16%	1592	13%	312	3%	10	0%	12289	100%
1998	7659	64%	59	0%	401	3%	1942	16%	1620	14%	252	2%	42	0%	11975	100%
1999	7421	62%	47	0%	517	4%	1970	16%	1705	14%	248	2%	41	0%	11949	100%
2000	8162	62%	59	0%	562	4%	2151	16%	1823	14%	471	4%	28	0%	13256	100%
2001	7787	61%	68	1%	445	3%	2198	17%	1815	14%	355	3%	65	1%	12733	100%
2002	8258	61%	61	0%	494	4%	2298	17%	1845	14%	379	3%	41	0%	13476	100%
2003	6852	60%	37	0%	448	4%	1991	17%	1795	16%	348	3%	33	0%	11504	100%
2004	6814	58%	53	0%	569	5%	2013	17%	1911	16%	390	3%	38	0%	11788	100%
2005	6745	55%	59	0%	617	5%	2076	17%	2183	18%	498	4%	29	0%	12207	100%
2006	7280	55%	68	1%	683	5%	2315	17%	2406	18%	547	4%	8	0%	13307	100%

All Enrolled First-time Freshmen

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1996	4159	65%	34	1%	266	4%	942	15%	932	14%	97	2%			6430	100%
1997	4730	67%	36	1%	190	3%	1130	16%	892	13%	107	2%			7085	100%
1998	4399	65%	37	1%	199	3%	1133	17%	891	13%	83	1%	2	0%	6744	100%
1999	4447	63%	28	0%	286	4%	1221	17%	976	14%	82	1%			7040	100%
2000	4801	62%	32	0%	296	4%	1325	17%	1011	13%	217	3%	4	0%	7686	100%
2001	4447	61%	34	0%	242	3%	1413	19%	1024	14%	139	2%	38	1%	7337	100%
2002	4882	62%	35	0%	272	3%	1452	18%	1137	14%	157	2%			7935	100%
2003	3866	59%	19	0%	267	4%	1153	18%	1068	16%	156	2%	15	0%	6544	100%
2004	3901	57%	28	0%	309	5%	1218	18%	1149	17%	173	3%	18	0%	6796	100%
2005	3838	56%	33	0%	351	5%	1192	17%	1244	18%	236	3%	18	0%	6912	100%
2006	4029	54%	38	1%	387	5%	1327	18%	1389	19%	249	3%	2	0%	7421	100%

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Table 1a
First-Time Enrolled Freshmen from Texas High Schools
Summers and Falls Combined
1996-2006

Top 10% First-Time Enrolled Freshmen from Texas High Schools

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1996	1497	62%	8	0%	91	4%	430	18%	396	16%	6	0%			2428	100%
1997	1408	60%	10	0%	50	2%	505	22%	358	15%	*	*	*	*	2332	100%
1998	1497	60%	9	0%	69	3%	519	21%	414	16%	5	0%			2513	100%
1999	1620	55%	10	0%	160	5%	609	21%	513	18%	10	0%	3	0%	2925	100%
2000	1921	57%	9	0%	156	5%	653	20%	591	18%	15	0%	1	0%	3346	100%
2001	1942	57%	10	0%	137	4%	718	21%	575	17%	25	1%	16	0%	3423	100%
2002	2203	56%	19	0%	156	4%	800	20%	703	18%	51	1%			3932	100%
2003	2378	55%	15	0%	194	5%	781	18%	858	20%	61	1%	2	0%	4289	100%
2004	2270	54%	20	0%	225	5%	776	18%	887	21%	60	1%	3	0%	4241	100%
2005	2288	52%	18	0%	252	6%	782	18%	966	22%	85	2%			4391	100%
2006	2524	51%	23	0%	268	5%	929	19%	1049	21%	108	2%	1	0%	4902	100%

Non-Top 10% First-Time Enrolled Freshmen from Texas High Schools

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1996	2215	66%	21	1%	164	5%	461	14%	506	15%	8	0%			3375	100%
1997	2781	69%	22	1%	135	3%	567	14%	519	13%	9	0%			4033	100%
1998	2457	68%	24	1%	119	3%	542	15%	441	12%	14	0%			3597	100%
1999	2472	69%	14	0%	113	3%	559	16%	424	12%	7	0%	7	0%	3596	100%
2000	2529	68%	21	1%	129	3%	606	16%	401	11%	25	1%	2	0%	3713	100%
2001	2076	64%	20	1%	98	3%	607	19%	426	13%	15	0%	13	0%	3255	100%
2002	2188	66%	12	0%	99	3%	562	17%	411	12%	30	1%			3302	100%
2003	1202	67%	*	*	64	4%	299	17%	199	11%	35	2%	*	*	1804	100%
2004	1384	64%	8	0%	77	4%	388	18%	251	12%	44	2%	5	0%	2157	100%
2005	1230	62%	10	1%	87	4%	350	18%	264	13%	44	2%	12	1%	1997	100%
2006	1163	59%	10	1%	110	6%	327	17%	314	16%	38	2%			1962	100%

All Enrolled First-time Freshmen from Texas High Schools

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1996	3712	64%	29	0%	255	4%	891	15%	902	16%	14	0%			5803	100%
1997	4189	66%	32	1%	185	3%	1072	17%	877	14%	10	0%			6365	100%
1998	3954	65%	33	1%	188	3%	1061	17%	855	14%	19	0%			6110	100%
1999	4092	63%	24	0%	273	4%	1168	18%	937	14%	17	0%	10	0%	6521	100%
2000	4450	63%	30	0%	285	4%	1259	18%	992	14%	40	1%	3	0%	7059	100%
2001	4018	60%	30	0%	235	4%	1325	20%	1001	15%	40	1%	29	0%	6678	100%
2002	4391	61%	31	0%	255	4%	1362	19%	1114	15%	81	1%			7234	100%
2003	3580	59%	19	0%	258	4%	1080	18%	1057	17%	96	2%	3	0%	6093	100%
2004	3654	57%	28	0%	302	5%	1164	18%	1138	18%	104	2%	8	0%	6398	100%
2005	3518	55%	28	0%	339	5%	1132	18%	1230	19%	129	2%	12	0%	6388	100%
2006	3687	54%	33	0%	378	6%	1256	18%	1363	20%	146	2%	1	0%	6864	100%

Table 2

TOP 10% STUDENTS ADMITTED TO UT AUSTIN BY RACIAL/ETHNIC BACKGROUND

HB 588 Automatic Admits divided by (" /") Total Admits

Summer/Fall 1999-2006

ETHNICITY	1999		2000		2001		2002		2003		2004		2005		2006	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
White	2753/7421	37%	3182/8162	39%	3213/7787	41%	3527/8258	43%	3996/6852	58%	3817/6814	56%	3887/6745	58%	4297/7280	59%
African American	268/517	52%	291/562	52%	245/445	55%	278/494	56%	326/448	73%	428/569	75%	441/617	71%	463/683	68%
Asian American	998/1970	51%	1034/2151	48%	1081/2198	49%	1211/2298	53%	1250/1991	63%	1257/2013	62%	1302/2076	63%	1572/2315	68%
Hispanic	911/1705	53%	1020/1823	56%	1012/1815	56%	1177/1945	61%	1424/1795	79%	1451/1911	76%	1656/2183	76%	1790/2406	74%

Table 2a

TOP 10% STUDENTS ADMITTED TO UT AUSTIN BY RACIAL/ETHNIC BACKGROUND

HB 588 Automatic Admits divided by (" /") Admits from Texas High Schools

Summer/Fall 1999-2006

ETHNICITY	1999		2000		2001		2002		2003		2004		2005		2006	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
White	2753/6664	41%	3182/7194	44%	3213/6629	48%	3527/6969	51%	3996/6004	67%	3817/6132	62%	3887/5906	66%	4297/6268	69%
African American	268/491	55%	291/531	55%	245/424	58%	278/452	62%	326/425	77%	428/553	77%	441/592	74%	463/661	70%
Asian American	998/1828	55%	1034/1941	53%	1081/1909	57%	1211/1965	62%	1250/1725	72%	1257/1823	69%	1302/1865	70%	1572/2060	76%
Hispanic	911/1643	55%	1020/1753	58%	1012/1714	59%	1177/1817	65%	1424/1745	82%	1451/1860	78%	1656/2119	78%	1790/2318	77%

Table 2b

UNIVERSITY OF TEXAS ENTERING FRESHMAN CLASSES

Breakout of Top 10% Status

Enrolled Students from Texas High Schools

Summer/Fall 1996-2006

	TX Grads	Top 10%		Non-Top 10%	
	N	N	%	N	%
1996	5803	2428	**42%**	3375	**58%**
1997	6365	2332	**37%**	4033	**63%**
1998	6110	2513	**41%**	3597	**59%**
1999	6521	2925	**45%**	3596	**55%**
2000	7059	3346	**47%**	3713	**53%**
2001	6678	3423	**51%**	3255	**49%**
2002	7234	3932	**54%**	3302	**46%**
2003	6093	4289	**70%**	1804	**30%**
2004	6398	4241	**66%**	2157	**34%**
2005	6388	4391	**69%**	1997	**31%**
2006	6864	4902	**71%**	1962	**29%**

Table 3

MEAN COLLEGE ADMISSION TEST SCORES OF ENROLLED TOP 10% AND NON-TOP 10% STUDENTS

Graduates of Texas High Schools

Summer/Fall 1996-2006

Note: The ranges below, and throughout this report, represent SAT combined scores and concorded ACT scores. As is the case with the UT admissions routine, students submitting more than one set of scores were given the benefit of the best performance from a single test date.

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Top 10%	1253	1249	1243	1231	1226	1225	1226	1223	1221	1226	1220
Non-Top 10%	1197	1180	1193	1193	1205	1215	1222	1257	1258	1277	1257
Total	1220	1205	1214	1210	1215	1220	1224	1233	1233	1242	1230

Table 4a

SAT SCORE RANGES FOR ENROLLED FRESHMEN TOP 10% STUDENTS

Graduates of Texas High Schools

Summer/Fall 1996-2006

Note: The ranges below, and throughout this report, represent SAT combined scores and concorded ACT scores. As is the case with the UT admissions routine, students submitting more than one set of scores were given the benefit of the best performance from a single test date.

SAT	1996		1997		1998		1999		2000		2001		2002		2003		2004		2005		2006	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
<900	15	1	16	1	27	1	68	2	82	2	81	2	98	3	128	3	135	3	129	3	171	3
900-990	54	2	76	3	89	4	122	4	176	5	190	6	223	6	258	6	263	6	247	6	298	6
1000-1090	297	12	251	11	309	12	375	13	439	13	440	13	522	13	572	13	560	13	570	13	690	14
1100-1190	475	20	439	19	473	19	540	18	669	20	692	20	728	19	805	19	801	19	844	19	891	18
1200-1290	622	26	632	27	664	26	762	26	810	24	811	24	933	24	1023	24	1004	24	1026	23	1145	23
1300-1390	557	23	546	23	557	22	636	22	675	20	704	21	848	22	841	20	830	20	863	20	949	19
1400-1490	305	13	300	13	300	12	324	11	381	11	393	11	461	12	499	12	478	11	507	12	547	11
1500+	103	4	72	3	94	4	98	3	114	3	112	3	119	3	163	4	169	4	205	5	211	4
Total	2428	100	2332	100	2513	100	2925	100	3346	100	3423	100	3932	100	4289	100	4241	100	4391	100	4902	100
SAT Mean	1253		1249		1243		1231		1226		1225		1226		1223		1221		1226		1220	

Table 4b

SAT SCORE RANGES FOR ENROLLED FRESHMEN NON-TOP 10% STUDENTS

Graduates of Texas High Schools

Summer/Fall 1996-2006

Note: The sum of the SAT intervals in 2005 may not equal to the total because 14 entering freshmen were specially enrolled "Hurricane Katrina" students who had no test scores.

SAT	1996		1997		1998		1999		2000		2001		2002		2003		2004		2005		2006	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
<900	40	1	77	2	52	1	47	1	45	1	19	1	43	1	30	2	36	2	30	2	56	3
900-990	151	4	226	6	169	5	181	5	117	3	96	3	96	3	43	2	47	2	41	2	69	4
1000-1090	482	14	741	18	560	16	602	17	531	14	439	13	374	11	128	7	130	6	140	7	142	7
1100-1190	948	28	1118	28	1009	28	965	27	1005	27	806	25	776	24	274	15	397	18	233	12	305	16
1200-1290	1046	31	1105	27	1009	28	1018	28	1155	31	1072	33	1074	33	577	32	639	30	564	28	504	26
1300-1390	513	15	552	14	591	16	544	15	611	16	572	18	655	20	491	27	608	28	599	30	578	29
1400-1490	166	5	181	4	178	5	202	6	193	5	206	6	239	7	209	12	247	11	302	15	244	12
1500+	29	1	33	1	29	1	37	1	56	2	45	1	45	1	51	3	53	2	74	4	64	3
Total	3375	100	4033	100	3597	100	3596	100	3713	100	3255	100	3302	100	1804	100	2157	100	1997	100	1962	100
SAT Mean	1197		1180		1193		1193		1205		1215		1222		1257		1258		1277		1257	

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Table 5

TASP/TSI RESULTS FOR TOP 10% AND NON-TOP 10% STUDENTS

1997-2006

	Exempt (%)		Passed (%)		Remediation (%)		Total (n-count)	
	Top 10%	**Other**	**Top 10%**	**Other**	**Top 10%**	**Other**	**Top 10%**	**Other**
1997	79	79	19	18	2	3	2332	4003
1998	89	82	10	15	1	3	2513	3597
1999	90	85	9	14	1	1	2925	3596
2000	90	88	8	10	1	1	3346	3713
2001	91	91	8	8	1	1	3423	3255
2002	96	95	4	5	<1	1	3932	3302
2003	97	97	2	3	<1	<1	4289	1804
2004	94	96	4	3	2	1	4241	2157
2005	87	93	11	5	2	2	4391	1997
2006	90	92	9	6	1	2	4902	1962

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Table 6
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools

	Entering 1996				Entering 1997				Entering 1998				Entering 1999				Entering 2000			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	15	**2.61**	40	**2.11**	16	**2.08**	77	**2.14**	27	**2.34**	52	**2.28**	68	**2.62**	47	**2.40**	82	**2.52**	45	**2.49**
900-990	54	**2.58**	151	**2.46**	76	**2.86**	226	**2.32**	89	**2.68**	169	**2.37**	122	**2.85**	181	**2.49**	176	**2.86**	117	**2.61**
1000-1090	297	**2.83**	482	**2.50**	251	**2.72**	741	**2.47**	309	**2.88**	560	**2.60**	375	**2.90**	602	**2.58**	439	**2.94**	531	**2.69**
1100-1190	475	**3.04**	948	**2.62**	439	**3.07**	1118	**2.59**	473	**2.97**	1009	**2.67**	540	**3.09**	965	**2.83**	669	**3.09**	1005	**2.76**
1200-1290	622	**3.19**	1046	**2.67**	632	**3.24**	1105	**2.66**	664	**3.22**	1009	**2.76**	762	**3.23**	1018	**2.84**	810	**3.28**	1155	**2.87**
1300-1390	557	**3.39**	513	**2.76**	546	**3.41**	552	**2.93**	557	**3.46**	591	**2.86**	636	**3.47**	544	**2.98**	675	**3.50**	611	**3.06**
1400-1490	305	**3.56**	166	**3.07**	300	**3.59**	181	**3.08**	300	**3.66**	178	**3.15**	324	**3.66**	202	**3.11**	381	**3.67**	193	**3.27**
1500+	103	**3.66**	29	**3.05**	72	**3.67**	33	**3.04**	94	**3.74**	29	**3.20**	98	**3.81**	37	**3.45**	114	**3.78**	56	**3.13**
Total/Mean	**2428**	**3.21**	**3375**	**2.65**	**2332**	**3.23**	**4033**	**2.64**	**2513**	**3.23**	**3597**	**2.72**	**2925**	**3.25**	**3596**	**2.76**	**3346**	**3.26**	**3713**	**2.86**
SAT Mean	**1253**		**1197**		**1249**		**1180**		**1243**		**1193**		**1231**		**1193**		**1226**		**1205**	

Table 6 *(continued from above)*
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools

Note: The sum of the SAT intervals in 2005 may not equal to the total because 14 entering freshmen were specially enrolled "Hurricane Katrina" students who had no test scores.

	Entering 2001				Entering 2002				Entering 2003				Entering 2004				Entering 2005			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	81	**2.32**	19	**2.46**	98	**2.46**	43	**2.18**	128	**2.50**	30	**2.17**	135	**2.32**	38	**2.34**	129	**2.33**	30	2.35
900-990	190	**2.75**	96	**2.59**	223	**2.69**	96	**2.43**	258	**2.71**	43	**2.46**	263	**2.59**	47	**2.29**	247	**2.60**	41	2.70
1000-1090	440	**2.87**	439	**2.57**	522	**2.89**	374	**2.66**	572	**2.90**	128	**2.79**	560	**2.82**	130	**2.70**	570	**2.80**	140	2.53
1100-1190	692	**3.08**	806	**2.70**	728	**3.08**	776	**2.80**	805	**3.09**	274	**2.94**	801	**3.09**	397	**2.80**	844	**2.98**	233	2.79
1200-1290	811	**3.28**	1072	**2.87**	933	**3.24**	1074	**2.84**	1023	**3.26**	577	**3.02**	1004	**3.27**	639	**3.01**	1026	**3.21**	564	**2.99**
1300-1390	704	**3.5**	572	**3.10**	848	**3.49**	655	**3.06**	841	**3.51**	491	**3.15**	830	**3.45**	608	**3.17**	863	**3.44**	599	**3.13**
1400-1490	393	**3.67**	206	**3.24**	461	**3.67**	239	**3.25**	499	**3.66**	209	**3.30**	478	**3.65**	247	**3.19**	507	**3.64**	302	**3.27**
1500+	112	**3.79**	45	**3.27**	119	**3.77**	45	**3.32**	163	**3.81**	51	**3.51**	169	**3.78**	53	**3.31**	205	**3.82**	74	**3.49**
Total/Mean	**3423**	**3.24**	**3255**	**2.85**	**3932**	**3.24**	**3302**	**2.90**	**4289**	**3.24**	**1804**	**3.05**	**4241**	**3.21**	**2157**	**3.00**	**4391**	**3.18**	**1997**	**3.02**
SAT Mean	**1225**		**1215**		**1226**		**1222**		**1223**		**1257**		**1221**		**1258**		**1226**		**1277**	

Table 6a
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools
White Students

	Entering 1996				Entering 1997				Entering 1998				Entering 1999				Entering 2000			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900			13	2.03	*	*	27	2.28	5	2.49	11	2.01	7	2.72	16	2.48	9	2.52	15	2.49
900-990	5	2.89	62	2.34	17	3.00	97	2.36	23	2.63	77	2.44	25	2.86	76	2.51	33	2.87	63	2.55
1000-1090	119	2.79	253	2.5	114	2.75	484	2.49	120	2.85	340	2.60	141	2.95	386	2.61	180	2.88	328	2.69
1100-1190	280	3.04	608	2.65	240	3.09	777	2.56	280	2.97	720	2.67	271	3.13	679	2.65	372	3.08	705	2.76
1200-1290	397	3.14	764	2.67	414	3.25	823	2.66	427	3.22	712	2.76	483	3.25	744	2.82	540	3.29	814	2.86
1300-1390	400	3.40	371	2.75	350	3.39	417	2.92	381	3.44	450	2.82	409	3.46	405	2.97	450	3.47	439	3.05
1400-1490	219	3.51	121	3.09	217	3.57	130	3.07	196	3.63	124	3.16	220	3.63	141	3.10	261	3.65	130	3.25
1500+	77	3.86	23	3.10	54	3.64	26	2.86	65	3.72	23	3.36	64	3.80	25	3.39	76	3.79	35	3.25
Total/Mean	1497	3.24	2215	2.68	1408	3.28	2871	2.65	1497	3.26	2457	2.73	1620	3.32	2472	2.77	1921	3.31	2529	2.86
SAT Mean	1280		1214		1275		1194		1267		1206		1267		1205		1262		1212	

Table 6a (continued from above)
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools
White Students

	Entering 2001				Entering 2002				Entering 2003				Entering 2004				Entering 2005			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	7	1.91	6	2.28	8	2.42	*	*	12	2.98	*	*	5	2.06	8	2.33	11	2.40	5	2.31
900-990	50	2.61	39	2.55	46	2.64	39	2.54	54	2.90	14	2.40	55	2.72	17	2.20	48	2.56	10	2.36
1000-1090	169	2.90	244	2.58	213	2.83	209	2.67	221	2.95	74	2.75	205	2.85	66	2.60	185	2.82	64	2.73
1100-1190	398	3.05	510	2.75	401	3.04	509	2.82	448	3.10	183	2.99	444	3.11	262	2.78	425	3.00	131	2.89
1200-1290	537	3.26	726	2.85	595	3.22	775	2.95	651	3.25	421	3.00	615	3.29	433	3.04	621	3.23	362	3.02
1300-1390	460	3.47	388	3.12	590	3.50	459	3.05	574	3.50	333	3.14	542	3.46	421	3.16	571	3.47	405	3.13
1400-1490	255	3.66	137	3.30	278	3.65	162	3.25	326	3.66	144	3.28	305	3.62	147	3.21	321	3.63	199	3.29
1500+	66	3.81	26	3.28	72	3.72	31	3.40	92	3.78	28	3.55	99	3.76	30	3.29	106	3.80	50	3.47
Total/Mean	1942	3.28	2076	2.87	2203	3.28	2188	2.94	2378	3.32	1202	3.06	2270	3.31	1384	3.02	2288	3.28	1230	3.08
SAT Mean	1257		1223		1261		1236		1262		1267		1262		1267		1268		1295	

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Table 6b
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools
African American Students

	Entering 1996				Entering 1997				Entering 1998				Entering 1999				Entering 2000			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	•	•	12	2.20	•	•	23	2.02	•	•	18	2.25	23	2.40	13	2.30	25	2.40	11	2.29
900-990	5	1.94	16	2.48	5	2.96	29	2.27	9	2.76	18	2.47	30	2.96	18	2.46	29	2.83	15	2.67
1000-1090	27	2.69	51	2.50	11	2.79	31	2.33	22	2.65	25	2.63	40	3.02	30	2.49	36	2.99	25	2.64
1100-1190	29	2.71	50	2.65	12	3.01	34	2.40	19	3.12	25	2.75	36	2.93	26	2.52	27	3.02	39	2.82
1200-1290	23	3.24	26	2.29	14	3.36	15	2.47	11	3.07	22	2.89	22	3.18	18	2.99	27	3.05	25	2.58
1300-1390	5	3.24	7	2.23	•	•	•	•	•	•	8	3.10	9	3.34	5	2.51	11	3.36	11	3.02
1400-1490	•	•	•	•	•	•	•	•	•	•	•	•			•	•	•	•	•	•
1500+			•	•	•	•	•	•	•	•	•	•			•	•	•	•	•	•
Total/Mean	**91**	**2.84**	**164**	**2.46**	**50**	**3.08**	**135**	**2.31**	**69**	**2.95**	**119**	**2.66**	**160**	**2.94**	**113**	**2.58**	**156**	**2.91**	**129**	**2.70**
SAT Mean	1139		1100		1139		1038		1111		1091		1058		1080		1068		1122	

Table 6b (continued from above)
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools
African American Students

	Entering 2001				Entering 2002				Entering 2003				Entering 2004				Entering 2005			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	22	2.20	6	2.37	23	2.26	19	2.02	31	2.19	12	2.34	48	1.97	13	2.34	45	2.18	12	2.32
900-990	19	2.60	8	2.45	27	2.73	12	2.15	30	2.62	11	2.25	40	2.51	8	1.96	35	2.31	8	2.13
1000-1090	38	2.74	22	2.52	49	2.84	19	2.60	61	2.74	10	2.35	54	2.81	11	2.42	66	2.85	11	1.95
1100-1190	29	2.92	22	2.68	19	2.83	21	2.71	30	2.93	14	2.50	34	2.95	13	2.94	50	2.80	23	2.52
1200-1290	23	3.31	31	2.78	29	3.22	18	2.73	31	3.33	12	3.07	33	3.11	19	2.62	42	3.09	16	2.70
1300-1390	5	3.81	9	3.06	7	3.37	10	2.17	9	3.37	•	•	14	3.33	10	3.12	11	3.21	14	2.98
1400-1490	•	•			•	•			•	•	•	•	•	•	•	•	•	•	•	•
1500+	•	•			•	•			•	•	•	•	•	•	•	•	•	•	•	•
Total/Mean	137	2.81	**98**	**2.68**	**156**	**2.84**	**99**	**2.44**	**194**	**2.79**	**64**	**2.55**	**225**	**2.69**	**77**	**2.58**	**252**	**2.66**	**87**	**2.50**
SAT Mean	1059		1137		1059		1079		1063		1065		1046		1116		1059		1118	

SJA 51a

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Table 6c
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools
Asian American Students

	Entering 1996				Entering 1997				Entering 1998				Entering 1999				Entering 2000			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	*	*	*	*	*	*	6	2.31			*	*	*	*	*	*	10	2.56	5	2.29
900-990	7	2.80	18	2.62	13	2.73	33	2.58	13	2.83	25	2.39	17	3.00	28	2.63	22	3.00	19	2.78
1000-1090	44	3.11	52	2.67	37	2.57	94	2.33	50	3.00	90	2.67	61	2.98	80	2.57	78	3.02	78	2.78
1100-1190	77	3.12	135	2.59	97	3.09	153	2.75	78	3.12	139	2.75	105	3.05	146	2.58	118	3.25	139	2.74
1200-1290	113	3.39	133	2.72	131	3.26	157	2.70	137	3.32	161	2.84	133	3.22	154	2.80	133	3.32	189	2.96
1300-1390	98	3.46	86	2.88	139	3.49	82	3.05	129	3.49	86	3.00	165	3.56	91	3.01	156	3.58	115	3.15
1400-1490	66	3.72	31	3.24	70	3.69	36	3.15	86	3.71	33	2.97	92	3.70	47	3.11	103	3.72	48	3.26
1500+	23	3.68	*	*	16	3.72	6	3.74	26	3.78	*	*	32	3.85	10	3.53	33	3.78	13	3.04
Total/Mean	**430**	**3.38**	**461**	**2.74**	**505**	**3.29**	**567**	**2.73**	**519**	**3.38**	**542**	**2.79**	**609**	**3.36**	**559**	**2.8**	**653**	**3.40**	**606**	**2.94**
SAT Mean	1272		1213		1263		1193		1277		1201		1268		1210		1257		1225	

Table 6c (continued from above)
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools
Asian American Students

	Entering 2001				Entering 2002				Entering 2003				Entering 2004				Entering 2005			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	9	2.03	*	*	10	2.23	*	*	9	2.01	*	*	12	2.48	*	*	11	2.30	*	*
900-990	34	2.69	12	2.62	30	3.01	9	2.05	27	2.78	5	2.99	30	2.42	*	*	24	2.55	*	*
1000-1090	76	2.89	61	2.56	53	2.91	57	2.71	68	2.90	14	3.02	58	2.93	11	3.11	65	2.79	23	2.18
1100-1190	116	3.14	144	2.60	147	3.17	130	2.77	109	3.20	38	2.99	116	3.19	52	2.90	124	3.11	30	2.82
1200-1290	144	3.30	187	2.99	193	3.30	159	2.92	187	3.33	66	3.09	179	3.36	106	3.03	170	3.28	74	3.01
1300-1390	185	3.58	129	3.08	167	3.55	134	3.14	192	3.61	100	3.20	179	3.49	118	3.20	157	3.39	122	3.23
1400-1490	114	3.73	57	3.14	156	3.70	58	3.18	128	3.72	54	3.37	138	3.70	79	3.20	141	3.69	75	3.29
1500+	40	3.78	16	3.32	44	3.84	11	3.15	61	3.87	19	3.53	64	3.80	16	3.56	90	3.83	23	3.52
Total/Mean	**718**	**3.35**	**607**	**2.89**	**800**	**3.38**	**582**	**2.93**	**781**	**3.41**	**299**	**3.17**	**776**	**3.38**	**388**	**3.11**	**782**	**3.33**	**350**	**3.11**
SAT Mean	1262		1242		1272		1242		1278		1300		1280		1304		1288		1322	

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Table 6d
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools
Hispanic Students

	Entering 1996				Entering 1997				Entering 1998				Entering 1999				Entering 2000			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	11	**2.61**	12	**2.11**	9	**2.11**	21	**2.05**	20	**2.29**	19	**2.52**	32	**2.75**	15	**2.40**	38	**2.57**	14	2.73
900-990	36	**2.54**	54	**2.54**	41	**2.83**	67	2.17	44	**2.66**	49	2.23	50	2.71	58	**2.41**	90	**2.83**	19	**2.60**
1000-1090	105	**2.80**	124	**2.43**	89	**2.74**	126	**2.55**	113	**2.94**	100	**2.54**	130	**2.78**	103	**2.51**	144	**2.96**	95	**2.58**
1100-1190	88	**3.05**	149	**2.51**	85	**3.01**	146	**2.82**	95	**2.83**	114	**2.54**	126	**3.09**	110	**2.60**	150	**3.01**	109	**2.80**
1200-1290	84	**3.15**	112	**2.68**	71	**3.16**	97	**2.61**	86	**3.10**	102	**2.64**	116	**3.16**	92	**2.81**	102	**3.22**	109	**2.86**
1300-1390	51	**3.26**	43	**2.63**	51	**3.35**	47	**2.82**	39	**3.43**	39	**2.93**	47	**3.26**	34	**2.92**	51	**3.47**	41	**2.92**
1400-1490	18	**3.60**	10	**2.31**	10	**3.33**	14	**2.97**	14	**3.60**	16	**3.45**	10	**3.78**	11	**3.35**	14	**3.60**	9	**3.38**
1500+	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	5	**3.42**
Total/Mean	**396**	**3.00**	**506**	**2.52**	**358**	**2.99**	**519**	**2.55**	**414**	**2.96**	**441**	**2.59**	**513**	**3**	**424**	**2.64**	**591**	**3.04**	**401**	**2.78**
SAT Mean	1158		1136		1147		1128		1134		1140		1129		1128		1114		1158	

Table 6d (continued from above)
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 1996-2005
Graduates of Texas High Schools
Hispanic Students

	Entering 2001				Entering 2002				Entering 2003				Entering 2004				Entering 2005			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	43	2.51	6	**2.94**	52	**2.56**	16	**2.14**	71	2.61	11	**2.06**	67	**2.54**	9	2.32	56	**2.42**	13	2.39
900-990	86	2.90	36	**2.64**	112	**2.60**	35	**2.50**	145	**2.67**	12	**2.50**	131	**2.60**	17	**2.44**	135	**2.69**	15	3.16
1000-1090	149	**2.87**	107	**2.55**	198	**2.96**	87	**2.61**	211	**2.89**	28	**2.86**	229	**2.73**	38	**2.80**	239	**2.83**	40	2.53
1100-1190	143	**3.13**	116	2.60	151	**3.13**	103	**2.69**	205	3.01	35	2.83	192	**3.02**	61	2.73	225	**2.90**	41	2.57
1200-1290	93	**3.29**	111	2.83	101	**3.26**	111	**2.93**	134	**3.21**	65	**3.02**	159	**3.14**	61	**2.73**	177	**3.11**	90	**2.86**
1300-1390	41	3.32	37	**2.96**	71	**3.37**	43	**3.06**	56	**3.31**	41	**2.97**	81	**3.37**	48	**3.15**	102	**3.42**	44	**2.93**
1400-1490	15	3.55	11	**3.09**	18	**3.71**	14	**3.42**	33	**3.47**	5	**3.22**	26	**3.59**	13	**3.12**	27	**3.45**	20	**3.25**
1500+	5	**3.74**	•	•			•	•	•	•	•	•	•	•	•	•	5	**3.84**	•	•
Total/Mean	**575**	**3.04**	**426**	2.71	**703**	**3.01**	**411**	2.77	**858**	**2.96**	**199**	**2.87**	**887**	**2.92**	**251**	**2.81**	**966**	**2.94**	**264**	**2.80**
SAT Mean	1109		1149		1103		1155		1100		1189		1110		1189		1122		1193	

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Table 7a

SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY

Entering 1996

Note: N-counts below represent students with a college admissions test score. SAT means represent SAT combined scores and concorded ACT scores. As is the case with the UT admissions routine, students submitting more than one set of scores were given the benefit of the best performance from a single test date. Students with no hours toward a GPA were excluded from the computation of the GPA mean. On very rare occasions students are admitted as freshmen to Pharmacy. Those are included in the total but are not listed.

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	27	1296	3.16	*	*	*	*	*	*	7	1236	3.42	38	1270	3.24
Business	318	1277	3.36	20	1183	3.02	97	1276	3.43	58	1178	3.23	495	1261	3.34
Communication	129	1223	3.10	13	1110	2.59	16	1211	3.20	27	1155	3.13	187	1206	3.08
Education	43	1184	3.08	4	1145	2.84	8	1230	3.50	9	1096	3.10	65	1171	3.13
Engineering	208	1335	3.35	13	1122	2.50	83	1346	3.44	68	1221	2.98	374	1309	3.28
Fine Arts	48	1258	3.40	*	*	*	*	*	*	17	1118	2.97	69	1224	3.30
Liberal Arts	371	1293	3.27	17	1132	3.02	55	1288	3.37	104	1134	2.89	548	1258	3.20
Natural Science	333	1274	3.11	19	1150	2.87	157	1241	3.34	99	1142	2.96	613	1240	3.14
Nursing	19	1184	3.01	*	*	*	*	*	*	7	1083	2.56	35	1131	2.88
Social Work	*	*	*	*	*	*	*	*	*				*	*	*
Total	1497	1280	3.24	91	1139	2.84	430	1272	3.38	396	1158	3.00	2428	1253	3.21

College/School	*Non-Top 10%*														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	17	1312	2.92	*	*	*	*	*	*	*	*	*	19	1314	2.97
Business	219	1279	2.99	14	1166	3.02	62	1284	3.34	40	1170	2.95	337	1262	3.05
Communication	282	1199	2.72	19	1093	2.52	27	1224	2.77	45	1124	2.52	373	1186	2.69
Education	71	1140	2.71	8	1011	2.78	8	1229	2.51	18	1146	2.46	105	1138	2.66
Engineering	196	1261	2.75	14	1172	2.63	69	1252	2.76	56	1171	2.65	339	1241	2.74
Fine Arts	132	1208	2.86	9	1167	2.50	6	1208	3.04	16	1151	2.86	164	1198	2.84
Liberal Arts	897	1190	2.58	55	1041	2.34	128	1159	2.55	216	1103	2.46	1308	1167	2.55
Natural Science	369	1239	2.55	41	1137	2.35	156	1211	2.63	103	1167	2.39	679	1215	2.53
Nursing	27	1157	2.89	*	*	*	*	*	*	8	1224	2.15	40	1164	2.73
Social Work	5	1194	2.82	*	*	*	*	*	*	*	*	*	10	1142	2.83
Total	2215	1214	2.68	164	1100	2.48	461	1213	2.74	506	1136	2.52	3375	1197	2.65

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Table 7b

SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY

Entering 1997

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	16	1254	3.56	*	*	*	*	*	*	*	*	*	21	1256	3.55
Business	307	1272	3.38	5	1156	3.03	120	1298	3.47	45	1211	3.33	479	1272	3.39
Communication	121	1248	3.27	6	1223	3.56	13	1235	3.43	32	1127	3.16	172	1223	3.27
Education	34	1169	3.13	*	*	*	7	1106	3.13	12	1113	3.05	54	1149	3.12
Engineering	217	1329	3.28	8	1185	3.26	109	1311	3.26	70	1142	2.70	406	1289	3.18
Fine Arts	44	1238	3.30	*	*	*	*	*	*	8	1160	3.21	57	1231	3.31
Liberal Arts	351	1281	3.28	11	1098	3.08	56	1263	3.29	77	1158	3.04	497	1256	3.24
Natural Science	302	1264	3.18	19	1106	2.84	188	1221	3.19	94	1144	2.93	607	1227	3.13
Nursing	15	1169	2.95	*	*	*	*	*	*	15	1013	2.84	34	1099	2.93
Social Work	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Total	1408	1275	3.28	50	1139	3.08	505	1263	3.29	358	1147	2.99	2332	1249	3.23

College/School	Non-Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	30	1244	2.92	*	*	*	*	*	*	*	*	*	34	1254	2.96
Business	286	1267	3.06	*	*	*	85	1256	3.26	33	1214	3.14	411	1260	3.11
Communication	274	1177	2.87	8	1126	2.42	16	1188	2.88	48	1138	2.62	348	1171	2.83
Education	134	1094	2.49	12	976	2.36	14	1096	2.66	27	1041	2.60	188	1079	2.50
Engineering	246	1273	2.71	11	1155	2.53	78	1264	2.89	55	1217	2.52	395	1259	2.72
Fine Arts	131	1162	2.68	8	994	2.85	10	1131	2.73	18	1114	2.82	171	1148	2.70
Liberal Arts	1076	1175	2.54	59	1003	2.12	147	1150	2.43	203	1108	2.47	1496	1157	2.50
Natural Science	543	1203	2.54	30	1043	2.31	209	1176	2.64	123	1118	2.42	910	1181	2.54
Nursing	48	1107	2.47	*	*	*	*	*	*	9	1109	2.89	62	1110	2.56
Social Work	13	1151	2.78	*	*	*	*	*	*	*	*	*	16	1119	2.81
Total	2781	1194	2.65	135	1038	2.31	567	1193	2.73	519	1128	2.55	4033	1180	2.64

Table 7c
SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY
Entering 1998

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	24	1296	3.38	*	*	*	*	*	*	*	*	*	29	1298	3.34
Business	382	1264	3.28	21	1106	3.09	141	1282	3.49	78	1111	2.90	625	1243	3.27
Communication	121	1227	3.33	7	1110	2.84	19	1268	3.28	31	1103	2.94	178	1205	3.24
Education	28	1184	3.17	*	*	*	*	*	*	16	1021	2.89	50	1120	3.09
Engineering	281	1329	3.31	5	1080	2.94	126	1318	3.36	84	1168	2.98	497	1296	3.27
Fine Arts	42	1252	3.42	*	*	*	*	*	*	*	*	*	48	1233	3.38
Liberal Arts	284	1263	3.26	17	1114	2.79	54	1288	3.42	74	1126	3.01	432	1237	3.22
Natural Science	314	1253	3.17	16	1161	3.04	167	1248	3.29	118	1157	2.99	621	1230	3.17
Nursing	19	1107	3.01	*	*	*	*	*	*	6	1065	2.73	29	1103	3.04
Social Work	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Total	1497	1267	3.26	69	1111	2.95	519	1277	3.38	414	1134	2.96	2513	1243	3.23
College/School	Non-Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	18	1324	2.86	*	*	*	*	*	*	*	*	*	21	1312	2.89
Business	125	1290	3.06	7	1163	2.84	25	1288	3.10	12	1192	2.97	170	1278	3.05
Communication	135	1240	2.93	*	*	*	9	1284	3.35	27	1143	2.83	177	1226	2.91
Education	91	1142	2.92	*	*	*	6	1080	2.85	10	1152	2.86	111	1137	2.88
Engineering	281	1284	2.67	15	1228	2.94	95	1257	2.83	49	1226	2.66	447	1270	2.71
Fine Arts	106	1186	2.91	*	*	*	8	1171	3.37	16	1132	2.54	135	1177	2.89
Liberal Arts	1165	1180	2.73	60	1031	2.51	174	1169	2.72	212	1110	2.63	1623	1164	2.71
Natural Science	490	1212	2.56	22	1149	2.78	217	1196	2.77	105	1151	2.40	844	1199	2.60
Nursing	31	1121	2.81	5	1032	2.42	6	1107	2.75	*	*	*	43	1104	2.76
Social Work	15	1139	2.53	*	*	*	*	*	*	6	1163	2.57	26	1136	2.52
Total	2457	1206	2.73	119	1091	2.66	542	1201	2.79	441	1140	2.59	3597	1193	2.72

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Table 7d

SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY

Entering 1999

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	20	1358	3.32	*	*	*	*	*	*	*	*	*	23	1352	3.27
Business	400	1252	3.40	38	1095	2.99	173	1269	3.43	99	1145	3.09	715	1233	3.34
Communication	164	1239	3.31	10	1126	3.19	18	1250	3.29	41	1121	3.15	234	1214	3.28
Education	39	1133	3.20	8	901	2.73	*	*	*	15	1012	3.08	62	1074	3.11
Engineering	274	1314	3.28	28	1089	2.75	142	1319	3.36	116	1153	2.90	566	1271	3.20
Fine Arts	53	1273	3.52	3	1040	3.44	*	*	*	12	1164	3.23	72	1237	3.45
Liberal Arts	314	1274	3.33	28	1014	2.96	54	1264	3.40	88	1119	3.11	490	1230	3.27
Natural Science	332	1268	3.26	40	1060	2.97	211	1240	3.30	137	1115	2.89	725	1219	3.19
Nursing	24	1182	3.11	*	*	*	6	1185	2.94	*	*	*	37	1152	3.03
Social Work				*	*	*	*	*	*	*	*	*	*	*	*
Total	1620	1267	3.32	160	1058	2.94	609	1268	3.36	513	1129	3.00	2925	1231	3.25

College/School	Non-Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	11	1345	2.83	*	*	*	*	*	*	*	*	*	13	1335	3.00
Business	94	1294	2.98	6	1145	2.64	21	1344	3.23	13	1247	2.95	139	1290	3.00
Communication	171	1250	3.07	*	*	*	11	1294	3.38	21	1250	2.96	206	1252	3.07
Education	120	1114	2.76	5	1036	2.90	8	1104	2.82	12	1082	2.58	147	1108	2.75
Engineering	307	1253	2.61	13	1145	2.81	116	1271	2.73	59	1157	2.43	500	1244	2.63
Fine Arts	110	1178	2.90	*	*	*	5	1104	2.74	14	1085	2.51	133	1163	2.82
Liberal Arts	1038	1184	2.80	58	1035	2.53	178	1158	2.81	189	1098	2.72	1470	1163	2.78
Natural Science	585	1217	2.69	22	1148	2.63	212	1209	2.75	108	1139	2.55	935	1205	2.69
Nursing	25	1123	2.75	*	*	*	*	*	*	*	*	*	34	1130	2.74
Social Work	11	1136	2.63	*	*	*	*	*	*	*	*	*	19	1138	2.56
Total	2472	1205	2.77	113	1080	2.58	559	1210	2.80	424	1128	2.64	3596	1193	2.76

Table 7a

SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY

Entering 2000

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	19	1343	3.61	•	•	•	•	•	•	•	•	•	24	1330	3.61
Business	517	1251	3.29	39	1055	2.78	207	1257	3.48	132	1126	3.05	901	1226	3.27
Communication	214	1221	3.34	9	1071	2.90	18	1184	3.28	49	1094	3.32	290	1192	3.32
Education	35	1151	3.22	9	1010	3.29	7	1117	3.47	18	1016	2.98	69	1094	3.20
Engineering	291	1304	3.27	22	1162	3.27	153	1293	3.35	129	1143	2.93	600	1262	3.23
Fine Arts	53	1235	3.44	•	•	•	7	1246	3.45	22	1126	2.97	87	1205	3.31
Liberal Arts	369	1279	3.38	26	1068	2.94	60	1263	3.40	96	1090	2.94	554	1235	3.29
Natural Science	402	1265	3.26	39	1069	2.81	193	1240	3.36	133	1112	3.10	776	1223	3.24
Nursing	20	1162	3.40	7	890	2.35	6	1122	2.98	8	1079	2.89	41	1093	3.06
Social Work	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Total	1921	1262	3.31	156	1068	2.91	653	1257	3.40	591	1114	3.04	3346	1226	3.26
College/School	Non-Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	10	1385	3.02	•	•	•	•	•	•	•	•	•	16	1386	3.17
Business	58	1244	2.98	•	•	•	17	1261	3.00	8	1195	3.47	87	1238	3.03
Communication	64	1281	3.27	•	•	•	8	1255	3.34	9	1178	2.97	85	1264	3.24
Education	105	1142	2.91	•	•	•	10	1181	2.99	10	1040	2.60	126	1135	2.89
Engineering	209	1302	2.89	16	1254	3.11	72	1312	3.02	41	1235	2.74	351	1294	2.91
Fine Arts	133	1182	2.83	•	•	•	7	1187	2.75	17	1161	2.60	159	1178	2.80
Liberal Arts	1403	1188	2.86	82	1085	2.65	262	1177	2.93	209	1139	2.84	1968	1177	2.86
Natural Science	517	1246	2.76	25	1177	2.63	223	1251	2.89	98	1168	2.67	879	1236	2.78
Nursing	17	1179	2.66	•	•	•	•	•	•	6	1160	2.32	26	1176	2.61
Social Work	13	1193	2.79	•	•	•	•	•	•	•	•	•	16	1204	2.83
Total	2529	1212	2.86	129	1122	2.70	606	1225	2.94	401	1158	2.78	3713	1205	2.86

Table 7f

SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY

Entering 2001

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	31	1384	3.40	*	*	*	*	*	*	*	*	*	40	1375	3.42
Business	373	1290	3.41	20	1094	2.86	183	1304	3.52	77	1140	3.25	662	1270	3.41
Communication	270	1203	3.35	15	1038	3.15	42	1165	3.18	70	1091	3.15	400	1174	3.29
Education	45	1149	3.32	6	910	2.55	*	*	*	13	975	2.92	68	1093	3.19
Engineering	329	1307	3.25	16	1119	2.98	167	1304	3.38	120	1141	2.94	646	1270	3.22
Fine Arts	56	1224	3.50	*	*	*	9	1322	3.71	13	1148	3.29	80	1220	3.47
Liberal Arts	405	1238	3.27	29	1035	2.96	80	1203	3.26	130	1100	3.10	658	1197	3.23
Natural Science	406	1252	3.13	40	1059	2.58	225	1237	3.27	132	1093	2.87	814	1213	3.10
Nursing	24	1152	2.99	7	1074	2.55	*	*	*	13	1024	2.80	48	1103	2.86
Social Work	*	*	*	*	*	*	*	*	*	*	*	*	7	1151	2.91
Total	1942	1257	3.28	137	1059	2.81	718	1262	3.35	575	1109	3.04	3423	1225	3.24
College/School	**Non-Top 10%**														
	White			**African American**			**Asian American**			**Hispanic**			**All Students**		
	N	**SAT**	**GPA**	**N**	**SAT**	**GPA**	**N**	**SAT**	**GPA**	**N**	**SAT**	**GPA**	**N**	**SAT**	**GPA**
Architecture	8	1336	2.97	*	*	*	*	*	*	*	*	*	12	1312	2.95
Business	63	1375	3.32	*	*	*	35	1375	3.38	*	*	*	104	1364	3.34
Communication	39	1212	3.24	*	*	*	*	*	*	11	1088	3.06	54	1183	3.21
Education	96	1136	2.98	*	*	*	11	1185	2.79	10	1103	3.13	118	1138	2.98
Engineering	224	1273	2.85	11	1184	2.36	94	1325	2.98	52	1190	2.77	387	1271	2.86
Fine Arts	119	1190	2.89	*	*	*	13	1132	2.59	17	1098	2.46	155	1174	2.84
Liberal Arts	978	1220	2.91	47	1101	2.69	177	1233	2.92	177	1152	2.73	1401	1209	2.88
Natural Science	484	1224	2.68	30	1171	2.65	258	1219	2.78	138	1153	2.80	920	1211	2.70
Nursing	41	1137	2.78	*	*	*	16	1103	2.97	9	1053	2.73	69	1119	2.85
Social Work	24	1115	2.76	*	*	*	*	*	*	7	1026	2.79	35	1091	2.77
Total	2076	1223	2.87	98	1137	2.68	607	1242	2.89	426	1149	2.71	3255	1215	2.85

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Table 7g
SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY
Entering 2002

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	21	1380	3.43	*	*	*	5	1396	3.25	*	*	*	30	1372	3.38
Business	412	1296	3.44	29	1093	2.82	200	1311	3.54	88	1155	3.23	741	1275	3.42
Communication	245	1242	3.35	9	1052	3.07	28	1205	3.46	61	1129	3.31	345	1215	3.35
Education	46	1142	3.26	*	*	*	*	*	*	30	1002	2.83	83	1086	3.07
Engineering	422	1307	3.27	27	1077	2.85	204	1309	3.37	129	1142	2.93	795	1272	3.22
Fine Arts	48	1254	3.52	*	*	*	5	1386	3.61	9	1033	3.08	64	1237	3.47
Liberal Arts	523	1228	3.23	51	1057	2.88	85	1238	3.39	165	1080	3.03	839	1186	3.19
Natural Science	444	1257	3.16	29	1023	2.72	259	1235	3.30	199	1092	2.93	955	1208	3.14
Nursing	37	1095	3.01	5	992	2.65	9	1151	2.71	17	974	2.63	71	1064	2.83
Social Work	5	1128	2.79	*	*	*	*	*	*	*	*	*	9	1087	2.77
Total	2203	1261	3.28	156	1059	2.84	800	1272	3.38	703	1103	3.01	3932	1226	3.24
College/School	Non-Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	12	1394	3.14	*	*	*				*	*	*	15	1397	3.24
Business	31	1348	3.31	*	*	*	20	1401	3.37	*	*	*	57	1348	3.33
Communication	68	1329	3.35	*	*	*	5	1360	3.39	*	*	*	79	1322	3.28
Education	121	1151	3.12	*	*	*	14	1174	3.00	21	1100	2.84	161	1143	3.05
Engineering	307	1274	2.79	12	1200	2.47	132	1283	2.74	85	1196	2.82	547	1262	2.75
Fine Arts	110	1206	2.99	*	*	*	17	1148	2.78	18	1143	3.09	151	1192	2.97
Liberal Arts	967	1232	2.99	43	994	2.47	138	1224	3.09	159	1130	2.76	1316	1211	2.95
Natural Science	517	1233	2.80	33	1139	2.41	216	1232	2.91	109	1171	2.81	887	1223	2.82
Nursing	29	1153	2.66	*	*	*	13	1131	2.91	*	*	*	47	1138	2.72
Social Work	26	1137	2.95	*	*	*	6	1153	2.82	7	1104	3.12	41	1126	2.94
Total	2188	1236	2.94	99	1079	2.44	562	1242	2.93	411	1155	2.77	3302	1222	2.90

Table 7h

SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY

Entering 2003

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	30	1364	3.37	*	*	*	5	1354	3.44	*	*	*	36	1362	3.39
Business	351	1312	3.45	24	1134	2.99	153	1342	3.62	94	1148	3.20	635	1287	3.44
Communication	214	1234	3.41	16	1030	3.08	21	1262	3.34	57	1118	3.03	313	1203	3.32
Education	45	1107	3.26	5	858	2.26	7	1139	3.25	27	1009	3.02	85	1060	3.12
Engineering	411	1306	3.30	28	1130	2.78	183	1313	3.38	167	1134	2.91	808	1266	3.21
Fine Arts	60	1243	3.61	*	*	*	9	1281	3.61	16	1178	3.17	89	1228	3.52
Liberal Arts	681	1244	3.32	46	1050	2.80	95	1214	3.37	237	1074	3.00	1072	1194	3.23
Natural Science	519	1253	3.21	58	1055	2.76	296	1254	3.35	228	1102	2.89	1128	1212	3.16
Nursing	61	1139	3.17	12	988	2.49	9	1088	3.29	20	987	2.50	103	1086	2.97
Social Work	6	1180	3.09	*	*	*	*	*	*	11	932	2.61	20	1013	2.76
Total	2378	1262	3.32	194	1062	2.79	781	1278	3.41	858	1100	2.96	4289	1223	3.24

College/School	Non-Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	9	1387	3.44	*	*	*	*	*	*	*	*	*	15	1364	3.44
Business	23	1415	3.55	*	*	*	8	1471	3.63	*	*	*	32	1424	3.57
Communication	6	1308	3.21	*	*	*	*	*	*	*	*	*	8	1315	3.25
Education	62	1197	3.15	*	*	*	5	1192	3.48	10	1123	3.23	79	1184	3.17
Engineering	218	1299	2.87	9	1152	2.47	90	1335	3.22	41	1213	2.86	373	1294	2.96
Fine Arts	82	1211	3.13	*	*	*	9	1197	3.23	14	1135	2.86	109	1198	3.11
Liberal Arts	548	1261	3.12	36	1007	2.43	72	1292	3.19	80	1202	2.95	746	1246	3.08
Natural Science	238	1277	2.98	15	1143	2.77	112	1276	3.07	46	1175	2.69	420	1261	2.97
Nursing	*	*	*	*	*	*	*	*	*	*	*	*	6	1063	2.81
Social Work	13	1215	3.06	*	*	*	*	*	*	*	*	*	16	1204	2.98
Total	1202	1267	3.06	64	1065	2.55	299	1300	3.17	199	1189	2.87	1804	1257	3.05

Table 7I

SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY

Entering 2004

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	22	1364	3.58	•	•	•	6	1398	3.63	•	•	•	31	1370	3.57
Business	399	1297	3.43	19	1092	2.80	156	1332	3.60	111	1160	3.11	696	1278	3.40
Communication	214	1251	3.49	17	1064	3.18	33	1254	3.51	63	1130	3.34	332	1218	3.45
Education	49	1142	3.15	13	1038	2.91	6	1050	2.62	35	1021	2.78	104	1084	2.97
Engineering	378	1323	3.29	27	1066	2.39	172	1342	3.33	186	1148	2.79	785	1274	3.15
Fine Arts	56	1266	3.61	•	•	•	•	•	•	11	1157	3.48	70	1250	3.53
Liberal Arts	566	1231	3.29	60	1019	2.79	88	1243	3.40	228	1079	2.89	962	1180	3.17
Natural Science	536	1247	3.14	70	1057	2.53	289	1246	3.33	215	1114	2.88	1132	1208	3.10
Nursing	41	1157	3.36	15	976	2.65	19	1087	2.92	34	976	2.63	110	1063	2.95
Social Work	9	1129	3.20	•	•	•	•	•	•	•	•	•	19	1059	2.95
Total	2270	1262	3.31	225	1046	2.69	776	1280	3.38	887	1110	2.92	4241	1221	3.21
College/School	Non-Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	10	1377	2.97	•	•	•	•	•	•	•	•	•	13	1371	2.89
Business	20	1373	3.40	•	•	•	10	1426	3.39	•	•	•	32	1390	3.40
Communication	31	1332	3.49	•	•	•	•	•	•	•	•	•	41	1311	3.49
Education	131	1188	3.00	•	•	•	13	1193	3.09	17	1119	2.74	166	1176	2.98
Engineering	229	1310	2.88	12	1198	2.55	96	1309	2.98	46	1232	2.82	400	1297	2.89
Fine Arts	88	1216	3.19	•	•	•	13	1304	3.22	21	1163	3.16	128	1213	3.18
Liberal Arts	559	1266	3.03	37	1039	2.50	70	1286	3.13	93	1162	2.81	774	1244	2.99
Natural Science	299	1270	2.96	22	1200	2.71	176	1311	3.16	61	1216	2.62	575	1273	2.98
Nursing				•	•	•	•	•	•	•	•	•	•	•	•
Social Work	17	1248	3.46	•	•	•	5	1228	3.22	•	•	•	25	1242	3.29
Total	1384	1267	3.02	77	1116	2.58	388	1304	3.11	251	1189	2.81	2157	1258	3.00

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Table 7j
SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY
Entering 2005

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	23	1384	3.59	*	*	*	*	*	*	*	*	*	33	1372	3.52
Business	330	1309	3.44	30	1076	2.82	143	1337	3.44	110	1151	3.11	628	1275	3.35
Communication	197	1251	3.32	28	1091	2.70	17	1322	3.49	70	1107	3.09	312	1209	3.23
Education	80	1157	3.07	13	1002	2.31	11	1171	3.28	32	1025	2.63	138	1113	2.90
Engineering	323	1341	3.24	16	1190	2.73	140	1370	3.35	120	1205	2.95	627	1315	3.19
Fine Arts	63	1254	3.36	*	*	*	5	1240	3.60	19	1126	3.20	89	1220	3.33
Liberal Arts	709	1244	3.28	70	1049	2.67	118	1240	3.33	321	1108	2.92	1235	1195	3.16
Natural Science	513	1255	3.17	83	1043	2.60	318	1265	3.29	259	1110	2.85	1209	1212	3.09
Nursing	40	1178	3.33	8	933	2.67	20	1131	3.09	22	1061	3.10	92	1113	3.16
Social Work	10	1247	3.24	*	*	*	7	1049	1.49	9	1004	2.69	28	1097	2.78
Total	2288	1268	3.28	252	1059	2.66	782	1288	3.33	966	1122	2.94	4391	1226	3.18

College/School	Non-Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	13	1402	3.26	*	*	*	*	*	*	*	*	*	20	1381	3.27
Business	23	1400	3.42	*	*	*	9	1450	3.66	*	*	*	37	1393	3.44
Communication	27	1379	3.27	*	*	*	*	*	*	*	*	*	34	1362	3.19
Education	65	1257	3.13	*	*	*	8	1251	3.31	9	1178	2.83	84	1248	3.08
Engineering	221	1335	2.97	12	1263	2.73	104	1320	2.99	44	1258	2.78	399	1317	2.95
Fine Arts	116	1215	3.28	2	1065	2.78	17	1216	3.16	20	1117	3.07	157	1197	3.22
Liberal Arts	486	1285	3.09	45	1030	2.48	94	1332	3.20	106	1183	2.91	759	1260	3.04
Natural Science	249	1304	2.95	24	1200	2.42	112	1323	3.08	73	1178	2.59	471	1283	2.90
Nursing	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Social Work	27	1269	3.13	*	*	*	*	*	*	*	*	*	32	1263	2.98
Total	1230	1295	3.08	87	1118	2.51	350	1322	3.11	264	1193	2.80	1997	1277	3.02

SJA 63a

Table 8

FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE AND GENDER

Entering 1996-2005

SAT Ranges	Top 10%																			
	Entering 1996				Entering 1997				Entering 1998				Entering 1999				Entering 2000			
	Male		Female		Male		Female		Male		Female		Male		Female		Male		Female	
	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	*	*	11	2.72	5	2.07	11	2.08	9	2.64	18	2.19	19	2.43	49	2.69	23	2.63	59	2.47
900-990	17	2.46	37	2.64	22	2.77	54	2.90	28	2.59	61	2.73	30	2.72	92	2.89	43	2.69	133	2.91
1000-1090	88	2.78	209	2.85	86	2.62	165	2.77	80	2.80	229	2.91	1[illegible]8	2.92	257	2.89	145	2.81	294	3.00
1100-1190	152	2.91	323	3.10	168	2.95	271	3.14	174	2.89	299	3.02	194	3.01	346	3.14	259	2.96	410	3.18
1200-1290	270	3.08	352	3.28	241	3.06	391	3.36	261	3.11	403	3.29	327	3.11	435	3.32	342	3.16	468	3.37
1300-1390	298	3.33	259	3.47	283	3.32	283	3.50	279	3.44	278	3.48	319	3.40	317	3.54	334	3.43	341	3.56
1400-1490	181	3.48	124	3.69	165	3.53	135	3.67	171	3.63	129	3.70	198	3.61	126	3.73	208	3.60	173	3.75
1500+	73	3.59	30	3.84	48	3.63	24	3.75	65	3.69	29	3.83	68	3.81	30	3.82	79	3.75	35	3.85
Total/ Mean GPA	1083	3.19	1345	3.24	998	3.17	1334	3.28	1067	3.24	1446	3.22	1273	3.25	1652	3.26	1433	3.22	1913	3.29
Mean Test Score	1290		1223		1275		1231		1279		1216		1269		1202		1260		1200	

SAT Ranges	Non-Top 10%																			
	Entering 1996				Entering 1997				Entering 1998				Entering 1999				Entering 2000			
	Male		Female		Male		Female		Male		Female		Male		Female		Male		Female	
	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	20	2.00	20	2.22	28	2.00	49	2.23	26	2.25	26	2.30	25	2.39	22	2.41	21	2.44	24	2.54
900-990	59	2.33	92	2.54	84	2.31	142	2.33	54	2.36	115	2.38	74	2.44	107	2.53	47	2.65	70	2.59
1000-1090	195	2.39	287	2.57	293	2.36	448	2.54	215	2.51	345	2.66	233	2.40	369	2.70	208	2.61	323	2.73
1100-1190	471	2.49	477	2.75	532	2.49	586	2.68	460	2.55	549	2.77	482	2.51	483	2.75	465	2.64	540	2.86
1200-1290	606	2.54	440	2.84	630	2.57	475	2.79	561	2.60	448	2.97	568	2.68	450	3.03	655	2.75	500	3.03
1300-1390	351	2.71	162	2.86	365	2.82	187	3.14	409	2.76	182	3.07	377	2.89	167	3.16	409	2.97	202	3.24
1400-1490	133	3.01	33	3.30	123	2.89	58	3.48	132	3.09	46	3.33	143	2.98	59	3.44	132	3.21	61	3.41
1500+	23	2.96	6	3.39	27	3.00	6	3.19	21	2.98	8	3.77	30	3.38	7	3.76	46	3.05	10	3.47
Total/ Mean GPA	1858	2.57	1517	2.75	2082	2.57	1951	2.71	1878	2.64	1719	2.82	1932	2.67	1664	2.87	1983	2.79	1730	2.94
Mean Test Score	1220		1168		1206		1152		1222		1162		1217		1166		1229		1178	

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Table 8 (continued from previous page)

FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE AND GENDER

Entering 1996-2005

SAT Ranges	Top 10%																			
	Entering 2001				Entering 2002				Entering 2003				Entering 2004				Entering 2005			
	Male		Female		Male		Female		Male		Female		Male		Female		Male		Female	
	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	27	2.32	54	2.33	32	2.22	66	2.57	30	2.68	98	2.44	38	2.23	97	2.36	33	2.00	96	2.44
900-990	54	2.56	136	2.83	57	2.37	166	2.80	77	2.64	181	2.75	80	2.51	183	2.63	76	2.56	171	2.62
1000-1090	133	2.74	307	2.93	181	2.81	341	2.94	189	2.81	383	2.94	181	2.65	379	2.90	177	2.70	393	2.85
1100-1190	255	2.92	437	3.17	264	2.93	464	3.16	293	2.99	512	3.15	302	2.99	499	3.18	301	2.84	543	3.05
1200-1290	333	3.11	478	3.39	393	3.18	540	3.29	420	3.18	603	3.31	384	3.13	620	3.36	416	3.14	610	3.26
1300-1390	362	3.40	342	3.60	409	3.37	439	3.61	402	3.42	439	3.60	406	3.32	424	3.58	391	3.31	472	3.55
1400-1490	233	3.62	160	3.74	270	3.62	191	3.73	285	3.61	214	3.72	268	3.61	210	3.70	290	3.57	217	3.72
1500+	79	3.77	33	3.85	83	3.73	36	3.85	96	3.76	67	3.88	115	3.74	54	3.87	124	3.78	81	3.86
Total/ Mean GPA	1476	3.19	1947	3.28	1689	3.20	2243	3.26	1792	3.23	2497	3.25	1775	3.17	2466	3.23	1808	3.15	2583	3.19
Mean Test Score	1263		1197		1261		1199		1258		1197		1256		1195		1261		1202	

SAT Ranges	Non-Top 10%																			
	Entering 2001				Entering 2002				Entering 2003				Entering 2004				Entering 2005			
	Male		Female		Male		Female		Male		Female		Male		Female		Male		Female	
	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	14	2.34	5	2.91	24	1.87	19	2.52	14	2.17	16	2.17	20	2.43	16	2.22	19	2.41	11	2.24
900-990	34	2.69	62	2.53	26	2.41	70	2.44	24	2.26	19	2.72	22	2.08	25	2.48	14	2.68	27	2.70
1000-1090	148	2.45	291	2.63	139	2.53	235	2.73	51	2.57	77	2.94	39	2.47	91	2.80	60	2.51	80	2.55
1100-1190	368	2.59	438	2.80	317	2.63	459	2.91	105	2.81	169	3.02	168	2.61	229	2.95	101	2.76	132	2.81
1200-1290	598	2.74	474	3.04	567	2.83	507	3.06	275	2.83	302	3.19	280	2.86	359	3.12	290	2.87	274	3.12
1300-1390	361	3.00	211	3.28	430	2.94	225	3.30	295	3.00	196	3.36	363	3.06	245	3.32	392	3.04	207	3.31
1400-1490	161	3.19	45	3.42	174	3.17	65	3.47	154	3.23	55	3.49	168	3.11	79	3.37	209	3.22	93	3.39
1500+	40	3.31	5	2.98	38	3.30	7	3.46	41	3.48	10	3.61	45	3.24	8	3.73	56	3.40	18	3.78
Total/ Mean GPA	1724	2.79	1531	2.92	1715	2.82	1587	2.99	959	2.94	845	3.17	1105	2.91	1052	3.10	1148	2.98	849	3.09
Mean Test Score	1243		1183		1251		1191		1283		1229		1283		1233		1299		1247	

Diversity Levels of Undergraduate Classes

at

The University of Texas at Austin

1996 – 2002

A report by

The Office of Admissions

November 20, 2003

THE UNIVERSITY OF TEXAS AT AUSTIN

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Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996-2002

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THE UNIVERSITY OF TEXAS AT AUSTIN

OFFICE OF ADMISSIONS

Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996-2002

Abstract

Recent United States Supreme Court rulings on affirmative action in higher education[1] have become an occasion for selective colleges and universities to audit their admission policies and their underlying philosophy. Specifically, the Court's emphasis on educational benefits focuses on *diversity, not of a campus or entering freshman class, but where teaching takes place—in the classroom.*

This document reports the results of an investigation into levels of diversity in undergraduate classrooms at The University of Texas at Austin from 1996 through 2002.

Classroom Diversity

Since UT Austin's educational mission includes the goal of producing future educational, cultural, business, and socio-political leaders, the undergraduate experience for each student should include classroom contact with peers of differing racial/ethnic and cultural backgrounds.[2] In *Grutter*, the Court accepted the principle of "critical mass" or an adequate representation of minority students to assure the educational benefits of diversity. The Court also accepted the Michigan argument that diversity benefits all students in that they learn that there is not "one" minority or majority view, but many. In addition, the Court recognized that critical mass is essential in order to avoid isolating or burdening individuals as "spokespersons" of their race or ethnicity.[3]

After reviewing *Grutter* and *Gratz*, the Office of Admissions identified a need for an investigation into whether there is a critical mass of minority students in the educational setting, more specifically, in classrooms where teaching and learning take place at The University of Texas at Austin. Are there large numbers of classes at The University of Texas at Austin where there are no members of any minority groups? Second, are there large numbers of classes in which there is only one member of a given racial/ethnic group who may be made to feel isolated or may be seen as a "spokesperson" of their race or ethnicity?

"Classes" Defined

"NR-CLASSES" is a very large database that stores all past UT Austin coursework at the end of each semester. This study utilized that source to analyze each fall semester from 1996 through 2002. The focus of this study was on undergraduate courses students take for credit towards a degree. As such, courses in the following areas were rejected: all courses attended exclusively by graduate students, the Law School, the School of Library Science, developmental courses that do not award credit, Study Abroad, In Absentia and Affiliated Study classes, Individual Study classes, Irregular Study classes, and courses in the cognitive sciences (which are largely graduate level). Classes with fewer than five students were not counted.

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[1] See *Grutter v Bollinger* and *Gratz v Bollinger* (2003). Citations are from slip opinions located online at http://www.supremecourtus.gov/opinions/02pdf/02-516.pdf (for *Gratz*) and http://www.supremecourtus.gov/opinions/02pdf/02-241.pdf (for *Grutter*).

[2] UT Austin's Mission is posted at http://www.utexas.edu/student/registrar/catalogs/ug02-04/ch01/ch01a.html#the_mission.

[3] *Grutter v Bollinger*, 6.

Labs, discussion classes, and freshman seminars (which are counted in the UT section, but do not belong to any college or school) were intentionally included because of their interactive nature. Some of these classes do not award credit.

Students excluded in the study were those who withdrew during the semester (and, thus, were not present for a significant number of class sessions) and International students. [Authors' Note: International is a racial/ethnic category and a citizenship code at UT Austin. This study essentially looks at diversity among American citizens by eliminating all non-citizens. Thus, for example, it is possible for a class to include a student from Africa but have no African American. Put another way, this report studies representation among American ethnic groups.]

Because of the very small numbers of American Indians (see Table 1), that group was not analyzed.

Results

Results indicate that large percentages of UT Austin classes have none or only one minority student.

In the aggregate sense the Top 10% Plan has contributed to the restoration of diversity levels at UT Austin to pre-*Hopwood* levels (see Table 1). Table 2, however, provides a snapshot comparison of pre-*Hopwood* classroom diversity (1996) with subsequent fall semesters through 2002. It shows that at the classroom level diversity has not improved. Indeed, the percentage of classes with none or only one African American and, separately, the percentage of classes with none or only one Hispanic is up noticeably. Undoubtedly, some of the increase is due to the larger number of sections observed (from 4,742 in 1996 to 5,631 in 2002)[4]. Limited numbers of minority students appeared to be "spread out" in more classes, leaving many sections with little or no representation.

The campus wide UT Austin Student/Faculty Ratio for the 2002-03 academic year was approximately 21/1.[5] At present, the University has an unofficial goal of lowering the ratio by increasing the size of the faculty by approximately 300 over a ten-year period. Since the majority of UT classes have between five and twenty-four students in them, and the University's goal is to increase the number of sections of that size, a special analysis was done for that subset. Table 3 (page 8) illustrates the results of that analysis. During the fall of 2002, nearly 90% of UT undergraduate classes with five to twenty-four students had no or only one African American to contribute their experiences or perspectives to a class discussion. Over 40% had no or only one Hispanic or Asian American, although the Asian American percentage appears to be high as a result of a concentration of those students in Business, Engineering, and Natural Sciences.

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[4] See Appendices 1 and 7 of this report.

[5] See *Statistical Handbook, 2002-03*, pgs. 122-25.

Table 1
Applicants/Admits/First-Time Freshmen
Summers and Falls Combined
1996-2003[6]

Applicants

	1996		1997		1998		1999		2000		2001		2002		2003	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
White	10584	61	9134	61	10138	60	11051	58	12737	59	11723	56	12603	57	13944	57
Native American	119	1	67	<1	94	1	87	<1	107	<1	127	1	110	<1	111	<1
African American	809	5	639	4	660	4	1030	5	1186	6	1053	5	1159	5	1351	6
Asian American	2363	14	2184	15	2491	15	2668	14	2939	14	3123	15	3259	15	3439	14
Hispanic	2492	14	1955	13	2338	14	2831	15	3087	14	3184	15	3487	16	4101	17
International	898	5	946	6	958	6	1199	6	1404	7	1673	8	1447	7	1477	6
Unknown	0	0	57	<1	118	1	64	<1	79	<1	123	1	114	1	96	<1
Total	**17283**	**100**	**14982**	**100**	**16797**	**100**	**18930**	**100**	**21539**	**100**	**20986**	**100**	**22179**	**100**	**24519**	**100**

Admits

	1996		1997		1998		1999		2000		2001		2002		2003	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
White	7167	63	7964	65	7659	64	7421	62	8162	62	7787	61	8258	61	6852	60
Native American	63	1	54	<1	59	<1	47	<1	59	<1	68	1	61	<1	37	<1
African American	501	4	419	3	401	3	517	4	562	4	445	3	494	4	448	4
Asian American	1654	14	1938	16	1942	16	1970	16	2151	16	2198	17	2298	17	1991	17
Hispanic	1761	15	1592	13	1620	14	1705	14	1823	14	1815	14	1945	14	1795	16
International	310	3	312	3	252	2	248	2	471	4	355	3	379	3	348	3
Unknown	0	0	10	<1	42	<1	41	<1	28	<1	65	1	41	<1	33	<1
Total	**11456**	**100**	**12289**	**100**	**11975**	**100**	**11949**	**100**	**13256**	**100**	**12733**	**100**	**13478**	**100**	**11504**	**100**

Enrolled

	1996		1997		1998		1999		2000		2001		2002		2003	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
White	4159	65	4730	67	4399	65	4447	63	4801	63	4447	61	4882	62	3866	59
Native American	34	<1	36	1	37	<1	28	<1	32	<1	34	<1	35	<1	19	<1
African American	266	4	190	3	199	3	286	4	296	4	242	3	272	3	267	4
Asian American	942	15	1130	16	1133	17	1221	17	1325	17	1413	19	1452	18	1153	18
Hispanic	932	14	892	13	891	13	976	14	1011	13	1024	14	1137	14	1068	16
International	97	2	107	2	83	1	82	1	217	3	139	2	157	2	156	2
Unknown	0	0	0	0	2	<1	0	0	4	<1	38	<1	0	0	15	<1
Total	**6430**	**100**	**7085**	**100**	**6744**	**100**	**7040**	**100**	**7686**	**100**	**7337**	**100**	**7935**	**100**	**6544**	**100**

Source: The University of Texas at Austin, Office of Institutional Studies, *Statistical Handbook*, 1996-2002 editions.

Additional Data

A complete analysis is provided in Appendices 1-7. Appendix 1 is for the fall of 1996, followed by an appendix for each subsequent year through the fall of 2002. Each appendix has eleven figures. Figure 1 in each appendix is for the entire University; Figure 2 analyzes the School of Architecture, and is followed by the rest of the colleges/schools in alphabetical order.

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[6] The entering class of 2003 is included here because the data are available. *Data in all other tables were captured at the end of the semester, and thus, 2003 is not available.*

Table 2
Representation of Racial/Ethnic Groups in UT Schools/Colleges in Classes ≥5 Students
Percentages of Classes With None or Only One Member of Select Racial/Ethnic Groups
Fall 1996 to Fall 2002

White	1996	1997	1998	1999	2000	2001	2002
Architecture	2.13	1.67					
Business		0.37		0.38		0.39	
Communication		0.33			0.33		
Education			0.31	0.30	0.91	0.29	1.17
Engineering	0.23		1.10	0.42	0.20	0.59	0.59
Fine Arts	0.59		0.30	0.30	0.30	0.30	
Liberal Arts	1.95	1.83	1.66	1.94	1.88	1.98	2.08
Nat. Sciences	0.24	0.16	0.08	0.54	0.51	1.12	1.09
Nursing							
Social Work							
UT Austin	**0.82**	**0.80**	**0.78**	**0.94**	**1.01**	**1.11**	**1.19**
African American	1996	1997	1998	1999	2000	2001	2002
Architecture	93.62	96.66	98.53	98.60	98.69	92.06	92.10
Business	59.84	65.93	60.70	64.26	63.00	62.36	54.20
Communication	74.45	71.28	76.07	79.15	81.06	81.04	81.53
Education	67.42	65.39	64.00	66.47	65.55	69.45	67.55
Engineering	70.64	80.47	78.63	83.89	83.30	83.63	80.98
Fine Arts	66.77	85.46	90.03	90.21	88.36	87.19	87.77
Liberal Arts	75.25	77.95	77.87	80.08	81.46	79.91	81.88
Nat. Sciences	71.55	76.39	77.24	77.52	75.46	75.84	77.78
Nursing	76.00	72.84	79.75	92.11	92.21	88.37	84.95
Social Work	35.30	42.11	45.16	50.00	76.92	70.37	50.00
UT Austin	**72.98**	**76.40**	**76.86**	**79.01**	**79.07**	**78.51**	**79.08**
Asian American	1996	1997	1998	1999	2000	2001	2002
Architecture	51.06	38.33	42.65	47.89	46.06	46.04	39.47
Business	8.20	7.40	8.94	7.22	4.33	3.14	2.94
Communication	57.41	55.45	52.83	52.44	55.15	49.23	46.18
Education	39.35	41.02	39.38	37.73	36.58	33.72	35.40
Engineering	29.81	30.26	29.07	23.09	20.78	18.94	18.04
Fine Arts	50.00	62.62	58.61	60.53	57.61	54.88	52.60
Liberal Arts	44.88	45.43	45.70	45.06	44.05	42.00	42.82
Nat. Sciences	25.20	25.75	25.75	24.34	22.78	20.74	20.24
Nursing	53.33	56.79	67.09	63.16	63.64	77.91	81.72
Social Work	70.58	63.16	70.97	77.27	73.08	74.08	76.67
UT Austin	**37.83**	**38.30**	**38.25**	**36.77**	**35.60**	**33.63**	**33.44**
Hispanic	1996	1997	1998	1999	2000	2001	2002
Architecture	48.93	40.00	42.65	47.89	51.32	53.97	40.79
Business	12.71	17.04	16.34	20.15	20.47	23.13	19.32
Communication	20.74	29.70	30.23	25.08	27.90	22.32	28.34
Education	12.26	16.02	15.39	12.57	16.15	17.58	16.81
Engineering	24.09	24.89	32.60	29.66	32.18	31.37	28.43
Fine Arts	35.29	30.87	33.54	40.06	38.21	40.85	39.75
Liberal Arts	30.61	30.63	33.06	33.90	34.62	35.79	34.95
Nat. Sciences	21.95	23.93	28.18	27.90	27.85	27.65	26.59
Nursing	41.34	51.86	58.23	44.74	50.65	41.86	48.39
Social Work	11.76		6.45	18.18	11.54	14.81	20.00
UT Austin	**25.16**	**26.99**	**30.07**	**30.23**	**31.10**	**31.09**	**30.42**

Table 3
Representation of Racial/Ethnic Groups in UT Undergraduate Classes With 5-24 Students
Percentages of Classes With None or Only One Member of Select Racial/Ethnic Groups
Fall 1996 to Fall 2002

White	1996	1997	1998	1999	2000	2001	2002
Architecture	2.56	2.44					
Business		1.09		1.35		2.08	
Communication		0.51			0.52		
Education			0.65	0.57	1.20	0.73	1.18
Engineering	0.40		1.91	0.71	0.34	1.01	1.06
Fine Arts	0.73		0.35	0.34	0.34	0.35	
Liberal Arts	2.84	2.62	2.28	2.63	2.41	2.64	2.65
Nat. Sciences	0.42	0.27	0.13	0.95	0.91	1.89	1.74
Nursing							
Social Work							
UT Austin	**1.35**	**1.26**	**1.19**	**1.44**	**1.47**	**1.67**	**1.69**
African American	1996	1997	1998	1999	2000	2001	2002
Architecture	94.87	100.00	100.00	100.00	98.25	92.98	96.66
Business	90.25	93.48	90.81	82.44	81.82	83.34	82.75
Communication	83.62	81.22	85.79	87.25	90.11	92.75	91.63
Education	82.88	82.13	88.96	84.57	85.72	84.53	90.53
Engineering	83.40	86.60	89.32	91.87	92.76	93.92	92.91
Fine Arts	71.43	89.01	93.66	93.56	94.50	93.26	91.93
Liberal Arts	84.60	87.85	86.75	88.04	88.84	87.47	88.85
Nat. Sciences	86.60	89.69	89.74	91.35	87.60	88.03	88.71
Nursing	87.50	83.33	87.10	98.27	98.24	97.14	96.00
Social Work	71.43	63.63	62.50	70.00	94.45	76.20	54.17
UT Austin	**85.59**	**87.79**	**88.60**	**89.60**	**89.63**	**89.08**	**89.80**
Asian American	1996	1997	1998	1999	2000	2001	2002
Architecture	61.54	56.10	60.42	67.35	57.89	49.13	50.00
Business	24.39	14.13	21.84	20.27	15.16	16.67	8.62
Communication	77.19	73.60	68.94	71.93	71.35	67.87	62.83
Education	47.26	51.40	57.79	56.57	55.35	46.40	55.03
Engineering	48.18	47.47	45.80	36.40	33.79	30.41	30.49
Fine Arts	53.85	69.24	64.79	67.12	64.61	60.99	57.89
Liberal Arts	53.88	53.62	54.26	53.51	51.93	50.66	50.30
Nat. Sciences	40.34	39.55	40.00	38.65	36.81	34.76	33.07
Nursing	71.43	66.66	82.26	75.86	82.46	91.43	90.67
Social Work	85.71	81.82	93.75	80.00	88.89	85.71	91.66
UT Austin	**52.23**	**51.17**	**51.62**	**50.30**	**48.92**	**47.05**	**46.15**
Hispanic	1996	1997	1998	1999	2000	2001	2002
Architecture	58.98	56.10	60.41	63.26	66.66	57.90	51.66
Business	39.02	42.39	34.48	36.48	31.82	56.25	41.38
Communication	29.83	40.10	40.52	33.68	38.55	31.08	41.89
Education	20.55	25.14	30.52	23.43	26.19	30.39	29.00
Engineering	38.47	38.40	49.61	43.10	46.56	42.91	45.04
Fine Arts	40.29	35.53	39.09	44.71	43.65	47.52	44.91
Liberal Arts	41.57	41.23	43.06	42.95	43.61	44.61	43.93
Nat. Sciences	34.70	35.92	43.86	42.57	42.95	44.33	41.32
Nursing	53.57	59.09	69.35	55.17	66.67	48.57	58.67
Social Work	14.29		6.25	40.00	16.67	19.05	25.00
UT Austin	**37.57**	**38.71**	**43.02**	**41.98**	**43.04**	**43.29**	**42.87**

Appendix 1

Figure 1

The University of Texas at Austin
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students										
Class Size	**White**		**African American**		**Asian American**		**Hispanic**		**All**	
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
5-24	11	0.38	1697	58.92	774	26.88	451	15.66	2880	100
25-49			449	33.33	108	8.02	25	1.86	1347	100
50-74			36	17.14	6	2.86			210	100
75-99			4	3.67	1	0.92			109	100
≥100			4	2.04	1	0.51			196	100
All ≥5	11	0.23	2190	46.18	890	18.77	476	10.04	4742	100
Only One Student										
Class Size	**White**		**African American**		**Asian American**		**Hispanic**		**All**	
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
5-24	28	0.97	768	26.67	730	25.35	631	21.91	2880	100
25-49			430	31.92	165	12.25	85	6.31	1347	100
50-74			42	20.00	6	2.86	1	0.48	210	100
75-99			20	18.35	2	1.83			109	100
≥100			11	5.61	1	0.51			196	100
All ≥5	28	0.59	1271	26.80	904	19.06	717	15.12	4742	100
None or Only One Student										
Class Size	**White**		**African American**		**Asian American**		**Hispanic**		**All**	
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
5-24	39	1.35	2465	85.59	1504	52.23	1082	37.57	2880	100
25-49			879	65.25	273	20.27	110	8.17	1347	100
50-74			78	37.14	12	5.72	1	0.48	210	100
75-99			24	22.02	3	2.75			109	100
≥100			15	7.65	2	1.02			196	100
All ≥5	39	0.82	3461	72.98	1794	37.83	1193	25.16	4742	100

Appendix 1

Figure 2
The University of Texas at Austin
School of Architecture
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			30	76.92	9	23.08	7	17.95	39	100
25-49			2	33.33					6	100
50-74										100
75-99										100
≥100									2	100
All ≥5			32	68.09	9	19.15	7	14.89	47	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	2.56	7	17.95	15	38.46	16	41.03	39	100
25-49			4	66.67					6	100
50-74										100
75-99										100
≥100			1	50.00					2	100
All ≥5	1	2.13	12	25.53	15	31.91	16	34.04	47	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	2.56	37	94.87	24	61.54	23	58.98	39	100
25-49			6	100.00					6	100
50-74										100
75-99										100
≥100			1	50					2	100
All ≥5	1	2.13	44	93.62	24	51.06	23	48.93	47	100

Appendix 1

Figure 3

The University of Texas at Austin
McCombs School of Business
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			23	56.10			6	14.63	41	100
25-49			45	38.79	3	2.59	3	2.59	116	100
50-74			10	21.74					46	100
75-99									16	100
≥100			1	4.00					25	100
All ≥5			79	32.38	3	1.23	9	3.69	244	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			14	34.15	10	24.39	10	24.39	41	100
25-49			39	33.62	7	6.03	12	10.34	116	100
50-74			5	10.87					46	100
75-99			8	50.00					16	100
≥100			1	4.00					25	100
All ≥5			67	27.46	17	6.97	22	9.02	244	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			37	90.25	10	24.39	16	39.02	41	100
25-49			84	72.41	10	8.62	15	12.93	116	100
50-74			15	32.61					46	100
75-99			8	50.00					16	100
≥100			2	8.00					25	100
All ≥5			146	59.84	20	8.2	31	12.71	244	100

Appendix 1

Figure 4

The University of Texas at Austin
College of Communication
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			99	57.89	74	43.27	22	12.87	171	100
25-49			23	31.94	7	9.72	2	2.78	72	100
50-74			4	28.57	1	7.14			14	100
75-99			1	33.33					3	100
≥100									10	100
All ≥5			127	47.04	82	30.37	24	8.89	270	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			44	25.73	58	33.92	29	16.96	171	100
25-49			28	38.89	13	18.06	3	4.17	72	100
50-74			1	7.14	2	14.29			14	100
75-99									3	100
≥100			1	10.00					10	100
All ≥5			74	27.41	73	27.04	32	11.85	270	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			143	83.62	132	77.19	51	29.83	171	100
25-49			51	70.83	20	27.78	5	6.95	72	100
50-74			5	35.71	3	21.43			14	100
75-99			1	33.33					3	100
≥100			1	10					10	100
All ≥5			201	74.45	155	57.41	56	20.74	270	100

Appendix 1

Figure 5
The University of Texas at Austin
College of Education
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			85	58.22	37	25.34	8	5.48	146	100
25-49			44	33.08	26	19.55	2	1.50	133	100
50-74			2	14.29	2	14.29			14	100
75-99									3	100
≥100					1	7.14			14	100
All ≥5			131	42.26	66	21.29	10	3.23	310	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			36	24.66	32	21.92	22	15.07	146	100
25-49			40	30.08	23	17.29	6	4.51	133	100
50-74			2	14.29	1	7.14			14	100
75-99									3	100
≥100									14	100
All ≥5			78	25.16	56	18.06	28	9.03	310	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			121	82.88	69	47.26	30	20.55	146	100
25-49			84	63.16	49	36.84	8	6.01	133	100
50-74			4	28.58	3	21.43			14	100
75-99									3	100
≥100					1	7.14			14	100
All ≥5			209	67.42	122	39.35	38	12.26	310	100

Appendix 1

Figure 6

The University of Texas at Austin

College of Engineering

Undergraduate Classroom Diversity Levels

Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			150	60.73	54	21.86	32	12.96	247	100
25-49			46	30.26	4	2.63	3	1.97	152	100
50-74			2	7.14					28	100
75-99			1	14.29					7	100
≥100									2	100
All ≥5			199	45.64	58	13.30	35	8.03	436	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.40	56	22.67	65	26.32	63	25.51	247	100
25-49			45	29.61	7	4.61	7	4.61	152	100
50-74			8	28.57					28	100
75-99									7	100
≥100									2	100
All ≥5	1	0.23	109	25.00	72	16.51	70	16.06	436	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.40	206	83.40	119	48.18	95	38.47	247	100
25-49			91	59.87	11	7.24	10	6.58	152	100
50-74			10	35.71					28	100
75-99			1	14.29					7	100
≥100									2	100
All ≥5	1	0.23	308	70.64	130	29.81	105	24.09	436	100

Appendix 1
Figure 7
The University of Texas at Austin
School of Fine Arts
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			173	63.37	101	37.00	34	12.45	273	100
25-49			17	36.17	11	23.40	1	2.13	47	100
50-74			3	50.00	1	16.67			6	100
75-99			1	11.11	1	11.11			9	100
≥100									5	100
All ≥5			194	57.06	114	33.53	35	10.29	340	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	2	0.73	22	8.06	46	16.85	76	27.84	273	100
25-49			9	19.15	10	21.28	9	19.15	47	100
50-74									6	100
75-99			2	22.22					9	100
≥100									5	100
All ≥5	2	0.59	33	9.71	56	16.47	85	25.00	340	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	2	0.73	195	71.43	147	53.85	110	40.29	273	100
25-49			26	55.32	21	44.68	10	21.28	47	100
50-74			3	50.00	1	16.67			6	100
75-99			3	33.33	1	11.11			9	100
≥100									5	100
All ≥5	2	0.59	227	66.77	170	50.00	120	35.29	340	100

Appendix 1

Figure 8
The University of Texas at Austin
College of Liberal Arts
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	11	0.95	680	58.52	328	28.23	216	18.59	1162	100
25-49			135	37.19	41	11.29	9	2.48	363	100
50-74			9	15.00	2	3.33			60	100
75-99			1	2.44					41	100
≥100			1	1.59					63	100
All ≥5	11	0.65	826	48.90	371	21.97	225	13.32	1689	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	22	1.89	303	26.08	298	25.65	267	22.98	1162	100
25-49			117	32.23	85	23.42	25	6.89	363	100
50-74			13	21.67	2	3.33			60	100
75-99			6	14.63	1	2.44			41	100
≥100			6	9.52	1	1.59			63	100
All ≥5	22	1.30	445	26.35	387	22.91	292	17.29	1689	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	33	2.84	983	84.60	626	53.88	483	41.57	1162	100
25-49			252	69.42	126	34.71	34	9.37	363	100
50-74			22	36.67	4	6.66			60	100
75-99			7	17.07	1	2.44			41	100
≥100			7	11.11	1	1.59			63	100
All ≥5	33	1.95	1271	75.25	758	44.88	517	30.61	1689	100

Appendix 1

Figure 9

The University of Texas at Austin
College of Natural Sciences
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			404	56.98	145	20.45	105	14.81	709	100
25-49			130	30.59	14	3.29	5	1.18	425	100
50-74			4	12.12					33	100
75-99									27	100
≥100			2	2.94					68	100
All ≥5			540	42.79	159	12.60	110	8.72	1262	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	3	0.42	210	29.62	141	19.89	141	19.89	709	100
25-49			137	32.24	17	4.00	25	5.88	425	100
50-74			11	33.33			1	3.03	33	100
75-99			3	11.11	1	3.70			27	100
≥100			2	2.94					68	100
All ≥5	3	0.24	363	28.76	159	12.60	167	13.23	1262	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	3	0.42	614	86.60	286	40.34	246	34.70	709	100
25-49			267	62.83	31	7.29	30	7.06	425	100
50-74			15	45.45			1	3.03	33	100
75-99			3	11.11	1	3.7			27	100
≥100			4	5.88					68	100
All ≥5	3	0.24	903	71.55	318	25.20	277	21.95	1262	100

Appendix 1

Figure 10
The University of Texas at Austin
School of Nursing
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			35	62.50	21	37.50	11	19.64	56	100
25-49			6	42.86					14	100
50-74									5	100
75-99										100
≥100										100
All ≥5			41	54.67	21	28.00	11	14.67	75	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			14	25.00	19	33.93	19	33.93	56	100
25-49			1	7.14			1	7.14	14	100
50-74			1	20.00					5	100
75-99										100
≥100										100
All ≥5			16	21.33	19	25.33	20	26.67	75	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			49	87.50	40	71.43	30	53.57	56	100
25-49			7	50.00			1	7.14	14	100
50-74			1	20.00					5	100
75-99										100
≥100										100
All ≥5			57	76.00	40	53.33	31	41.34	75	100

Appendix 1

Figure 11

The University of Texas at Austin
School of Social Work
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			3	42.86	4	57.14			7	100
25-49					2	22.22			9	100
50-74										100
75-99									1	100
≥100										100
All ≥5			3	17.65	6	35.29			17	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			2	28.57	2	28.57	1	14.29	7	100
25-49			1	11.11	4	44.44	1	11.11	9	100
50-74										100
75-99									1	100
≥100										100
All ≥5			3	17.65	6	35.29	2	11.76	17	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			5	71.43	6	85.71	1	14.29	7	100
25-49			1	11.11	6	66.66	1	11.11	9	100
50-74										100
75-99									1	100
≥100										100
All ≥5			6	35.30	12	70.58	2	11.76	17	100

Appendix 2

Figure 1

The University of Texas at Austin
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	19	0.60	1978	62.40	866	27.32	498	15.71	3170	100
25-49			477	37.77	86	6.81	25	1.98	1263	100
50-74			42	19.44	4	1.85			216	100
75-99			12	11.21					107	100
≥100			4	1.95	1	0.49			205	100
All ≥5	19	0.38	2513	50.66	957	19.29	523	10.54	4961	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	21	0.66	805	25.39	756	23.85	729	23.00	3170	100
25-49			379	30.01	179	14.17	83	6.57	1263	100
50-74			54	25.00	6	2.78	4	1.85	216	100
75-99			22	20.56	2	1.87			107	100
≥100			17	8.29					205	100
All ≥5	21	0.42	1277	25.74	943	19.01	816	16.45	4961	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	40	1.26	2783	87.79	1622	51.17	1227	38.71	3170	100
25-49			856	67.78	265	20.98	108	8.55	1263	100
50-74			96	44.44	10	4.63	4	1.85	216	100
75-99			34	31.77	2	1.87			107	100
≥100			21	10.24	1	0.49			205	100
All ≥5	40	0.80	3790	76.40	1900	38.30	1339	26.99	4961	100

Appendix 2

Figure 2

The University of Texas at Austin
School of Architecture
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			40	97.56	11	26.83	9	21.95	41	100
25-49			13	68.42			1	5.26	19	100
50-74										100
75-99										100
≥100										100
All ≥5			53	88.33	11	18.33	10	16.67	60	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	2.44	1	2.44	12	29.27	14	34.15	41	100
25-49			4	21.05					19	100
50-74										100
75-99										100
≥100										100
All ≥5	1	1.67	5	8.33	12	20.00	14	23.33	60	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	2.44	41	100.00	23	56.10	23	56.10	41	100
25-49			17	89.47			1	5.26	19	100
50-74										100
75-99										100
≥100										100
All ≥5	1	1.67	58	96.66	23	38.33	24	40.00	60	100

Appendix 2

Figure 3

The University of Texas at Austin
McCombs School of Business
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			64	69.57	5	5.43	13	14.13	92	100
25-49			35	38.89	3	3.33	2	2.22	90	100
50-74			5	11.90					42	100
75-99									19	100
≥100			1	3.70					27	100
All ≥5			105	38.89	8	2.96	15	5.56	270	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	1.09	22	23.91	8	8.70	26	28.26	92	100
25-49			33	36.67	4	4.44	5	5.56	90	100
50-74			12	28.57					42	100
75-99			1	5.26					19	100
≥100			5	18.52					27	100
All ≥5	1	0.37	73	27.04	12	4.44	31	11.48	270	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	1.09	86	93.48	13	14.13	39	42.39	92	100
25-49			68	75.56	7	7.77	7	7.78	90	100
50-74			17	40.47					42	100
75-99			1	5.26					19	100
≥100			6	22.22					27	100
All ≥5	1	0.37	178	65.93	20	7.40	46	17.04	270	100

Appendix 2

Figure 4

The University of Texas at Austin
College of Communication
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			96	48.73	77	39.09	23	11.68	197	100
25-49			29	34.94	5	6.02	1	1.20	83	100
50-74			1	12.50	1	12.50			8	100
75-99									6	100
≥100									9	100
All ≥5			126	41.58	83	27.39	24	7.92	303	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.51	64	32.49	68	34.52	56	28.43	197	100
25-49			25	30.12	17	20.48	10	12.05	83	100
50-74									8	100
75-99			1	16.67					6	100
≥100									9	100
All ≥5	1	0.33	90	29.70	85	28.05	66	21.78	303	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.51	160	81.22	145	73.60	79	40.10	197	100
25-49			54	65.06	22	26.50	11	13.25	83	100
50-74			1	12.50	1	12.50			8	100
75-99			1	16.67					6	100
≥100									9	100
All ≥5	1	0.33	216	71.28	168	55.45	90	29.70	303	100

Appendix 2

Figure 5

The University of Texas at Austin
College of Education
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes

No Students										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			100	55.87	55	30.73	9	5.03	179	100
25-49			27	27.27	8	8.08			99	100
50-74			3	18.75	1	6.25			16	100
75-99									5	100
≥100									13	100
All ≥5			130	41.67	64	20.51	9	2.88	312	100
Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			47	26.26	37	20.67	36	20.11	179	100
25-49			24	24.24	26	26.26	4	4.04	99	100
50-74			3	18.75	1	6.25	1	6.25	16	100
75-99									5	100
≥100									13	100
All ≥5			74	23.72	64	20.51	41	13.14	312	100
None or Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			147	82.13	92	51.4	45	25.14	179	100
25-49			51	51.51	34	34.34	4	4.04	99	100
50-74			6	37.50	2	12.50	1	6.25	16	100
75-99									5	100
≥100									13	100
All ≥5			204	65.39	128	41.02	50.00	16.02	312	100

Appendix 2

Figure 6

The University of Texas at Austin
College of Engineering
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students										
Class Size	**White**		**African American**		**Asian American**		**Hispanic**		**All**	
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
5-24			172	62.32	59	21.38	48	17.39	276	100
25-49			69	43.67	2	1.27	2	1.27	158	100
50-74			8	38.10					21	100
75-99			3	33.33					9	100
≥100									2	100
All ≥5			252	54.08	61	13.09	50	10.73	466	100
Only One Student										
Class Size	**White**		**African American**		**Asian American**		**Hispanic**		**All**	
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
5-24			67	24.28	72	26.09	58	21.01	276	100
25-49			51	32.28	7	4.43	8	5.06	158	100
50-74			3	14.29	1	4.76			21	100
75-99			1	11.11					9	100
≥100			1	50.00					2	100
All ≥5			123	26.39	80	17.17	66	14.16	466	100
None or Only One Student										
Class Size	**White**		**African American**		**Asian American**		**Hispanic**		**All**	
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
5-24			239	86.60	131	47.47	106	38.40	276	100
25-49			120	75.95	9	5.70	10	6.33	158	100
50-74			11	52.39	1	4.76			21	100
75-99			4	44.44					9	100
≥100			1	50.00					2	100
All ≥5			375	80.47	141	30.26	116	24.89	466	100

Appendix 2
Figure 7
The University of Texas at Austin
School of Fine Arts
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			197	72.16	112	41.03	29	10.62	273	100
25-49			20	40.00	12	24.00			50	100
50-74			4	66.67					6	100
75-99									3	100
≥100									5	100
All ≥5			221	65.58	124	36.80	29	8.61	337	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			46	16.85	77	28.21	68	24.91	273	100
25-49			17	34.00	9	18.00	7	14.00	50	100
50-74			1	16.67	1	16.67			6	100
75-99			3	100.00					3	100
≥100									5	100
All ≥5			67	19.88	87	25.82	75	22.26	337	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			243	89.01	189	69.24	97	35.53	273	100
25-49			37	74.00	21	42.00	7	14	50	100
50-74			5	83.34	1	16.67			6	100
75-99			3	100.00					3	100
≥100									5	100
All ≥5			288	85.46	211	62.62	104	30.87	337	100

Appendix 2
Figure 8
The University of Texas at Austin
College of Liberal Arts
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	19	1.51	787	62.51	375	29.79	251	19.94	1259	100
25-49			148	39.26	49	13.00	7	1.86	377	100
50-74			11	16.67	1	1.52			66	100
75-99			4	11.76					34	100
≥100			2	2.90	1	1.45			69	100
All ≥5	19	1.05	952	52.74	426	23.60	258	14.29	1805	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	14	1.11	319	25.34	300	23.83	268	21.29	1259	100
25-49			105	27.85	89	23.61	27	7.16	377	100
50-74			19	28.79	3	4.55			66	100
75-99			8	23.53	2	5.88			34	100
≥100			4	5.80					69	100
All ≥5	14	0.78	455	25.21	394	21.83	295	16.34	1805	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	33	2.62	1106	87.85	675	53.62	519	41.23	1259	100
25-49			253	67.11	138	36.61	34	9.02	377	100
50-74			30	45.46	4	6.07			66	100
75-99			12	35.29	2	5.88			34	100
≥100			6	8.70	1	1.45			69	100
All ≥5	33	1.83	1407	77.95	820	45.43	553	30.63	1805	100

Appendix 2

Figure 9
The University of Texas at Austin
College of Natural Sciences
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students										
Class Size	**White**		**African American**		**Asian American**		**Hispanic**		**All**	
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
5-24			470	**63.00**	138	**18.50**	94	**12.60**	746	**100**
25-49			132	**35.97**	6	**1.63**	12	**3.27**	367	**100**
50-74			10	**20.00**	1	**2.00**			50	**100**
75-99			5	**17.24**					29	**100**
≥100			1	**1.43**					70	**100**
All ≥5			618	**48.97**	145	**11.49**	106	**8.40**	1262	**100**
Only One Student										
Class Size	**White**		**African American**		**Asian American**		**Hispanic**		**All**	
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
5-24	2	0.27	199	**26.68**	157	**21.05**	174	**23.32**	746	**100**
25-49			117	**31.88**	23	**6.27**	20	**5.45**	367	**100**
50-74			15	**30.00**			2	**4.00**	50	**100**
75-99			8	**27.59**					29	**100**
≥100			7	**10.00**					70	**100**
All ≥5	2	0.16	346	**27.42**	180	**14.26**	196	**15.53**	1262	**100**
None or Only One Student										
Class Size	**White**		**African American**		**Asian American**		**Hispanic**		**All**	
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
5-24	2	0.27	669	**89.68**	295	**39.55**	268	**35.92**	746	**100**
25-49			249	**67.85**	29	**7.90**	32	**8.72**	367	**100**
50-74			25	**50.00**	1	**2**	2	**4**	50	**100**
75-99			13	**44.83**					29	**100**
≥100			8	**11.43**					70	**100**
All ≥5	2	0.16	964	**76.39**	325	**25.75**	302	**23.93**	1262	**100**

Appendix 2

Figure 10
The University of Texas at Austin
School of Nursing
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			30	45.45	26	39.39	19	28.79	66	100
25-49			2	22.22	1	11.11			9	100
50-74									6	100
75-99										100
≥100										100
All ≥5			32	39.51	27	33.33	19	23.46	81	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			25	37.88	18	27.27	20	30.30	66	100
25-49			1	11.11	1	11.11	2	22.22	9	100
50-74			1	16.67			1	16.67	6	100
75-99										100
≥100										100
All ≥5			27	33.33	19	23.46	23	28.40	81	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			55	83.33	44	66.66	39	59.09	66	100
25-49			3	33.33	2	22.22	2	22.22	9	100
50-74			1	16.67			1	16.67	6	100
75-99										100
≥100										100
All ≥5			59	72.84	46	56.79	42	51.86	81	100

Appendix 2

Figure 11
The University of Texas at Austin
School of Social Work
Undergraduate Classroom Diversity Levels
Fall 1997

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			2	18.18	8	72.73			11	100
25-49									6	100
50-74									1	100
75-99									1	100
≥100										100
All ≥5			2	10.53	8	42.11			19	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			5	45.45	1	9.09			11	100
25-49			1	16.67	3	50.00			6	100
50-74									1	100
75-99									1	100
≥100										100
All ≥5			6	31.58	4	21.05			19	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			7	63.63	9	81.82			11	100
25-49			1	16.67	3	50.00			6	100
50-74									1	100
75-99									1	100
≥100										100
All ≥5			8	42.11	12	63.16			19	100

Appendix 3

Figure 1
The University of Texas at Austin
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	16	0.50	2039	63.52	851	26.51	572	17.82	3210	100
25-49	1	0.08	477	37.24	82	6.40	35	2.73	1281	100
50-74			53	21.37	2	0.81			248	100
75-99			5	5.21	1	1.04			96	100
≥100			4	2.08					192	100
All ≥5	17	0.34	2578	51.28	936	18.62	607	12.07	5027	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	22	0.69	805	25.08	806	25.11	809	25.20	3210	100
25-49			385	30.05	176	13.74	92	7.18	1281	100
50-74			63	25.40	5	2.02	4	1.61	248	100
75-99			19	19.79					96	100
≥100			14	7.29					192	100
All ≥5	22	0.44	1286	25.58	987	19.63	905	18.00	5027	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	38	1.19	2844	88.60	1657	51.62	1381	43.02	3210	100
25-49	1	0.08	862	67.29	258	20.14	127	9.91	1281	100
50-74			116	46.77	7	2.83	4	1.61	248	100
75-99			24	25	1	1.04			96	100
≥100			18	9.37					192	100
All ≥5	39	0.78	3864	76.86	1923	38.25	1512	30.07	5027	100

Appendix 3

Figure 2

The University of Texas at Austin
School of Architecture
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			45	93.75	14	29.17	16	33.33	48	100
25-49			19	95.00					20	100
50-74										100
75-99										100
≥100										100
All ≥5			64	94.12	14	20.59	16	23.53	68	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			3	6.25	15	31.25	13	27.08	48	100
25-49									20	100
50-74										100
75-99										100
≥100										100
All ≥5			3	4.41	15	22.06	13	19.12	68	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			48	100.00	29	60.42	29	60.41	48	100
25-49			19	95.00					20	100
50-74										100
75-99										100
≥100										100
All ≥5			67	98.53	29	42.65	29	42.65	68	100

Appendix 3

Figure 3

The University of Texas at Austin
McCombs School of Business
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			54	62.07	6	6.90	15	17.24	87	100
25-49			31	37.80			6	7.32	82	100
50-74			10	23.26					43	100
75-99			3	17.65					17	100
≥100			1	3.57					28	100
All ≥5			99	38.52	6	2.33	21	8.17	257	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			25	28.74	13	14.94	15	17.24	87	100
25-49			21	25.61	4	4.88	5	6.10	82	100
50-74			10	23.26			1	2.33	43	100
75-99			1	5.88					17	100
≥100									28	100
All ≥5			57	22.18	17	6.61	21	8.17	257	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			79	90.81	19	21.84	30	34.48	87	100
25-49			52	63.41	4	4.88	11	13.42	82	100
50-74			20	46.52			1	2.33	43	100
75-99			4	23.53					17	100
≥100			1	3.57					28	100
All ≥5			156	60.70	23	8.94	42	16.34	257	100

Appendix 3

Figure 4

The University of Texas at Austin
College of Communication
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			106	55.79	64	33.68	24	12.63	190	100
25-49			29	34.94	10	12.05	3	3.61	83	100
50-74			2	15.38	1	7.69			13	100
75-99									4	100
≥100									11	100
All ≥5			137	45.51	75	24.92	27	8.97	301	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			57	30.00	67	35.26	53	27.89	190	100
25-49			32	38.55	16	19.28	11	13.25	83	100
50-74			2	15.38	1	7.69			13	100
75-99			1	25.00					4	100
≥100									11	100
All ≥5			92	30.56	84	27.91	64	21.26	301	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			163	85.79	131	68.94	77	40.52	190	100
25-49			61	73.49	26	31.33	14	16.86	83	100
50-74			4	30.76	2	15.38			13	100
75-99			1	25.00					4	100
≥100									11	100
All ≥5			229	76.07	159	52.83	91	30.23	301	100

Appendix 3

Figure 5

The University of Texas at Austin
College of Education
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.65	97	62.99	40	25.97	18	11.69	154	100
25-49			40	29.20	11	8.03			137	100
50-74									18	100
75-99									2	100
≥100									14	100
All ≥5	1	0.31	137	42.15	51	15.69	18	5.54	325	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			40	25.97	49	31.82	29	18.83	154	100
25-49			30	21.90	27	19.71	3	2.19	137	100
50-74			1	5.56	1	5.56			18	100
75-99									2	100
≥100									14	100
All ≥5			71	21.85	77	23.69	32	9.85	325	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.65	137	88.96	89	57.79	47	30.52	154	100
25-49			70	51.10	38	27.74	3	2.19	137	100
50-74			1	5.56	1	5.56			18	100
75-99									2	100
≥100									14	100
All ≥5	1	0.31	208	64.00	128	39.38	50	15.39	325	100

Appendix 3

Figure 6

The University of Texas at Austin
College of Engineering
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.38	171	65.27	47	17.94	56	21.37	262	100
25-49			63	42.00	6	4.00	8	5.33	150	100
50-74			9	25.71					35	100
75-99									4	100
≥100			1	33.33					3	100
All ≥5	1	0.22	244	53.74	53	11.67	64	14.10	454	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	4	1.53	63	24.05	73	27.86	74	28.24	262	100
25-49			40	26.67	6	4.00	8	5.33	150	100
50-74			9	25.71			2	5.71	35	100
75-99			1	25.00					4	100
≥100									3	100
All ≥5	4	0.88	113	24.89	79	17.40	84	18.50	454	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	5	1.91	234	89.32	120	45.80	130	49.61	262	100
25-49			103	68.67	12	8	16	10.66	150	100
50-74			18	51.42			2	5.71	35	100
75-99			1	25.00					4	100
≥100			1	33.33					3	100
All ≥5	5	1.10	357	78.63	132	29.07	148	32.60	454	100

Appendix 3
Figure 7
The University of Texas at Austin
School of Fine Arts
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			205	72.18	104	36.62	37	13.03	284	100
25-49			15	51.72	5	17.24			29	100
50-74			2	33.33					6	100
75-99			1	12.50					8	100
≥100									4	100
All ≥5			223	67.37	109	32.93	37	11.18	331	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.35	61	21.48	80	28.17	74	26.06	284	100
25-49			6	20.69	5	17.24			29	100
50-74			4	66.67					6	100
75-99			3	37.50					8	100
≥100			1	25.00					4	100
All ≥5	1	0.30	75	22.66	85	25.68	74	22.36	331	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.35	266	93.66	184	64.79	111	39.09	284	100
25-49			21	72.41	10	34.48			29	100
50-74			6	100.00					6	100
75-99			4	50.00					8	100
≥100			1	25.00					4	100
All ≥5	1	0.30	298	90.03	194	58.61	111	33.54	331	100

Appendix 3

Figure 8

The University of Texas at Austin
College of Liberal Arts
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	14	1.10	778	61.36	373	29.42	245	19.32	1268	100
25-49	1	0.26	149	38.40	44	11.34	11	2.84	388	100
50-74			9	18.00	1	2.00			50	100
75-99			1	2.50	1	2.50			40	100
≥100									57	100
All ≥5	15	0.83	937	51.97	419	23.24	256	14.20	1803	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	15	1.18	322	25.39	315	24.84	301	23.74	1268	100
25-49			119	30.67	87	22.42	39	10.05	388	100
50-74			12	24.00	3	6.00			50	100
75-99			6	15.00					40	100
≥100			8	14.04					57	100
All ≥5	15	0.83	467	25.90	405	22.46	340	18.86	1803	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	29	2.28	1100	86.75	688	54.26	546	43.06	1268	100
25-49	1	0.26	268	69.07	131	33.76	50	12.89	388	100
50-74			21	42.00	4	8			50	100
75-99			7	17.50	1	2.50			40	100
≥100			8	14.04					57	100
All ≥5	30	1.66	1404	77.87	824	45.70	596	33.06	1803	100

Appendix 3

Figure 9

The University of Texas at Austin
College of Natural Sciences
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			476	63.47	155	20.67	130	17.33	750	100
25-49			129	35.25	6	1.64	7	1.91	366	100
50-74			19	26.03					73	100
75-99									19	100
≥100			2	3.03					66	100
All ≥5			626	49.14	161	12.64	137	10.75	1274	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.13	197	26.27	145	19.33	199	26.53	750	100
25-49			127	34.70	22	6.01	22	6.01	366	100
50-74			22	30.14			1	1.37	73	100
75-99			7	36.84					19	100
≥100			5	7.58					66	100
All ≥5	1	0.08	358	28.10	167	13.11	222	17.43	1274	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.13	673	89.74	300	40.00	329	43.86	750	100
25-49			256	69.95	28	7.65	29	7.92	366	100
50-74			41	56.17			1	1.37	73	100
75-99			7	36.84					19	100
≥100			7	10.61					66	100
All ≥5	1	0.08	984	77.24	328	25.75	359	28.18	1274	100

Appendix 3
Figure 10
The University of Texas at Austin
School of Nursing
Undergraduate Classroom Diversity Levels
Fall 1996

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			37	59.68	28	45.16	21	33.87	62	100
25-49									8	100
50-74			2	22.22					9	100
75-99										100
≥100										100
All ≥5			39	49.37	28	35.44	21	26.58	79	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			17	27.42	23	37.10	22	35.48	62	100
25-49			5	62.50	2	25.00	3	37.50	8	100
50-74			2	22.22					9	100
75-99										100
≥100										100
All ≥5			24	30.38	25	31.65	25	31.65	79	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			54	87.10	51	82.26	43	69.35	62	100
25-49			5	62.50	2	25.00	3	37.50	8	100
50-74			4	44.44					9	100
75-99										100
≥100										100
All ≥5			63	79.75	53	67.09	46	58.23	79	100

Appendix 3

Figure 11
The University of Texas at Austin
School of Social Work
Undergraduate Classroom Diversity Levels
Fall 1998

Note: "N" refers to the number of classes.

No Students										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			6	37.50	10	62.50			16	100
25-49			1	7.14					14	100
50-74										100
75-99									1	100
≥100										100
All ≥5			7	22.58	10	32.26			31	100

Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			4	25.00	5	31.25	1	6.25	16	100
25-49			3	21.43	7	50.00	1	7.14	14	100
50-74										100
75-99									1	100
≥100										100
All ≥5			7	22.58	12	38.71	2	6.45	31	100

None or Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			10	62.50	15	93.75	1	6.25	16	100
25-49			4	28.57	7	50.00	1	7.14	14	100
50-74										100
75-99									1	100
≥100										100
All ≥5			14	45.16	22	70.97	2	6.45	31	100

Appendix 4

Figure 1

The University of Texas at Austin
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	17	0.52	2115	64.52	852	25.99	592	18.06	3278	100
25-49	1	0.08	524	39.49	78	5.88	51	3.84	1327	100
50-74			47	23.86	3	1.52			197	100
75-99			12	12.90					93	100
≥100			3	1.51					199	100
All ≥5	18	0.35	2701	53.02	933	18.32	643	12.62	5094	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	30	0.92	822	25.08	797	24.31	784	23.92	3278	100
25-49			409	30.82	133	10.02	112	8.44	1327	100
50-74			63	31.98	8	4.06	1	0.51	197	100
75-99			15	16.13	1	1.08			93	100
≥100			15	7.54	1	0.50			199	100
All ≥5	30	0.59	1324	25.99	940	18.45	897	17.61	5094	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	47	1.44	2937	89.60	1649	50.30	1376	41.98	3278	100
25-49	1	0.08	933	70.31	211	15.90	163	12.28	1327	100
50-74			110	55.84	11	5.58	1	0.51	197	100
75-99			27	29.03	1	1.08			93	100
≥100			18	9.05	1	0.50			199	100
All ≥5	48	0.94	4025	79.01	1873	36.77	1540	30.23	5094	100

Appendix 4

Figure 2

The University of Texas at Austin
School of Architecture
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			47	95.92	14	28.57	14	28.57	49	100
25-49			20	90.91					22	100
50-74										100
75-99										100
≥100										100
All ≥5			67	94.37	14	19.72	14	19.72	71	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			2	4.08	19	38.78	17	34.69	49	100
25-49			1	4.55	1	4.55	3	13.64	22	100
50-74										100
75-99										100
≥100										100
All ≥5			3	4.23	20	28.17	20	28.17	71	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			49	100.00	33	67.35	31	63.26	49	100
25-49			21	95346	1	4.55	3	13.64	22	100
50-74										100
75-99										100
≥100										100
All ≥5			70	98.60	34	47.89	34	47.89	71	100

Appendix 4

Figure 3
The University of Texas at Austin
McCombs School of Business
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			35	47.30	4	5.41	11	14.86	74	100
25-49			44	40.74			3	2.78	108	100
50-74			11	35.48					31	100
75-99			3	17.65					17	100
≥100									33	100
All ≥5			93	35.36	4	1.52	14	5.32	263	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	1.35	26	35.14	11	14.86	16	21.62	74	100
25-49			37	34.26	4	3.70	23	21.30	108	100
50-74			8	25.81					31	100
75-99			2	11.76					17	100
≥100			3	9.09					33	100
All ≥5	1	0.38	76	28.90	15	5.70	39	14.83	263	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	1.35	61	82.44	15	20.27	27	36.48	74	100
25-49			81	75.00	4	3.70	26	24.08	108	100
50-74			19	61.29					31	100
75-99			5	29.41					17	100
≥100			3	9.09					33	100
All ≥5	1	0.38	169	64.26	19	7.22	53	20.15	263	100

Appendix 4

Figure 4
The University of Texas at Austin
College of Communication
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			125	63.78	69	35.20	27	13.78	196	100
25-49			36	40.00	8	8.89	4	4.44	90	100
50-74			3	37.50					8	100
75-99									3	100
≥100									10	100
All ≥5			164	53.42	77	25.08	31	10.10	307	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			46	23.47	72	36.73	39	19.90	196	100
25-49			32	35.56	11	12.22	7	7.78	90	100
50-74			1	12.50	1	12.50			8	100
75-99									3	100
≥100									10	100
All ≥5			79	25.73	84	27.36	46	14.98	307	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			171	87.25	141	71.93	66	33.68	196	100
25-49			68	75.56	19	21.11	11	12.22	90	100
50-74			4	50.00	1	12.50			8	100
75-99									3	100
≥100									10	100
All ≥5			243	79.15	161	52.44	77	25.08	307	100

Appendix 4

Figure 5

The University of Texas at Austin
College of Education
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.57	77	44.00	45	25.71	9	5.14	175	100
25-49			37	29.37	10	7.94			126	100
50-74			1	5.88	1	5.88			17	100
75-99									3	100
≥100									13	100
All ≥5	1	0.30	115	34.43	56	16.77	9	2.69	334	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			71	40.57	54	30.86	32	18.29	175	100
25-49			31	24.60	14	11.11	1	0.79	126	100
50-74			4	23.53	2	11.76			17	100
75-99									3	100
≥100			1	7.69					13	100
All ≥5			107	32.04	70	20.96	33	9.88	334	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.57	148	84.57	99	56.57	41	23.43	175	100
25-49			68	53.97	24	19.05	1	0.79	126	100
50-74			5	29.41	3	17.64			17	100
75-99									3	100
≥100			1	7.69					13	100
All ≥5	1	0.30	222	66.47	126	37.73	42	12.57	334	100

Appendix 4

Figure 6

The University of Texas at Austin
College of Engineering
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			173	61.13	38	13.43	55	19.43	283	100
25-49			51	34.46	1	0.68	10	6.76	148	100
50-74			12	37.50					32	100
75-99			2	28.57					7	100
≥100									2	100
All ≥5			238	50.42	39	8.26	65	13.77	472	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	2	0.71	87	30.74	65	22.97	67	23.67	283	100
25-49			55	37.16	5	3.38	8	5.41	148	100
50-74			14	43.75					32	100
75-99			2	28.57					7	100
≥100									2	100
All ≥5	2	0.42	158	33.47	70	14.83	75	15.89	472	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	2	0.71	260	91.87	103	36.40	122	43.10	283	100
25-49			106	71.62	6	4.06	18	12.17	148	100
50-74			26	81.25					32	100
75-99			4	57.14					7	100
≥100									2	100
All ≥5	2	0.42	396	83.89	109	23.09	140	29.66	472	100

Appendix 4
Figure 7
The University of Texas at Austin
School of Fine Arts
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.34	213	72.20	106	35.93	48	16.27	295	100
25-49			12	54.55	1	4.55	1	4.55	22	100
50-74			2	20.00					10	100
75-99			3	60.00					5	100
≥100									5	100
All ≥5	1	0.30	230	68.25	107	31.75	49	14.54	337	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			63	21.36	92	31.19	84	28.47	295	100
25-49			5	22.73	5	22.73	2	9.09	22	100
50-74			5	50.00					10	100
75-99			1	20.00					5	100
≥100									5	100
All ≥5			74	21.96	97	28.78	86	25.52	337	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.34	276	93.56	198	67.12	132	44.74	295	100
25-49			17	77.28	6	27.28	3	13.64	22	100
50-74			7	70.00					10	100
75-99			4	80.00					5	100
≥100									5	100
All ≥5	1	0.30	304	90.21	204	60.53	135	40.06	337	100

Appendix 4

Figure 8

The University of Texas at Austin
College of Liberal Arts
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	12	0.93	840	64.76	390	30.07	263	20.28	1297	100
25-49	1	0.26	160	42.22	40	10.55	20	5.28	379	100
50-74			3	9.09	2	6.06			33	100
75-99			2	5.88					34	100
≥100			1	1.69					59	100
All ≥5	13	0.72	1006	55.83	432	23.97	283	15.70	1802	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	22	1.70	302	23.28	304	23.44	294	22.67	1297	100
25-49			113	29.82	69	18.21	34	8.97	379	100
50-74			11	33.33	5	15.15			33	100
75-99			6	17.65	1	2.94			34	100
≥100			5	8.47	1	1.69			59	100
All ≥5	22	1.22	437	24.25	380	21.09	328	18.20	1802	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	34	2.63	1142	88.04	694	53.51	557	42.95	1297	100
25-49	1	0.26	273	72.04	109	28.76	54	14.25	379	100
50-74			14	42.42	7	21.21			33	100
75-99			8	23.53	1	2.94			34	100
≥100			6	10.16	1	1.69			59	100
All ≥5	35	1.94	1443	80.08	812	45.06	611	33.90	1802	100

Appendix 4

Figure 9

The University of Texas at Austin
College of Natural Sciences
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	2	0.27	496	67.03	142	19.19	130	17.57	740	100
25-49			152	37.62	13	3.22	13	3.22	404	100
50-74			15	25.42					59	100
75-99			2	9.09					22	100
≥100			2	2.90					69	100
All ≥5	2	0.15	667	51.55	155	11.98	143	11.05	1294	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	5	0.68	180	24.32	144	19.46	185	25.00	740	100
25-49			131	32.43	16	3.96	32	7.92	404	100
50-74			15	25.42			1	1.69	59	100
75-99			4	18.18					22	100
≥100			6	8.70					69	100
All ≥5	5	0.39	336	25.97	160	12.36	218	16.85	1294	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	7	0.95	676	91.35	286	38.65	315	42.57	740	100
25-49			283	70.05	29	7.18	45	11.14	404	100
50-74			30	50.84			1	1.69	59	100
75-99			6	27.27					22	100
≥100			8	11.60					69	100
All ≥5	7	0.54	1003	77.52	315	24.34	361	27.90	1294	100

Appendix 4

Figure 10
The University of Texas at Austin
School of Nursing
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			47	81.03	29	50.00	17	29.31	58	100
25-49			6	50.00	2	16.67			12	100
50-74									6	100
75-99										100
≥100										100
All ≥5			53	69.74	31	40.79	17	22.37	76	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			10	17.24	15	25.86	15	25.86	58	100
25-49			2	16.67	2	16.67	2	16.67	12	100
50-74			5	83.33					6	100
75-99										100
≥100										100
All ≥5			17	22.37	17	22.37	17	22.37	76	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			57	98.27	44	75.86	32	55.17	58	100
25-49			8	66.67	4	33.34	2	16.67	12	100
50-74			5	83.33					6	100
75-99										100
≥100										100
All ≥5			70	92.11	48	63.16	34	44.74	76	100

Appendix 4

Figure 11

The University of Texas at Austin
School of Social Work
Undergraduate Classroom Diversity Levels
Fall 1999

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			3	30.00	4	40.00			10	100
25-49			4	36.36	3	27.27			11	100
50-74										100
75-99									1	100
≥100										100
All ≥5			7	31.82	7	31.82			22	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			4	40.00	4	40.00	4	40.00	10	100
25-49					6	54.55			11	100
50-74										100
75-99									1	100
≥100										100
All ≥5			4	18.18	10	45.45	4	18.18	22	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			7	70.00	8	80.00	4	40.00	10	100
25-49			4	36.36	9	81.82			11	100
50-74										100
75-99									1	100
≥100										100
All ≥5			11	50.00	17	77.27	4	18.18	22	100

Appendix 5

Figure 1

The University of Texas at Austin
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	13	0.38	2189	64.71	819	24.21	571	16.88	3383	100
25-49			495	36.61	72	5.33	36	2.66	1352	100
50-74			39	19.70	7	3.54	2	1.01	198	100
75-99			15	13.64	1	0.91			110	100
≥100			7	3.54					198	100
All ≥5	13	0.25	2745	52.38	899	17.15	609	11.62	5241	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	37	1.09	843	24.92	836	24.71	885	26.16	3383	100
25-49	3	0.22	453	33.51	125	9.25	131	9.69	1352	100
50-74			69	34.85	6	3.03	5	2.53	198	100
75-99			21	19.09					110	100
≥100			13	6.57					198	100
All ≥5	40	0.76	1399	26.69	967	18.45	1021	19.48	5241	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	50	1.47	3032	89.63	1655	48.92	1456	43.04	3383	100
25-49	3	0.22	948	70.12	197	14.58	167	12.35	1352	100
50-74			108	54.55	13	6.57	7	3.54	198	100
75-99			36	32.73	1	0.91			110	100
≥100			20	10.11					198	100
All ≥5	53	1.01	4144	79.07	1866	35.60	1630	31.10	5241	100

Appendix 5

Figure 2

The University of Texas at Austin
School of Architecture
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			52	91.23	19	33.33	17	29.82	57	100
25-49			15	78.95	1	5.26			19	100
50-74										100
75-99										100
≥100										100
All ≥5			67	88.16	20	26.32	17	22.37	76	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			4	7.02	14	24.56	21	36.84	57	100
25-49			4	21.05	1	5.26	1	5.26	19	100
50-74										100
75-99										100
≥100										100
All ≥5			8	10.53	15	19.74	22	28.95	76	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			56	98.25	33	57.89	38	66.66	57	100
25-49			19	100.00	2	10.52	1	5.26	19	100
50-74										100
75-99										100
≥100										100
All ≥5			75	98.69	35	46.06	39	51.32	76	100

Appendix 5

Figure 3

The University of Texas at Austin
McCombs School of Business
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			37	56.06	1	1.52	6	9.09	66	100
25-49			37	33.94			10	9.17	109	100
50-74			3	11.11			1	3.70	27	100
75-99			2	8.70					23	100
≥100			1	3.45					29	100
All ≥5			80	31.50	1	0.39	17	6.69	254	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			17	25.76	9	13.64	15	22.73	66	100
25-49			47	43.12	1	0.92	18	16.51	109	100
50-74			9	33.33			2	7.41	27	100
75-99			4	17.39					23	100
≥100			3	10.34					29	100
All ≥5			80	31.50	10	3.94	35	13.78	254	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			54	81.82	10	15.16	21	31.82	66	100
25-49			84	77.06	1	0.92	28	25.68	109	100
50-74			12	44.44			3	11.11	27	100
75-99			6	26.09					23	100
≥100			4	13.79					29	100
All ≥5			160	63.00	11	4.33	52	20.47	254	100

Appendix 5

Figure 4

The University of Texas at Austin
College of Communication
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes

No Students										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			116	60.42	60	31.25	18	9.38	192	100
25-49			36	42.86	9	10.71	1	1.19	84	100
50-74					1	9.09			11	100
75-99			1	33.33					3	100
≥100									11	100
All ≥5			153	50.83	70	23.26	19	6.31	301	100

Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.52	57	29.69	77	40.10	56	29.17	192	100
25-49			27	32.14	17	20.24	9	10.71	84	100
50-74			5	45.45	2	18.18			11	100
75-99			1	33.33					3	100
≥100			1	9.09					11	100
All ≥5	1	0.33	91	30.23	96	31.89	65	21.59	301	100

None or Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.52	173	90.11	137	71.35	74	38.55	192	100
25-49			63	75.00	26	30.95	10	11.90	84	100
50-74			5	45.45	3	27.27			11	100
75-99			2	66.66					3	100
≥100			1	9.09					11	100
All ≥5	1	0.33	244	81.06	166	55.15	84	27.90	301	100

Appendix 5
Figure 5
The University of Texas at Austin
College of Education
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.60	106	63.10	39	23.21	11	6.55	168	100
25-49			29	23.39	11	8.87			124	100
50-74			2	11.76					17	100
75-99									8	100
≥100									11	100
All ≥5	1	0.30	137	41.77	50	15.24	11	3.35	328	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.60	38	22.62	54	32.14	33	19.64	168	100
25-49	1	0.81	38	30.65	13	10.48	9	7.26	124	100
50-74			1	5.88	3	17.65			17	100
75-99			1	12.50					8	100
≥100									11	100
All ≥5	2	0.61	78	23.78	70	21.34	42	12.80	328	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	2	1.20	144	85.72	93	55.35	44	26.19	168	100
25-49	1	0.81	67	54.04	24	19.35	9	7.26	124	100
50-74			3	17.64	3	17.65			17	100
75-99			1	12.50					8	100
≥100									11	100
All ≥5	3	0.91	215	65.55	120	36.58	53	16.15	328	100

Appendix 5

Figure 6

The University of Texas at Austin
College of Engineering
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			193	66.55	42	14.48	55	18.97	290	100
25-49			65	41.67	1	0.64	4	2.56	156	100
50-74			12	33.33					36	100
75-99			1	25.00					4	100
≥100									5	100
All ≥5			271	55.19	43	8.76	59	12.02	491	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.34	76	26.21	56	19.31	80	27.59	290	100
25-49			47	30.13	3	1.92	18	11.54	156	100
50-74			13	36.11			1	2.78	36	100
75-99									4	100
≥100			2	40.00					5	100
All ≥5	1	0.20	138	28.11	59	12.02	99	20.16	491	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.34	269	92.76	98	33.79	135	46.56	290	100
25-49			112	71.80	4	2.56	22	14.10	156	100
50-74			25	69.44			1	2.78	36	100
75-99			1	25					4	100
≥100			2	40					5	100
All ≥5	1	0.20	409	83.30	102	20.78	158	32.18	491	100

Appendix 5

Figure 7

The University of Texas at Austin
School of Fine Arts
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			215	73.88	104	35.74	54	18.56	291	100
25-49			4	17.39	3	13.04			23	100
50-74			5	62.50					8	100
75-99			3	37.50					8	100
≥100									5	100
All ≥5			227	67.76	107	31.94	54	16.12	335	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.34	60	20.62	84	28.87	73	25.09	291	100
25-49			6	26.09	2	8.70	1	4.35	23	100
50-74			2	25.00					8	100
75-99			1	12.50					8	100
≥100									5	100
All ≥5	1	0.30	69	20.60	86	25.67	74	22.09	335	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.34	275	94.50	188	64.61	127	43.65	291	100
25-49			10	43.48	5	21.74	1	4.35	23	100
50-74			7	87.50					8	100
75-99			4	50.00					8	100
≥100									5	100
All ≥5	1	0.30	296	88.36	193	57.61	128	38.21	335	100

Appendix 5

Figure 8

The University of Texas at Austin
College of Liberal Arts
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	10	0.73	857	62.51	369	26.91	263	19.18	1371	100
25-49			147	41.18	39	10.92	9	2.52	357	100
50-74			9	25.71	5	14.29	1	2.86	35	100
75-99			4	10.53	1	2.63			38	100
≥100			5	7.69					65	100
All ≥5	10	0.54	1022	54.77	414	22.19	273	14.63	1866	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	23	1.68	361	26.33	343	25.02	335	24.43	1371	100
25-49	2	0.56	112	31.37	64	17.93	37	10.36	357	100
50-74			15	42.86	1	2.86	1	2.86	35	100
75-99			8	21.05					38	100
≥100			2	3.08					65	100
All ≥5	25	1.34	498	26.69	408	21.86	373	19.99	1866	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	33	2.41	1218	88.84	712	51.93	598	43.61	1371	100
25-49	2	0.56	259	72.55	103	28.85	46	12.88	357	100
50-74			24	68.57	6	17.15	2	5.72	35	100
75-99			12	31.58	1	2.63			38	100
≥100			7	10.77					65	100
All ≥5	35	1.88	1520	81.46	822	44.05	646	34.62	1866	100

Appendix 5

Figure 9
The University of Texas at Austin
College of Natural Sciences
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.13	479	62.53	136	17.75	108	14.10	766	100
25-49			154	34.07	5	1.11	12	2.65	452	100
50-74			7	12.96					54	100
75-99			4	16.00					25	100
≥100			1	1.56					64	100
All ≥5	1	0.07	645	47.39	141	10.36	120	8.82	1361	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	6	0.78	192	25.07	146	19.06	221	28.85	766	100
25-49			158	34.96	23	5.09	37	8.19	452	100
50-74			21	38.89			1	1.85	54	100
75-99			6	24.00					25	100
≥100			5	7.81					64	100
All ≥5	6	0.44	382	28.07	169	12.42	259	19.03	1361	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	7	0.91	671	87.60	282	36.81	329	42.95	766	100
25-49			312	69.03	28	6.20	49	10.84	452	100
50-74			28	51.85			1	1.85	54	100
75-99			10	40.00					25	100
≥100			6	9.37					64	100
All ≥5	7	0.51	1027	75.46	310	22.78	379	27.85	1361	100

Appendix 5

Figure 10
The University of Texas at Austin
School of Nursing
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			44	77.19	22	38.60	18	31.58	57	100
25-49			3	21.43	1	7.14			14	100
50-74					1	16.67			6	100
75-99										100
≥100										100
All ≥5			47	61.04	24	31.17	18	23.38	77	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			12	21.05	25	43.86	20	35.09	57	100
25-49			9	64.29			1	7.14	14	100
50-74			3	50.00					6	100
75-99										100
≥100										100
All ≥5			24	31.17	25	32.47	21	27.27	77	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			56	98.24	47	82.46	38	66.67	57	100
25-49			12	85.72	1	7.14	1	7.14	14	100
50-74			3	50.00	1	16.67			6	100
75-99										100
≥100										100
All ≥5			71	92.21	49	63.64	39	50.65	77	100

Appendix 5

Figure 11

The University of Texas at Austin
School of Social Work
Undergraduate Classroom Diversity Levels
Fall 2000

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			14	77.78	14	77.78	1	5.56	18	100
25-49			2	28.57	2	28.57			7	100
50-74									1	100
75-99										100
≥100										100
All ≥5			16	61.54	16	61.54	1	3.85	26	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			3	16.67	2	11.11	2	11.11	18	100
25-49			1	14.29	1	14.29			7	100
50-74									1	100
75-99										100
≥100										100
All ≥5			4	15.38	3	11.54	2	7.69	26	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			17	94.45	16	88.89	3	16.67	18	100
25-49			3	42.86	3	42.86			7	100
50-74									1	100
75-99										100
≥100										100
All ≥5			20	76.92	19	73.08	3	11.54	26	100

Appendix 6

Figure 1

The University of Texas at Austin
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	17	0.49	2226	63.86	833	23.90	627	17.99	3486	100
25-49	2	0.14	527	37.51	60	4.27	50	3.56	1405	100
50-74			31	14.83	1	0.48	4	1.91	209	100
75-99			20	17.39			1	0.87	115	100
≥100			4	2.00	1	0.50			200	100
All ≥5	19	0.35	2808	51.86	895	16.53	682	12.59	5415	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	41	1.18	879	25.22	807	23.15	882	25.30	3486	100
25-49			470	33.45	109	7.76	114	8.11	1405	100
50-74			61	29.19	5	2.39	6	2.87	209	100
75-99			24	20.87	5	4.35			115	100
≥100			9	4.50					200	100
All ≥5	41	0.76	1443	26.65	926	17.10	1002	18.50	5415	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	58	1.67	3105	89.08	1640	47.05	1509	43.29	3486	100
25-49	2	0.14	997	70.96	169	12.03	164	11.67	1405	100
50-74			92	44.02	6	2.87	10	4.78	209	100
75-99			44	38.26	5	4.35	1	0.87	115	100
≥100			13	6.50	1	0.50			200	100
All ≥5	60	1.11	4251	78.51	1821	33.63	1684	31.09	5415	100

Appendix 6

Figure 2
The University of Texas at Austin
School of Architecture
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			44	77.19	8	14.04	18	31.58	57	100
25-49			4	66.67	1	16.67			6	100
50-74										100
75-99										100
≥100										100
All ≥5			48	76.19	9	14.29	18	28.57	63	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			9	15.79	20	35.09	15	26.32	57	100
25-49			1	16.67			1	16.67	6	100
50-74										100
75-99										100
≥100										100
All ≥5			10	15.87	20	31.75	16	25.40	63	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			53	92.98	28	49.13	33	57.90	57	100
25-49			5	83.34	1	16.67	1	16.67	6	100
50-74										100
75-99										100
≥100										100
All ≥5			58	92.06	29	46.04	34	53.97	63	100

Appendix 6

Figure 3

The University of Texas at Austin
McCombs School of Business
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			26	54.17	3	6.25	8	16.67	48	100
25-49			54	45.00			8	6.67	120	100
50-74			3	10.71					28	100
75-99			7	28.00					25	100
≥100			1	2.94					34	100
All ≥5			91	35.69	3	1.18	16	6.27	255	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	2.08	14	29.17	5	10.42	19	39.58	48	100
25-49			43	35.83			22	18.33	120	100
50-74			8	28.57			2	7.14	28	100
75-99			2	8.00					25	100
≥100			1	2.94					34	100
All ≥5	1	0.39	68	26.67	5	1.96	43	16.86	255	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	2.08	40	83.34	8	16.67	27	56.25	48	100
25-49			97	80.83			30	25.00	120	100
50-74			11	39.28			2	7.14	28	100
75-99			9	36.00					25	100
≥100			2	5.88					34	100
All ≥5	1	0.39	159	62.36	8	3.14	59	23.13	255	100

Appendix 6

Figure 4

The University of Texas at Austin
College of Communication
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			120	62.18	73	37.82	19	9.84	193	100
25-49			49	42.24	8	6.90	5	4.31	116	100
50-74									8	100
75-99									3	100
≥100									7	100
All ≥5			169	51.68	81	24.77	24	7.34	327	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			59	30.57	58	30.05	41	21.24	193	100
25-49			37	31.90	21	18.10	8	6.90	116	100
50-74									8	100
75-99					1	33.33			3	100
≥100									7	100
All ≥5			96	29.36	80	24.46	49	14.98	327	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			179	92.75	131	67.87	60	31.08	193	100
25-49			86	74.14	29	25.00	13	11.21	116	100
50-74									8	100
75-99					1	33.33			3	100
≥100									7	100
All ≥5			265	81.04	161	49.23	73	22.32	327	100

Appendix 6

Figure 5

The University of Texas at Austin
College of Education
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.73	106	58.56	50	27.62	20	11.05	181	100
25-49			42	30.66	23	16.79	1	0.73	137	100
50-74									11	100
75-99									6	100
≥100									12	100
All ≥5	1	0.29	148	42.65	73	21.04	21	6.05	347	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			47	25.97	34	18.78	35	19.34	181	100
25-49			43	31.39	10	7.30	5	3.65	137	100
50-74			2	18.18					11	100
75-99			1	16.67					6	100
≥100									12	100
All ≥5			93	26.80	44	12.68	40	11.53	347	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.73	153	84.53	84	46.40	55	30.39	181	100
25-49			85	62.05	33	24.09	6	4.38	137	100
50-74			2	18.18					11	100
75-99			1	16.67					6	100
≥100									12	100
All ≥5	1	0.29	241	69.45	117	33.72	61	17.58	347	100

Appendix 6

Figure 6
The University of Texas at Austin
College of Engineering
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			204	68.92	30	10.14	48	16.22	296	100
25-49			77	46.95			6	3.66	164	100
50-74			9	30.00			2	6.67	30	100
75-99			3	25.00					12	100
≥100			1	20.00					5	100
All ≥5			294	57.99	30	5.92	56	11.05	507	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	3	1.01	74	25.00	60	20.27	79	26.69	296	100
25-49			45	27.44	6	3.66	22	13.41	164	100
50-74			7	23.33			2	6.67	30	100
75-99			3	25.00					12	100
≥100			1	20.00					5	100
All ≥5	3	0.59	130	25.64	66	13.02	103	20.32	507	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	3	1.01	278	93.92	90	30.41	127	42.91	296	100
25-49			122	74.39	6	3.66	28	17.07	164	100
50-74			16	53.33			4	13.34	30	100
75-99			6	50.00					12	100
≥100			2	40.00					5	100
All ≥5	3	0.59	424	83.63	96	18.94	159	31.37	507	100

Appendix 6

Figure 7
The University of Texas at Austin
School of Fine Arts
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			215	76.24	103	36.52	51	18.09	282	100
25-49			10	41.67	1	4.17			24	100
50-74					1	11.11			9	100
75-99			1	16.67					6	100
≥100					1	14.29			7	100
All ≥5			226	68.90	106	32.32	51	15.55	328	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.35	48	17.02	69	24.47	83	29.43	282	100
25-49			5	20.83	5	20.83			24	100
50-74			6	66.67					9	100
75-99			1	16.67					6	100
≥100									7	100
All ≥5	1	0.30	60	18.29	74	22.56	83	25.30	328	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.35	263	93.26	172	60.99	134	47.52	282	100
25-49			15	62.50	6	25.00			24	100
50-74			6	66.67	1	11.11			9	100
75-99			2	33.34					6	100
≥100					1	14.29			7	100
All ≥5	1	0.30	286	87.19	180	54.88	134	40.85	328	100

Appendix 6

Figure 8

The University of Texas at Austin
College of Liberal Arts
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	14	0.97	890	61.93	391	27.21	289	20.11	1437	100
25-49			122	36.75	23	6.93	18	5.42	332	100
50-74			9	20.45					44	100
75-99			8	19.51			1	2.44	41	100
≥100			2	3.17					63	100
All ≥5	14	0.73	1031	53.78	414	21.60	308	16.07	1917	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	24	1.67	367	25.54	337	23.45	352	24.50	1437	100
25-49			112	33.73	46	13.86	26	7.83	332	100
50-74			10	22.73	4	9.09			44	100
75-99			9	21.95	4	9.76			41	100
≥100			3	4.76					63	100
All ≥5	24	1.25	501	26.13	391	20.40	378	19.72	1917	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	38	2.64	1257	87.47	728	50.66	641	44.61	1437	100
25-49			244	70.48	69	20.79	44	13.25	332	100
50-74			19	43.18	4	9.09			44	100
75-99			17	41.46	4	9.76	1	2.44	41	100
≥100			5	7.93					63	100
All ≥5	38	1.98	1532	79.91	805	42.00	686	35.79	1917	100

Appendix 6

Figure 9
The University of Texas at Austin
College of Natural Sciences
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	3	0.38	480	60.45	119	14.99	141	17.76	794	100
25-49	1	0.21	163	33.75	4	0.83	12	2.48	483	100
50-74			10	14.29			2	2.86	70	100
75-99			1	4.76					21	100
≥100									64	100
All ≥5	4	0.28	654	45.67	123	8.59	155	10.82	1432	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	12	1.51	219	27.58	157	19.77	211	26.57	794	100
25-49			175	36.23	17	3.52	28	5.80	483	100
50-74			26	37.14			2	2.86	70	100
75-99			8	38.10					21	100
≥100			4	6.25					64	100
All ≥5	12	0.84	432	30.17	174	12.15	241	16.83	1432	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	15	1.89	699	88.03	276	34.76	352	44.33	794	100
25-49	1	0.21	338	69.98	21	4.35	40	8.28	483	100
50-74			36	51.43			4	5.72	70	100
75-99			9	42.86					21	100
≥100			4	6.25					64	100
All ≥5	16	1.12	1086	75.84	297	20.74	396	27.65	1432	100

Appendix 6

Figure 10
The University of Texas at Austin
School of Nursing
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			53	75.71	35	50.00	15	21.43	70	100
25-49			2	18.18					11	100
50-74									5	100
75-99										100
≥100										100
All ≥5			55	63.95	35	40.70	15	17.44	86	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			15	21.43	29	41.43	19	27.14	70	100
25-49			5	45.45	2	18.18	2	18.18	11	100
50-74			1	20.00	1	20.00			5	100
75-99										100
≥100										100
All ≥5			21	24.42	32	37.21	21	24.42	86	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			68	97.14	64	91.43	34	48.57	70	100
25-49			7	63.63	2	18.18	2	18.18	11	100
50-74			1	20.00	1	20.00			5	100
75-99										100
≥100										100
All ≥5			76	88.37	67	77.91	36	41.86	86	100

Appendix 6

Figure 11
The University of Texas at Austin
School of Social Work
Undergraduate Classroom Diversity Levels
Fall 2001

Note: "N" refers to the number of classes.

No Students										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			8	38.10	13	61.90	1	4.76	21	100
25-49			1	20.00					5	100
50-74									1	100
75-99										100
≥100										100
All ≥5			9	33.33	13	48.15	1	3.70	27	100

Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			8	38.10	5	23.81	3	14.29	21	100
25-49			2	40.00	2	40.00			5	100
50-74									1	100
75-99										100
≥100										100
All ≥5			10	37.04	7	25.93	3	11.11	27	100

None or Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			16	76.20	18	85.71	4	19.05	21	100
25-49			3	60.00	2	40.00			5	100
50-74									1	100
75-99										100
≥100										100
All ≥5			19	70.37	20	74.08	4	14.81	27	100

Appendix 7

Figure 1
The University of Texas at Austin
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	19	0.53	2342	64.77	821	22.70	640	17.70	3616	100
25-49	2	0.14	554	37.89	61	4.17	38	2.60	1462	100
50-74			32	15.02	2	0.94	1	0.47	213	100
75-99			17	14.05			1	0.83	121	100
≥100			3	1.37					219	100
All ≥5	21	0.37	2948	52.35	884	15.70	680	12.08	5631	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	42	1.16	905	25.03	848	23.45	910	25.17	3616	100
25-49	4	0.27	483	33.04	140	9.58	115	7.87	1462	100
50-74			66	30.99	9	4.23	7	3.29	213	100
75-99			35	28.93			1	0.83	121	100
≥100			16	7.31	2	0.91			219	100
All ≥5	46	0.82	1505	26.73	999	17.74	1033	18.34	5631	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	61	1.69	3247	89.80	1669	46.15	1550	42.87	3616	100
25-49	6	0.41	1037	70.93	201	13.75	153	10.47	1462	100
50-74			98	46.01	11	5.17	8	3.76	213	100
75-99			52	42.98			2	1.66	121	100
≥100			19	8.68	2	0.91			219	100
All ≥5	67	1.19	4453	79.08	1883	33.44	1713	30.42	5631	100

Appendix 7
Figure 2
The University of Texas at Austin
School of Architecture
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			47	78.33	12	20.00	17	28.33	60	100
25-49			7	43.75					16	100
50-74										100
75-99										100
≥100										100
All ≥5			54	71.05	12	15.79	17	22.37	76	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			11	18.33	18	30.00	14	23.33	60	100
25-49			5	31.25					16	100
50-74										100
75-99										100
≥100										100
All ≥5			16	21.05	18	23.68	14	18.42	76	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			58	96.66	30	50.00	31	51.66	60	100
25-49			12	75.00					16	100
50-74										100
75-99										100
≥100										100
All ≥5			70	92.10	30	39.47	31	40.79	76	100

Appendix 7

Figure 3

The University of Texas at Austin
McCombs School of Business
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			35	60.34	1	1.72	15	25.86	58	100
25-49			38	42.22			9	10.00	90	100
50-74			1	3.85					26	100
75-99			1	4.35					23	100
≥100									41	100
All ≥5			75	31.51	1	0.42	24	10.08	238	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			13	22.41	4	6.90	9	15.52	58	100
25-49			22	24.44	2	2.22	13	14.44	90	100
50-74			9	34.62					26	100
75-99			8	34.78					23	100
≥100			2	4.88					41	100
All ≥5			54	22.69	6	2.52	22	9.24	238	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			48	82.75	5	8.62	24	41.38	58	100
25-49			60	66.66	2	2.22	22	24.44	90	100
50-74			10	38.47					26	100
75-99			9	39.13					23	100
≥100			2	4.88					41	100
All ≥5			129	54.20	7	2.94	46	19.32	238	100

Appendix 7

Figure 4

The University of Texas at Austin
College of Communication
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			131	68.59	55	28.80	27	14.14	191	100
25-49			36	36.36	6	6.06	3	3.03	99	100
50-74			1	20.00					5	100
75-99			2	25.00					8	100
≥100									11	100
All ≥5			170	54.14	61	19.43	30	9.55	314	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			44	23.04	65	34.03	53	27.75	191	100
25-49			36	36.36	19	19.19	6	6.06	99	100
50-74			2	40.00					5	100
75-99			3	37.50					8	100
≥100			1	9.09					11	100
All ≥5			86	27.39	84	26.75	59	18.79	314	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			175	91.63	120	62.83	80	41.89	191	100
25-49			72	72.72	25	25.25	9	9.09	99	100
50-74			3	60					5	100
75-99			5	62.50					8	100
≥100			1	9.09					11	100
All ≥5			256	81.53	145	46.18	89	28.34	314	100

Appendix 7

Figure 5
The University of Texas at Austin
College of Education
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.59	110	65.09	43	25.44	9	5.33	169	100
25-49	2	1.43	36	25.71	11	7.86			140	100
50-74									13	100
75-99									5	100
≥100									12	100
All ≥5	3	0.88	146	43.07	54	15.93	9	2.65	339	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	1	0.59	43	25.44	50	29.59	40	23.67	169	100
25-49			36	25.71	16	11.43	8	5.71	140	100
50-74			3	23.08					13	100
75-99									5	100
≥100			1	8.33					12	100
All ≥5	1	0.29	83	24.48	66	19.47	48	14.16	339	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	2	1.18	153	90.53	93	55.03	49	29.00	169	100
25-49	2	1.43	72	51.42	27	19.29	8	5.71	140	100
50-74			3	23.08					13	100
75-99									5	100
≥100			1	8.33					12	100
All ≥5	4	1.17	229	67.55	120	35.40	57	16.81	339	100

Appendix 7

Figure 6

The University of Texas at Austin
College of Engineering
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			191	67.73	27	9.57	52	18.44	282	100
25-49			74	43.53			3	1.76	170	100
50-74			7	18.42			1	2.63	38	100
75-99			1	6.67					15	100
≥100									5	100
All ≥5			273	53.53	27	5.29	56	10.98	510	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	3	1.06	71	25.18	59	20.92	75	26.60	282	100
25-49			54	31.76	6	3.53	10	5.88	170	100
50-74			11	28.95			3	7.89	38	100
75-99			4	26.67			1	6.67	15	100
≥100									5	100
All ≥5	3	0.59	140	27.45	65	12.75	89	17.45	510	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	3	1.06	262	92.91	86	30.49	127	45.04	282	100
25-49			128	75.29	6	3.53	13	7.64	170	100
50-74			18	47.37			4	10.52	38	100
75-99			5	33.34			1	6.67	15	100
≥100									5	100
All ≥5	3	0.59	413	80.98	92	18.04	145	28.43	510	100

Appendix 7

Figure 7

The University of Texas at Austin
School of Fine Arts
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			204	71.58	94	32.98	45	15.79	285	100
25-49			7	33.33	4	19.05			21	100
50-74			4	40.00					10	100
75-99			1	20.00					5	100
≥100									6	100
All ≥5			216	66.06	98	29.97	45	13.76	327	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			58	20.35	71	24.91	83	29.12	285	100
25-49			5	23.81	3	14.29	2	9.52	21	100
50-74			4	40.00					10	100
75-99			3	60.00					5	100
≥100			1	16.67					6	100
All ≥5			71	21.71	74	22.63	85	25.99	327	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			262	91.93	165	57.89	128	44.91	285	100
25-49			12	57.14	7	33.34	2	9.52	21	100
50-74			8	80					10	100
75-99			4	80					5	100
≥100			1	16.67					6	100
All ≥5			287	87.77	172	52.60	130	39.75	327	100

Appendix 7

Figure 8

The University of Texas at Austin
College of Liberal Arts
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	16	1.06	938	62.24	401	26.61	293	19.44	1507	100
25-49			140	40.82	33	9.62	10	2.92	343	100
50-74			9	15.79	2	3.51			57	100
75-99			10	20.41			1	2.04	49	100
≥100			1	1.56					64	100
All ≥5	16	0.79	1098	54.36	436	21.58	304	15.05	2020	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	24	1.59	401	26.61	357	23.69	369	24.49	1507	100
25-49	2	0.58	119	34.69	64	18.66	33	9.62	343	100
50-74			17	29.82	7	12.28			57	100
75-99			13	26.53					49	100
≥100			6	9.38	1	1.56			64	100
All ≥5	26	1.29	556	27.52	429	21.24	402	19.90	2020	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	40	2.65	1339	88.85	758	50.30	662	43.93	1507	100
25-49	2	0.58	259	75.51	97	28.28	43	12.54	343	100
50-74			26	45.61	9	15.79			57	100
75-99			23	46.94			1	2.04	49	100
≥100			7	10.94	1	1.56			64	100
All ≥5	42	2.08	1654	81.88	865	42.82	706	34.95	2020	100

Appendix 7

Figure 9

The University of Texas at Austin
College of Natural Sciences
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	2	0.23	549	63.91	110	12.81	147	17.11	859	100
25-49			211	37.81	5	0.90	12	2.15	558	100
50-74			10	18.87					53	100
75-99			2	12.50					16	100
≥100			2	2.82					71	100
All ≥5	2	0.13	774	49.71	115	7.39	159	10.21	1557	100

Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	13	1.51	213	24.80	174	20.26	208	24.21	859	100
25-49	2	0.36	196	35.13	24	4.30	43	7.71	558	100
50-74			19	35.85	1	1.89	4	7.55	53	100
75-99			4	25.00					16	100
≥100			5	7.04	1	1.41			71	100
All ≥5	15	0.96	437	28.07	200	12.85	255	16.38	1557	100

None or Only One Student										
Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24	15	1.74	762	88.71	284	33.07	355	41.32	859	100
25-49	2	0.36	407	72.94	29	5.20	55	9.86	558	100
50-74			29	54.72	1	1.89	4	7.55	53	100
75-99			6	37.50					16	100
≥100			7	9.86	1	1.41			71	100
All ≥5	17	1.09	1211	77.78	315	20.24	414	26.59	1557	100

Appendix 7

Figure 10

The University of Texas at Austin
School of Nursing
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			51	68.00	44	58.67	18	24.00	75	100
25-49			2	16.67	2	16.67	1	8.33	12	100
50-74									6	100
75-99										100
≥100										100
All ≥5			53	56.99	46	49.46	19	20.43	93	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			21	28.00	24	32.00	26	34.67	75	100
25-49			5	41.67	5	41.67			12	100
50-74					1	16.67			6	100
75-99										100
≥100										100
All ≥5			26	27.96	30	32.26	26	27.96	93	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			72	96.00	68	90.67	44	58.67	75	100
25-49			7	58.34	7	58.34	1	8.33	12	100
50-74					1	16.67			6	100
75-99										100
≥100										100
All ≥5			79	84.95	76	81.72	45	48.39	93	100

Appendix 7

Figure 11
The University of Texas at Austin
School of Social Work
Undergraduate Classroom Diversity Levels
Fall 2002

Note: "N" refers to the number of classes.

No Students

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			7	29.17	14	58.33	1	4.17	24	100
25-49									4	100
50-74									2	100
75-99										100
≥100										100
All ≥5			7	23.33	14	46.67	1	3.33	30	100

Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			6	25.00	8	33.33	5	20.83	24	100
25-49			2	50.00	1	25.00			4	100
50-74									2	100
75-99										100
≥100										100
All ≥5			8	26.67	9	30.00	5	16.67	30	100

None or Only One Student

Class Size	White		African American		Asian American		Hispanic		All	
	N	%	N	%	N	%	N	%	N	%
5-24			13	54.17	22	91.66	6	25.00	24	100
25-49			2	50.00	1	25.00			4	100
50-74									2	100
75-99										100
≥100										100
All ≥5			15	50.00	23	76.67	6	20.00	30	100

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF ADMISSIONS

IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588)
at
THE UNIVERSITY OF TEXAS AT AUSTIN

DEMOGRAPHIC ANALYSIS OF ENTERING FRESHMEN
FALL 2008

ACADEMIC PERFORMANCE OF TOP 10% AND NON-TOP 10% STUDENTS
ACADEMIC YEARS 2003-2007

Prepared by:

The Office of Admissions
The University of Texas at Austin
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Introduction to Report 11

This is the eleventh in a series of reports on the demographic makeup of Top 10% students entering The University of Texas at Austin. These reports were developed to provide easy access to understandable data for the press, the general public, policy analysts, political decision-makers, and fellow academicians.

The Texas Top 10% Law (HB 588) requires the automatic admission of any student graduating in the top 10% of an accredited Texas high school.

Because of space limitations this report differs from previous reports in that the data are largely limited to the past eleven years for demographics (the Entering Classes of 1998 through 2008) and the past five years for performance (the Entering Classes of 2003 through 2007). For performance and demographic data of the classes of 1996 through 2001 see "Volume 1" posted on the Admissions Research Website at:

http://www.utexas.edu/student/admissions/research/index.html

This paper is designed to present simple, descriptive statistics relative to graduates of Texas high schools matriculating as entering freshmen from 1998-2008. This is not a position paper. It is not an evaluation of past or present affirmative action policies. It is not a proposed blueprint for other universities or public institutions seeking diversity. It is not representative of the higher education experience in all of Texas. It is merely a presentation of demographic and performance information over the past decade.

Performance and test data in individual cells in the tables with an n-count of <5 have been withheld in order to protect the confidentiality of the students.

An Overview of Freshman Admissions at the University of Texas

The admissions process of any university is an exercise in both selecting qualified students with a high probability of success, and crafting an entering class that also meets the university's mission. In 1996, UT Austin carefully reviewed its admissions process. At the time, merit, when applied to an admission decision, consisted of high standardized test scores and high class rank. In 1997, the Texas State Legislature exerted its own definition of merit through the "Texas Top 10% Automatic Admissions Law."[1] Today, any student graduating in the top 10% of his/her Texas high school class is automatically admissible to any public college or university in the state—including The University of Texas at Austin. In order to enjoy the entitlement, however, applicants must meet certain conditions defined by the Texas Higher Education Coordinating Board.[2]

The UT Austin admissions routine for students *not* automatically admitted is elaborate and entails a broad concept of merit. Beginning with the entering class of 1997, for those not automatically admitted, the idea of merit was expanded from class rank and test scores exclusively to the inclusion of the following factors:

The Academic Index (AI)
High School Record:

- Class rank[3]
- Completion of UT required high school curriculum[4]
- Extent to which students exceed the UT required units
- SAT/ACT score[5]

The Personal Achievement Index (PAI)

- Scores on two essays
- Leadership
- Extracurricular Activities
- Awards/honors
- Work experience
- Service to school or community
- Special circumstances:
  - Socio-economic status of family
  - Single parent home
  - Language spoken at home
  - Family responsibilities
  - Socio-economic status of school attended
  - Average SAT/ACT of school attended in relation to student's own SAT/ACT
  - Race (addition approved by the UT Board of Regents in 2003)

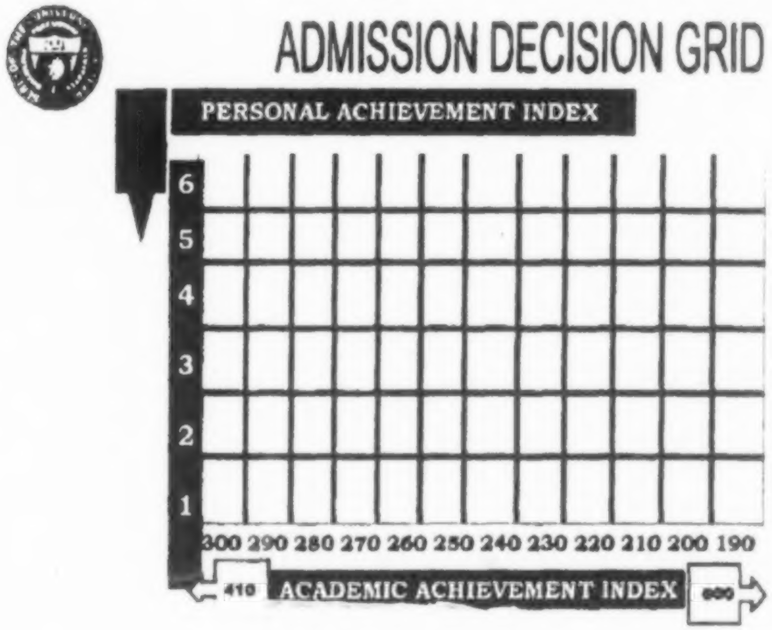
Thus, merit includes the ambition to tackle rigorous high school coursework, the production of quality prose, and the desire to make a difference in one's school, home, or community. Evidence of employability (work), and some sense of having excelled in any number of areas are also considered. Moreover, admissions officials place these attributes in the context of the circumstances under which the student lived.

The Academic Index (AI) is determined by a multiple regression equation utilizing a high school percentile derived from an explicit class rank [1-(class rank/class size)]*100, and verbal and math test scores from the ACT Assessment or the SAT I: Reasoning Test. The equation produces a predicted freshman year grade point average.[6] After a review of the high school transcript, an applicant can be "awarded" a tenth of a point if he/she exceeded UT's required high school curriculum. Thus, AI values range from 4.10-0.00.

The Personal Achievement Index (PAI) is UT Austin's holistic approach to admissions. Admissions officers are trained each year to conduct comprehensive reviews of every application from students not automatically admitted. All applicants are required to submit two essays. Each are read and scored on a scale of 1-6. The application itself, and any attachments an applicant chooses to include, is then reviewed. A "personal achievement" score on a scale of 1-6 is then assigned to the application. From the three scores, two essays and a personal achievement score, a PAI is computed. The equation reflects a 1997 faculty decision to give slightly more weight to the personal achievement score than the essays: PAI = [(personal achievement score * 4)+(mean essay * 3)] / 7.

AIs and PAIs of applicants not automatically admitted are then plotted on an admissions decision grid. (See Figure 1 below.) The most-qualified candidates are located in the cells closest to the upper left corner. Admissions liaisons, and/or representatives of Deans' offices or faculty, then make decisions as to which cells to select as admitted students. Texas resident applicants are either admitted, "cascaded" to their second choice of major, offered Summer Freshman Admission, or offered the Coordinated Admission Program (CAP) at a UT System component school. Thus, Texas residents submitting a completed entering freshman application by published deadlines are not denied admission to UT Austin. Non-residents are either admitted or denied.

Figure 1



Demographic Analysis—1998-2008

Table 1 below illustrates the numbers of applicants, admits, and enrolled students from 1998 through 2008. Throughout this report, n-counts include first-time freshmen for the fall plus those entering during the preceding summer and continuing into the fall. Since the size of the entering classes ranges from 6430 to 7935 it is most appropriate to focus on percentages.

Important note:* *Table 1 and Table 2 are the only tables illustrating all first-time freshmen. Tables 1a, 2a, 3 and those that follow illustrate the graduates of Texas high schools only. Graduates of Texas high schools are isolated because HB 588 grants an automatic admission entitlement only to graduates of public and accredited non-public high schools in Texas. For this reason, the n-counts and other data reported here will not match official first-time freshman data reported by the Office of Information Management and Analysis in its Statistical Handbook.

Notes to researchers:

Concise descriptions of UT Austin's admissions policies by year are as follows:

- 1997—Use of the "AI" (as described above), the "PAI" (as described above), with an institutional policy admitting the top 10%, and no affirmative action policy—the result of the *Hopwood* decision.
- 1998-2004—Use of the "AI", the "PAI", with HB 588 mandated automatic admission of the top 10%, and no affirmative action policy—the result of the *Hopwood* decision.
- 2005-2008—Use of the "AI", the "PAI", with HB 588 mandated automatic admission of the top 10%, and the utilization of affirmative action (as described above)—the result of the *Grutter* decision.

Drops in SAT averages from 2005 to 2006 and 2007 were common throughout the US, especially for large institutions, and was due in part to changes made on the SAT 1: Reasoning Test. Students in the 2006 cohort were the first class to take the "New SAT," which was 40 minutes longer, included a 25-minute writing sample, and much more expensive (from $25 to $41). The College Board reports that nationwide and institution-level score declines are likely the result of dramatically reduced multiple test-taking by students. Multiple test-taking usually results in higher scores for an individual. The average ACT Composite score, a test that did not change or see any change in test-taking behaviors in its population, remained steady at 26.[7]

Office of Admissions
The University of Texas at Austin
512-475-7337

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[1] The text of the Uniform Admissions Law (HB 588) is posted at: http://www.utexas.edu/student/admissions/research/HB588Law.html

[2] Those conditions are posted at: http://www.thecb.state.tx.us/rules/tac3.cfm?Chapter_ID=5&Subchapter=A#5.5

[3] Class rank is expressed as a high school percentile using the following formula: (1-(class rank/class size))*100. For students from non-ranking schools, a rank is estimated using the student's GPA and grade distributions provided by the schools.

[4] For non-top 10% students the required units are:

Language Arts

4 units of English, one of which may be writing, world literature, speech, or journalism. English as a second language (ESL) and correlated language arts do not count as units of English.

Foreign Language

2 units (3 recommended) of a single foreign language.

Mathematics

3 units (4 recommended) at the level of Algebra I or higher: algebra, plane geometry, trigonometry, analytic geometry, elementary analysis, probability & statistics, solid geometry, calculus with analytic geometry, or number theory. Fundamentals of mathematics, mathematics of money, and informal geometry do not count as units of mathematics.

Science

2 units (3 recommended) of laboratory science. Recommended courses include biology, chemistry, physical science, and physics.

Social Studies

3 units, which may include anthropology, area studies, ethnic studies, economics, geography, government (civics), philosophy, psychology, problems in social science, sociology, Texas history (advanced), U.S. history, or world history.

Fine Arts

One-half unit of art, dance, music, or theatre arts is strongly recommended.

The units listed above are the minimum requirements for admission consideration at UT-Austin. The pool of prospective freshmen is so competitive that students who take additional units, especially in math and science, will strengthen their chances for both admission and later success in a rigorous college curriculum.

Admission is granted to applicants who have not completed the required units listed above if they are Texas residents who have completed the "recommended curriculum" and who are otherwise qualified for admission on the basis of graduation in the top 10% of their high school class. Recipients of bona fide scholarships designated by the University president and students whose high school does not offer the courses necessary to complete the unit requirements may apply to the Director of Admissions for an exception. Students who are admitted by exception must remove deficiencies to graduate; courses taken to remove a deficiency do not count toward the student's degree.

[5] UT accepts either the SAT 1: Reasoning Test or the ACT Assessment. Students sending more than one set of scores are given the benefit of the best performance from a single test date.

[6] The equations are as follows:

For Liberal Arts, Communications, Fine Arts, Social Work, and Education:

$$\text{Predicted Freshman GPA} = -0.19949 + (\text{SAT V} * 0.00142) + (\text{SAT M} * 0.00191) + (\text{HSR} * 0.01459)$$

$$\text{Predicted Freshman GPA} = 0.09689 + (\text{ACT E} * 0.02513) + (\text{ACT M} * 0.04577) + (\text{HSR} * 0.01351)$$

For Nursing, Natural Sciences, and Architecture:

$$\text{Predicted Freshman GPA} = -1.10339 + (\text{SAT V} * 0.00088166) + (\text{SAT M} * 0.00230) + (\text{HSR} * 0.02416)$$

$$\text{Predicted Freshman GPA} = -0.51242 + (\text{ACT E} * 0.00824) + (\text{ACT M} * 0.05007) + (\text{HSR} * 0.02199)$$

For Engineering:

$$\text{Predicted Freshman GPA} = -1.53545 + (\text{SAT V} * 0.00072937) + (\text{SAT M} * 0.00313) + (\text{HSR} * 0.02285)$$

$$\text{Predicted Freshman GPA} = -1.78910 + (\text{ACT E} * 0.01074) + (\text{ACT M} * 0.07335) + (\text{HSR} * 0.02708)$$

For Business:

$$\text{Predicted Freshman GPA} = -2.31253 + (\text{SAT V} * 0.00157) + (\text{SAT M} * 0.00229) + (\text{HSR} * 0.03419)$$

$$\text{Predicted Freshman GPA} = -2.14521 + (\text{ACT E} * 0.02892) + (\text{ACT M} * 0.05405) + (\text{HSR} * 0.03409)$$

[7] See http://www.collegeboard.com/satscores/letter.html

THE UNIVERSITY OF TEXAS AT AUSTIN
TOP 10% REPORT 11

October 28, 2008

Table 1
Applicants/Admits/First-Time Enrolled Freshmen
Summers and Falls Combined
1998-2008

All Freshman Applications

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1998	10138	60%	94	1%	660	4%	2491	15%	2338	14%	958	6%	118	1%	16797	100%
1999	11051	58%	87	0%	1030	5%	2668	14%	2831	15%	1199	6%	64	0%	18930	100%
2000	12737	59%	107	0%	1186	6%	2939	14%	3087	14%	1404	7%	79	0%	21539	100%
2001	11723	56%	127	1%	1053	5%	3123	15%	3164	15%	1673	8%	123	1%	20986	100%
2002	12603	57%	110	0%	1159	5%	3259	15%	3487	16%	1447	7%	114	1%	22179	100%
2003	13944	57%	111	0%	1351	6%	3439	14%	4101	17%	1477	6%	96	0%	24519	100%
2004	12417	54%	127	1%	1456	6%	3262	14%	4035	18%	1571	7%	140	1%	23008	100%
2005	12552	52%	124	1%	1552	6%	3483	15%	4457	19%	1700	7%	57	0%	23925	100%
2006	14301	52%	178	1%	1915	7%	4005	15%	5148	19%	1741	6%	27	0%	27315	100%
2007	13659	50%	126	0%	1952	7%	4159	15%	5335	20%	1969	7%	37	0%	27237	100%
2008	14038	48%	140	0%	2234	8%	4344	15%	6081	21%	2620	9%	44	0%	29501	100%

All Freshman Admits

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1998	7659	64%	59	0%	401	3%	1942	16%	1620	14%	252	2%	42	0%	11975	100%
1999	7421	62%	47	0%	517	4%	1970	16%	1705	14%	248	2%	41	0%	11949	100%
2000	8162	62%	59	0%	562	4%	2151	16%	1823	14%	471	4%	28	0%	13256	100%
2001	7787	61%	68	1%	445	3%	2198	17%	1815	14%	355	3%	65	1%	12733	100%
2002	8258	61%	61	0%	494	4%	2298	17%	1945	14%	379	3%	41	0%	13476	100%
2003	6852	60%	37	0%	448	4%	1991	17%	1795	16%	348	3%	33	0%	11504	100%
2004	6814	58%	53	0%	569	5%	2013	17%	1911	16%	390	3%	38	0%	11788	100%
2005	6745	55%	59	0%	617	5%	2076	17%	2183	18%	498	4%	29	0%	12207	100%
2006	7280	56%	68	1%	683	5%	2315	17%	2406	18%	547	4%	8	0%	13307	100%
2007	7310	53%	52	0%	747	5%	2498	18%	2632	19%	549	4%	12	0%	13800	100%
2008	6582	51%	50	0%	728	6%	2309	18%	2621	20%	536	4%	17	0%	12843	100%

All Enrolled First-time Freshmen

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1998	4399	65%	37	1%	199	3%	1133	17%	891	13%	83	1%	2	0%	6744	100%
1999	4447	63%	28	0%	286	4%	1221	17%	976	14%	82	1%			7040	100%
2000	4801	62%	32	0%	296	4%	1325	17%	1011	13%	217	3%	4	0%	7686	100%
2001	4447	61%	34	0%	242	3%	1413	19%	1024	14%	139	2%	38	1%	7337	100%
2002	4882	62%	35	0%	272	3%	1452	18%	1137	14%	157	2%			7935	100%
2003	3866	59%	19	0%	267	4%	1153	18%	1068	16%	156	2%	15	0%	6544	100%
2004	3901	57%	28	0%	309	5%	1218	18%	1149	17%	173	3%	18	0%	6796	100%
2005	3838	56%	33	0%	351	5%	1192	17%	1244	18%	236	3%	18	0%	6912	100%
2006	4028	54%	38	1%	387	5%	1326	18%	1386	19%	250	3%	2	0%	7417	100%
2007	3839	51%	27	0%	431	6%	1474	20%	1470	20%	236	3%	2	0%	7479	100%
2008	3513	52%	23	0%	375	6%	1249	19%	1338	20%	208	3%	9	0%	6715	100%

Table 1a
First-Time Enrolled Freshmen from Texas High Schools
Summers and Falls Combined
1998-2008

Top 10% First-Time Enrolled Freshmen from Texas High Schools

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1998	1497	60%	9	0%	69	3%	519	21%	414	16%	5	0%			2513	100%
1999	1620	55%	10	0%	160	5%	609	21%	513	18%	10	0%	3	0%	2925	100%
2000	1921	57%	9	0%	156	5%	653	20%	591	18%	15	0%	1	0%	3348	100%
2001	1942	57%	10	0%	137	4%	718	21%	575	17%	25	1%	16	0%	3423	100%
2002	2203	56%	19	0%	156	4%	800	20%	703	18%	51	1%			3932	100%
2003	2378	55%	15	0%	194	5%	781	18%	858	20%	61	1%	2	0%	4289	100%
2004	2270	54%	20	0%	225	5%	776	18%	887	21%	60	1%	3	0%	4241	100%
2005	2288	52%	18	0%	252	6%	782	18%	966	22%	85	2%			4391	100%
2006	2524	51%	23	0%	268	5%	929	19%	1049	21%	108	2%	1	0%	4902	100%
2007	2359	48%	15	0%	284	6%	1005	21%	1109	23%	98	2%			4870	100%
2008	2480	48%	14	0%	305	6%	1025	20%	1164	23%	122	2%	4	0%	5114	100%

Non-Top 10% First-Time Enrolled Freshmen from Texas High Schools

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1998	2457	68%	24	1%	119	3%	542	15%	441	12%	14	0%			3597	100%
1999	2472	69%	14	0%	113	3%	559	16%	424	12%	7	0%	7	0%	3596	100%
2000	2529	68%	21	1%	129	3%	606	16%	401	11%	25	1%	2	0%	3713	100%
2001	2076	64%	20	1%	98	3%	607	19%	426	13%	15	0%	13	0%	3255	100%
2002	2188	66%	12	0%	99	3%	562	17%	411	12%	30	1%			3302	100%
2003	1202	67%	*	*	64	4%	298	17%	199	11%	35	2%	1	0%	1804	100%
2004	1384	64%	8	0%	77	4%	388	18%	251	12%	44	2%	5	0%	2157	100%
2005	1230	62%	10	1%	87	4%	350	18%	264	13%	44	2%	12	1%	1997	100%
2006	1163	59%	10	1%	110	6%	327	17%	314	16%	38	2%			1962	100%
2007	1112	55%	11	1%	138	7%	378	19%	343	17%	48	2%			2030	100%
2008	790	65%	8	1%	58	5%	173	14%	158	13%	18	1%	3	0%	1208	100%

All Enrolled First-time Freshmen from Texas High Schools

	White		Native American		African American		Asian American		Hispanic		International		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1998	3954	65%	33	1%	188	3%	1061	17%	855	14%	19	0%			6110	100%
1999	4092	63%	24	0%	273	4%	1168	18%	937	14%	17	0%	10	0%	6521	100%
2000	4450	63%	30	0%	285	4%	1259	18%	992	14%	40	1%	3	0%	7059	100%
2001	4018	60%	30	0%	235	4%	1325	20%	1001	15%	40	1%	29	0%	6678	100%
2002	4391	61%	31	0%	255	4%	1362	19%	1114	15%	81	1%			7234	100%
2003	3580	59%	19	0%	258	4%	1080	18%	1057	17%	96	2%	3	0%	6093	100%
2004	3654	57%	28	0%	302	5%	1164	18%	1138	18%	104	2%	8	0%	6398	100%
2005	3518	55%	28	0%	339	5%	1132	18%	1230	19%	129	2%	12	0%	6388	100%
2006	3687	54%	33	0%	378	6%	1256	18%	1363	20%	146	2%	1	0%	6864	100%
2007	3471	50%	26	0%	422	6%	1383	20%	1452	21%	146	2%			6900	100%
2008	3270	52%	22	0%	363	6%	1198	19%	1322	21%	140	2%	7	0%	6322	100%

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Table 2

TOP 10% STUDENTS ADMITTED TO UT AUSTIN BY RACIAL/ETHNIC BACKGROUND

HB 588 Automatic Admits divided by (" /") Total Admits

Summer/Fall 2001-2008

ETHNICITY	2001		2002		2003		2004		2005		2006		2007		2008	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
White	3213/7787	41%	3527/8258	43%	3996/6852	58%	3817/6814	56%	3887/6745	58%	4297/7280	59%	4244/7310	58%	4440/6582	67%
African American	245/445	55%	278/494	56%	326/448	73%	428/569	75%	441/617	71%	463/683	68%	485/747	65%	582/728	80%
Asian American	1081/2198	49%	1211/2298	53%	1250/1991	63%	1257/2013	62%	1302/2076	63%	1572/2315	68%	1571/2498	63%	1744/2309	76%
Hispanic	1012/1815	56%	1177/1945	61%	1424/1795	79%	1451/1911	76%	1656/2183	76%	1790/2406	74%	1974/2632	75%	2218/2621	85%

Table 2a

TOP 10% STUDENTS ADMITTED TO UT AUSTIN BY RACIAL/ETHNIC BACKGROUND

HB 588 Automatic Admits divided by (" /") Admits from Texas High Schools

Summer/Fall 2001-2008

ETHNICITY	2001		2002		2003		2004		2005		2006		2007		2008	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
White	3213/6629	48%	3527/6969	51%	3996/6004	67%	3817/6132	62%	3887/5906	66%	4297/6268	69%	4244/6196	68%	4440/5854	76%
African American	245/424	58%	278/452	62%	326/425	77%	428/553	77%	441/592	74%	463/661	70%	485/707	69%	582/700	83%
Asian American	1081/1909	57%	1211/1965	62%	1250/1725	72%	1257/1823	69%	1302/1865	70%	1572/2060	76%	1571/2163	73%	1744/2079	84%
Hispanic	1012/1714	59%	1177/1817	65%	1424/1745	82%	1451/1860	78%	1656/2119	78%	1790/2318	77%	1974/2550	77%	2218/2553	87%

Table 2b

UNIVERSITY OF TEXAS ENTERING FRESHMAN CLASSES

Breakout of Top 10% Status

Enrolled Students from Texas High Schools

Summer/Fall 1998-2008

	TX Grads	Top 10%		Non-Top 10%	
	N	N	%	N	%
1998	6110	2513	**41%**	3597	**59%**
1999	6521	2925	**45%**	3596	**55%**
2000	7059	3346	**47%**	3713	**53%**
2001	6678	3423	**51%**	3255	**49%**
2002	7234	3932	**54%**	3302	**46%**
2003	6093	4289	**70%**	1804	**30%**
2004	6398	4241	**66%**	2157	**34%**
2005	6388	4391	**69%**	1997	**31%**
2006	6864	4902	**71%**	1962	**29%**
2007	6900	4870	**71%**	2030	**29%**
2008	6322	5114	**81%**	1208	**19%**

Table 3

MEAN COLLEGE ADMISSION TEST SCORES OF ENROLLED TOP 10% AND NON-TOP 10% STUDENTS

Graduates of Texas High Schools

Summer/Fall 1998-2008

Note: The ranges below, and throughout this report, represent SAT combined scores and concorded ACT scores. As is the case with the UT admissions routine, students submitting more than one set of scores were given the benefit of the best performance from a single test date.

	1998	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**
Top 10%	1243	1231	1226	1225	1226	1223	1221	1226	1220	1225	1219
Non-Top 10%	1193	1193	1205	1215	1222	1257	1258	1277	1257	1246	1285
Total	1214	1210	1215	1220	1224	1233	1233	1242	1230	1231	1232

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Table 4a

SAT SCORE RANGES FOR ENROLLED FRESHMEN TOP 10% STUDENTS

Graduates of Texas High Schools

Summer/Fall 1998-2008

Note: The ranges below, and throughout this report, represent SAT combined scores and concorded ACT scores. As is the case with the UT admissions routine, students submitting more than one set of scores were given the benefit of the best performance from a single test date.

SAT	1998		1999		2000		2001		2002		2003		2004		2005		2006		2007		2008	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
<900	27	1	68	2	82	2	81	2	98	3	128	3	135	3	129	3	171	3	131	3%	139	3%
900-990	89	4	122	4	176	5	190	6	223	6	258	6	263	6	247	6	298	6	326	7%	336	7%
1000-1090	309	12	375	13	439	13	440	13	522	13	572	13	560	13	570	13	690	14	642	13%	720	14%
1100-1190	473	19	540	18	669	20	692	20	728	19	805	19	801	19	844	19	891	18	908	19%	952	19%
1200-1290	664	26	762	26	810	24	811	24	933	24	1023	24	1004	24	1026	23	1145	23	1094	22%	1242	24%
1300-1390	557	22	636	22	675	20	704	21	848	22	841	20	830	20	863	20	949	19	961	20%	988	19%
1400-1490	300	12	324	11	381	11	393	11	461	12	499	12	478	11	507	12	547	11	600	12%	542	11%
1500+	94	4	98	3	114	3	112	3	119	3	163	4	169	4	205	5	211	4	207	4%	195	4%
Total	2513	100	2925	100	3346	100	3423	100	3932	100	4289	100	4241	100	4391	100	4902	100	4870	100%	5114	100%
SAT Mean	1243		1231		1226		1225		1226		1223		1221		1226		1220		1225		1219	

Table 4b

SAT SCORE RANGES FOR ENROLLED FRESHMEN NON-TOP 10% STUDENTS

Graduates of Texas High Schools

Summer/Fall 1998-2008

Note: The sum of the SAT intervals in 2005 may not equal to the total because 14 entering freshmen were specially enrolled "Hurricane Katrina" students who had no test scores.

SAT	1998		1999		2000		2001		2002		2003		2004		2005		2006		2007		2008	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
<900	52	1	47	1	45	1	19	1	43	1	30	2	36	2	30	2	56	3	42	2%	16	1%
900-990	169	5	181	5	117	3	96	3	96	3	43	2	47	2	41	2	69	4	107	5%	30	2%
1000-1090	560	16	602	17	531	14	439	13	374	11	128	7	130	6	140	7	142	7	182	9%	72	6%
1100-1190	1009	28	965	27	1005	27	806	25	776	24	274	15	397	18	233	12	305	16	318	16%	138	11%
1200-1290	1009	28	1018	28	1155	31	1072	33	1074	33	577	32	639	30	564	28	504	26	529	26%	308	25%
1300-1390	591	16	544	15	611	16	572	18	655	20	491	27	608	28	599	30	578	29	544	27%	411	34%
1400-1490	178	5	202	6	193	5	208	6	239	7	209	12	247	11	302	15	244	12	239	12%	174	14%
1500+	29	1	37	1	56	2	45	1	45	1	51	3	53	2	74	4	64	3	68	3%	59	5%
Total	3597	100	3596	100	3713	100	3255	100	3302	100	1804	100	2157	100	1997	100	1962	100	2030	100%	1208	100%
SAT Mean	1193		1193		1205		1215		1222		1257		1258		1277		1257		1246		1285	

Table 5

TASP/TSI RESULTS FOR TOP 10% AND NON-TOP 10% STUDENTS

1998-2008

	Exempt (%)		Passed (%)		Remediation (%)		Total (n-count)	
	Top 10%	Other	Top 10%	Other	Top 10%	Other	Top 10%	Other
1998	89	82	10	15	1	3	2513	3597
1999	90	85	9	14	1	1	2925	3596
2000	90	88	8	10	1	1	3346	3713
2001	91	91	8	8	1	1	3423	3255
2002	96	95	4	5	<1	1	3932	3302
2003	97	97	2	3	<1	<1	4289	1804
2004	94	96	4	3	2	1	4241	2157
2005	87	93	11	5	2	2	4391	1997
2006	90	92	9	6	1	2	4902	1962
2007	92	92	7	7	1	2	4870	2030
2008	94	95	5	4	1	1	4804	1518

Table 6

FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE

Entering 2003-2007

Graduates of Texas High Schools

Note: The sum of the SAT intervals in 2005 may not equal to the total because 14 entering freshmen were specially enrolled "Hurricane Katrina" students who had no test scores.

	Entering 2003				Entering 2004				Entering 2005				Entering 2006				Entering 2007			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**	**N**	**GPA**
<900	128	2.50	30	2.17	135	2.32	36	2.34	129	2.33	30	2.35	171	2.27	56	2.34	131	2.12	42	2.03
900-990	258	2.71	43	2.46	263	2.59	47	2.29	247	2.60	41	2.70	298	2.57	69	2.15	326	2.43	107	2.20
1000-1090	572	2.90	128	2.79	560	2.82	130	2.70	570	2.80	140	2.53	690	2.76	142	2.49	642	2.64	182	2.43
1100-1190	805	3.09	274	2.94	801	3.09	397	2.80	844	2.98	233	2.79	891	2.95	305	2.76	908	2.89	319	2.68
1200-1290	1023	3.26	577	3.02	1004	3.27	639	3.01	1026	3.21	564	2.99	1145	3.19	504	3.03	1094	3.16	529	2.89
1300-1390	841	3.51	491	3.15	830	3.45	608	3.17	863	3.44	599	3.13	949	3.43	578	3.07	961	3.38	544	3.04
1400-1490	499	3.66	209	3.30	478	3.65	247	3.19	507	3.64	302	3.27	547	3.64	244	3.32	600	3.54	239	3.05
1500+	163	3.81	51	3.51	169	3.78	53	3.31	205	3.82	74	3.49	211	3.79	64	3.41	207	3.68	68	3.16
Total/Mean	**4289**	3.24	**1804**	3.05	**4241**	3.21	**2157**	3.00	**4391**	3.18	**1997**	3.02	**4902**	3.14	**1962**	2.96	**4870**	3.08	**2030**	2.83
SAT Mean	1223		1257		1221		1258		1226		1277		1220		1257		1225		1246	

Table 6a
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 2003-2007
Graduates of Texas High Schools
White Students

	Entering 2003				Entering 2004				Entering 2005				Entering 2006				Entering 2007			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	12	2.98	*	*	5	2.06	8	2.33	11	2.40	5	2.31	8	2.59	6	2.63	8	2.59	*	*
900-990	54	2.90	14	2.40	55	2.72	17	2.20	48	2.56	10	2.36	57	2.73	18	2.46	44	2.58	27	2.65
1000-1090	221	2.95	74	2.75	205	2.85	66	2.60	185	2.82	64	2.73	245	2.79	61	2.57	189	2.83	69	2.57
1100-1190	448	3.10	183	2.99	444	3.11	262	2.78	425	3.00	131	2.89	433	2.96	156	2.80	419	3.02	162	2.74
1200-1290	651	3.25	421	3.00	615	3.29	433	3.04	621	3.23	362	3.02	724	3.23	331	3.08	623	3.19	317	2.94
1300-1390	574	3.50	333	3.14	542	3.46	421	3.18	571	3.47	405	3.13	622	3.42	392	3.09	593	3.41	374	3.07
1400-1490	326	3.66	144	3.28	305	3.62	147	3.21	321	3.63	199	3.29	321	3.64	163	3.30	370	3.53	124	3.13
1500+	92	3.76	28	3.55	99	3.78	30	3.29	106	3.80	50	3.47	114	3.82	36	3.42	113	3.69	36	3.29
Total/Mean	2378	3.32	1202	3.06	2270	3.31	1384	3.02	2288	3.28	1230	3.08	2524	3.25	1163	3.05	2359	3.25	1112	2.95
SAT Mean	1262		1267		1262		1267		1268		1295		1264		1286		1275		1275	

Table 6b
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 2003-2007
Graduates of Texas High Schools
African American Students

	Entering 2003				Entering 2004				Entering 2005				Entering 2006				Entering 2007			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	31	2.19	12	2.34	46	1.97	13	2.34	45	2.18	12	2.32	34	2.14	25	2.28	26	2.14	21	2.15
900-990	30	2.62	11	2.25	40	2.51	8	1.96	35	2.31	8	2.13	52	2.38	6	2.18	62	2.38	29	2.10
1000-1090	61	2.74	10	2.35	54	2.81	11	2.42	66	2.65	11	1.95	81	2.64	13	2.50	73	2.61	24	2.50
1100-1190	30	2.93	14	2.50	34	2.95	13	2.94	50	2.80	23	2.52	45	3.06	35	2.7	61	2.67	30	2.59
1200-1290	31	3.33	12	3.07	33	3.11	19	2.62	42	3.09	16	2.70	34	3.06	22	2.81	44	3.11	22	2.79
1300-1390	9	3.37	*	*	14	3.33	10	3.12	11	3.21	14	2.98	16	3.14	8	2.73	12	3.44	6	2.23
1400-1490	*	*	*	*	*	*	*	*	*	*	*	*	5	2.87	*	*	*	*	5	2.83
1500+	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Total/Mean	194	2.79	64	2.55	225	2.69	77	2.58	252	2.66	87	2.50	268	2.69	110	2.58	284	2.65	138	2.42
SAT Mean	1063		1065		1046		1116		1059		1118		1067		1086		1078		1073	

Table 6c
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 2003-2007
Graduates of Texas High Schools
Asian American Students

	Entering 2003				Entering 2004				Entering 2005				Entering 2006				Entering 2007			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	9	2.01	*	*	12	2.48	*	*	11	2.30	*	*	11	2.48	*	*	12	2.10		
900-990	27	2.78	5	2.99	30	2.42	*	*	24	2.55	*	*	33	2.7	*	*	29	2.38	8	2.41
1000-1090	68	2.90	14	3.02	58	2.93	11	3.11	65	2.79	23	2.18	81	2.85	19	2.07	103	2.76	16	2.53
1100-1190	109	3.20	38	2.99	116	3.19	52	2.90	124	3.11	30	2.82	148	3.04	30	2.92	154	2.92	43	2.67
1200-1290	187	3.33	66	3.09	179	3.36	106	3.03	170	3.28	74	3.01	175	3.22	75	2.94	214	3.18	100	2.90
1300-1390	192	3.61	100	3.20	179	3.49	118	3.20	157	3.39	122	3.23	216	3.56	111	3.14	228	3.38	97	3.06
1400-1490	128	3.72	54	3.37	138	3.70	79	3.20	141	3.69	75	3.29	179	3.67	63	3.4	185	3.58	85	3.01
1500+	61	3.87	19	3.53	64	3.80	16	3.56	90	3.83	23	3.52	86	3.76	23	3.36	80	3.67	29	3.19
Total/Mean	781	3.41	299	3.17	776	3.38	388	3.11	782	3.33	350	3.11	929	3.35	327	3.05	1005	3.22	378	2.94
SAT Mean	1278		1300		1280		1304		1288		1322		1284		1310		1277		1310	

Table 6d
FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE
Entering 2003-2007
Graduates of Texas High Schools
Hispanic Students

	Entering 2003				Entering 2004				Entering 2005				Entering 2006				Entering 2007			
	Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%		Top 10%		Non-Top 10%	
SAT Ranges	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	71	2.61	11	2.06	67	2.54	9	2.32	56	2.42	13	2.39	98	2.27	21	2.35	76	2.05	16	1.80
900-990	145	2.67	12	2.50	131	2.60	17	2.44	135	2.69	15	3.18	146	2.50	39	1.97	180	2.40	39	1.96
1000-1090	211	2.89	28	2.86	229	2.73	38	2.80	239	2.83	40	2.53	265	2.72	44	2.53	261	2.46	70	2.25
1100-1190	205	3.01	35	2.83	192	3.02	61	2.73	225	2.90	41	2.57	242	2.84	74	2.6	259	2.73	70	2.55
1200-1290	134	3.21	65	3.02	159	3.14	61	2.73	177	3.11	90	2.86	184	3.02	66	3.02	182	3.05	81	2.71
1300-1390	56	3.31	41	2.97	81	3.37	48	3.15	102	3.42	44	2.93	83	3.27	5	3.93	106	3.27	47	2.80
1400-1490	33	3.47	5	3.22	26	3.59	13	3.12	27	3.45	20	3.25	26	3.65	13	3.15	35	3.46	19	2.85
1500+	*	*	*	*	*	*	*	*	5	3.84	*	*	5	3.55	*	*	10	3.72	*	*
Total/Mean	858	2.96	199	2.87	887	2.92	251	2.81	966	2.94	264	2.80	1049	2.8	314	2.67	1109	2.70	343	2.47
SAT Mean	1100		1189		1110		1189		1122		1193		1105		1154		1115		1155	

Table 7

SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND ETHNICITY

Entering 2007

Note: N-counts below represent students with a college admissions test score. SAT means represent SAT combined scores and concorded ACT scores. As is the case with the UT admissions routine, students submitting more than one set of scores were given the benefit of the best performance from a single test date. Students with no hours toward a GPA were excluded from the computation of the GPA mean. On very rare occasions students are admitted as freshmen to Pharmacy. Those are included in the total but are not listed.

College/School	Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	21	1387	3.38				*	*	*	9	1318	3.14	31	1371	3.33
Business	346	1322	3.43	38	1079	2.89	200	1358	3.54	143	1133	2.85	739	1280	3.31
Communication	275	1218	3.33	22	1065	2.66	32	1200	3.32	107	1114	2.96	441	1182	3.21
Education	59	1158	3.16	16	1088	2.84	8	1149	2.82	41	973	2.25	126	1086	2.80
Engineering	454	1331	3.16	26	1210	2.76	221	1326	3.22	163	1218	2.75	889	1305	3.09
Fine Arts	48	1288	3.49	3	1183	3.28	*	*	*	19	1155	3.31	77	1246	3.41
Geosciences	9	1242	2.92	*	*	*	5	1200	3.08				15	1213	2.94
Liberal Arts	588	1254	3.25	72	1054	2.62	127	1198	2.99	267	1065	2.63	1077	1183	3.02
Natural Science	513	1260	3.15	97	1072	2.60	396	1247	3.13	324	1116	2.62	1369	1207	2.98
Nursing	36	1258	3.27	7	925	2.38	10	1180	3.43	27	1029	2.60	82	1140	2.99
Social Work	10	1152	2.72	*	*	*	*	*	*	9	998	2.69	24	1051	2.66
Total	2359	1275	3.25	284	1078	2.65	1005	1277	3.22	1109	1115	2.70	4870	1225	3.08

College/School	Non-Top 10%														
	White			African American			Asian American			Hispanic			All Students		
	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA	N	SAT	GPA
Architecture	10	1364	3.18	*	*	*	7	1416	2.62				22	1343	2.95
Business	5	1306	3.08				8	1486	2.95	*	*	*	15	1387	2.90
Communication	27	1298	3.12	*	*	*	8	1275	2.88	5	1168	2.10	45	1261	2.94
Education	92	1210	3.18	10	990	2.78	15	1211	2.98	18	1030	2.46	140	1165	3.01
Engineering	153	1328	2.74	12	1261	2.26	85	1371	2.94	36	1268	2.45	302	1326	2.75
Fine Arts	84	1247	3.02	8	1055	2.72	12	1204	2.88	17	1148	2.57	123	1218	2.89
Geosciences	28	1290	2.88	*	*	*	*	*	*	5	1200	2.13	41	1265	2.84
Liberal Arts	466	1268	3.01	59	1029	2.28	92	1317	3.08	149	1157	2.55	780	1234	2.87
Natural Science	227	1283	2.83	38	1093	2.46	141	1274	2.86	106	1137	2.37	530	1237	2.73
Nursing							*	*	*				*	*	*
Social Work	20	1251	3.17	*	*	*	*	*	*	5	1054	2.88	30	1219	3.03
Total	1112	1275	2.95	138	1073	2.42	378	1310	2.94	343	1155	2.47	2030	1246	2.83

Table 8

FRESHMAN YEAR PERFORMANCE BY SAT SCORE RANGE AND GENDER

Entering 2003-2007

SAT Ranges	Top 10%																			
	Entering 2003				Entering 2004				Entering 2005				Entering 2006				Entering 2007			
	Male		Female		Male		Female		Male		Female		Male		Female		Male		Female	
	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	26	2.25	26	2.30	25	2.39	22	2.41	21	2.44	24	2.54	44	2.09	127	2.33	38	1.84	93	2.23
900-990	54	2.36	115	2.38	74	2.44	107	2.53	47	2.65	70	2.59	88	2.45	210	2.61	105	2.39	221	2.44
1000-1090	215	2.51	345	2.66	233	2.40	369	2.70	208	2.61	323	2.73	242	2.66	448	2.81	218	2.52	424	2.71
1100-1190	460	2.55	549	2.77	482	2.51	483	2.75	465	2.64	540	2.88	333	2.87	558	3.00	366	2.75	542	2.99
1200-1290	561	2.60	448	2.97	568	2.68	450	3.03	655	2.75	500	3.03	469	3.07	676	3.26	441	3.04	653	3.25
1300-1390	409	2.76	182	3.07	377	2.89	167	3.16	409	2.97	202	3.24	444	3.32	505	3.53	468	3.31	493	3.45
1400-1490	132	3.09	46	3.33	143	2.98	59	3.44	132	3.21	61	3.41	291	3.60	256	3.69	332	3.48	268	3.62
1500+	21	2.98	8	3.77	30	3.38	7	3.76	46	3.05	10	3.47	126	3.77	85	3.84	134	3.65	73	3.74
Total/ Mean GPA	1878	2.64	1719	2.82	1932	2.67	1664	2.87	1983	2.79	1730	2.94	2037	3.12	2865	3.15	2103	3.05	2767	3.10
Mean Test Score	1222		1162		1217		1166		1229		1178		1251		1198		1257		1201	

SAT Ranges	Non Top 10%																			
	Entering 2003				Entering 2004				Entering 2005				Entering 2006				Entering 2007			
	Male		Female		Male		Female		Male		Female		Male		Female		Male		Female	
	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA	N	GPA
<900	14	2.17	16	2.17	20	2.43	16	2.22	19	2.41	11	2.24	29	2.28	27	2.40	25	2.05	17	2.01
900-990	24	2.26	19	2.72	22	2.08	25	2.48	14	2.68	27	2.70	32	1.90	37	2.38	42	2.14	65	2.24
1000-1090	51	2.57	77	2.94	39	2.47	91	2.80	60	2.51	80	2.55	55	2.40	87	2.55	66	2.35	116	2.48
1100-1190	105	2.81	169	3.02	168	2.61	229	2.95	101	2.76	132	2.81	149	2.63	156	2.88	149	2.53	170	2.81
1200-1290	275	2.83	302	3.19	280	2.86	359	3.12	290	2.87	274	3.12	247	2.88	257	3.17	260	2.74	269	3.04
1300-1390	295	3.00	196	3.36	363	3.06	245	3.32	392	3.04	207	3.31	330	2.99	248	3.19	316	2.94	228	3.17
1400-1490	154	3.23	55	3.49	168	3.11	79	3.37	209	3.22	93	3.39	178	3.25	66	3.50	167	2.97	72	3.25
1500+	41	3.48	10	3.61	45	3.24	8	3.73	56	3.40	18	3.78	53	3.42	11	3.34	51	3.11	17	3.30
Total/ Mean GPA	959	2.94	845	3.17	1105	2.91	1052	3.10	1148	2.98	849	3.09	1073	2.90	889	3.04	1078	2.76	954	2.91
Mean Test Score	1283		1229		1283		1233		1290		1247		1279		1229		1271		1219	

Table 9

SAT MEAN AND FRESHMAN GPA BY UNDERGRADUATE COLLEGES AND GENDER

Entering 2007

Note: N-counts below represent students with a college admissions test score. SAT means represent SAT combined scores a concorded ACT scores. As is the case with the UT admissions routine, students submitting more than one set of scores were given the benefit of the best performance from a single test date. Students with no hours toward a GPA were excluded from th computation of the GPA mean. On very rare occasions students are admitted as freshmen to Pharmacy. Those are included i the total but are not listed.

College/School	Top 10%					
	Male			Female		
	N	SAT	GPA	N	SAT	GPA
Architecture	12	1372	3.18	19	1371	3.43
Business	308	1311	3.27	431	1258	3.33
Communication	130	1202	3.11	311	1173	3.25
Education	28	1084	2.89	100	1088	2.78
Engineering	652	1304	3.07	237	1306	3.15
Fine Arts	22	1230	3.43	55	1253	3.41
Geosciences	9	1151	2.78	6	1305	3.27
Liberal Arts	390	1191	2.90	687	1179	3.08
Natural Science	546	1241	3.00	823	1185	2.97
Nursing	6	1048	2.79	78	1146	3.00
Social Work	•	•	•	22	1040	2.81
Total	2103	1257	3.05	2787	1201	3.10

College/School	Non-Top 10%					
	Male			Female		
	N	SAT	GPA	N	SAT	GPA
Architecture	13	1335	2.90	9	1354	3.03
Business	11	1397	2.74	•	•	•
Communication	18	1263	2.62	27	1259	3.18
Education	25	1094	2.78	115	1181	3.05
Engineering	261	1328	2.72	41	1310	2.98
Fine Arts	52	1222	2.65	71	1215	3.07
Geosciences	26	1283	2.94	15	1233	2.68
Liberal Arts	383	1246	2.81	397	1223	2.94
Natural Science	275	1267	2.72	255	1204	2.73
Nursing	•	•	•	•	•	•
Social Work	11	1259	3.11	19	1195	2.99
Total	1078	1271	2.76	954	1219	2.91

Total Number of Non-Top 10% Applicants for Years 2003-2008 by Race

	Total Apps	HB 588 Admits	Non-HB 588 Apps
2003	24519	7132	17387
2004	23008	7089	15919
2005	23925	7466	16459
2006	27315	8353	18962
2007	27237	8476	18761
2008	29501	9253	20248

2003 Total Apps	
RACE	Total
AMERICAN INDIAN	111
ASIAN AMERICAN	3439
BLACK	1351
HISPANIC	4101
INTERNATIONAL	1477
WHITE	13944
Not Reported	96
Total	24519

2003 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	24
ASIAN AMERICAN	1250
BLACK	326
HISPANIC	1424
INTERNATIONAL	101
WHITE	4002
Not Reported	5
Total	7132

2003 Non-HB 588 Applicants	
RACE	Total
AMERICAN INDIAN	87
ASIAN AMERICAN	2189
BLACK	1025
HISPANIC	2677
INTERNATIONAL	1376
WHITE	9942
Not Reported	91
Total	17387

2004 Total Apps	
RACE	Total
AMERICAN INDIAN	127
ASIAN AMERICAN	3262
BLACK	1456
HISPANIC	4035
INTERNATIONAL	1571
WHITE	12417
Not Reported	140
Total	23008

2004 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	30
ASIAN AMERICAN	1257
BLACK	428
HISPANIC	1451
INTERNATIONAL	100
WHITE	3817
Not Reported	6
Total	7089

2004 Non-HB 588 Applicants	
RACE	Total
AMERICAN INDIAN	97
ASIAN AMERICAN	2005
BLACK	1028
HISPANIC	2584
INTERNATIONAL	1471
WHITE	8600
Not Reported	134
Total	15919

2005 Total Apps	
RACE	Total
AMERICAN INDIAN	124
ASIAN AMERICAN	3483
BLACK	1552
HISPANIC	4457
INTERNATIONAL	1700
WHITE	12552
Not Reported	57
Total	23925

2005 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	25
ASIAN AMERICAN	1302
BLACK	441
HISPANIC	1656
INTERNATIONAL	152
WHITE	3888
Not Reported	2
Total	7466

2005 Non-HB 588 Applicants	
RACE	Total
AMERICAN INDIAN	99
ASIAN AMERICAN	2181
BLACK	1111
HISPANIC	2801
INTERNATIONAL	1548
WHITE	8664
Not Reported	55
Total	16459

2006 Total Apps	
RACE	Total
AMERICAN INDIAN	178
ASIAN AMERICAN	4005
BLACK	1915
HISPANIC	5148
INTERNATIONAL	1741
WHITE	14301
Not Reported	27
Total	27315

2006 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	37
ASIAN AMERICAN	1572
BLACK	463
HISPANIC	1790
INTERNATIONAL	192
WHITE	4297
Not Reported	2
Total	8353

2006 Non-HB 588 Applicants	
RACE	Total
AMERICAN INDIAN	141
ASIAN AMERICAN	2433
BLACK	1452
HISPANIC	3358
INTERNATIONAL	1549
WHITE	10004
Not Reported	25
Total	18962

2007 Total Apps	
RACE	Total
AMERICAN INDIAN	126
ASIAN AMERICAN	4159
BLACK	1952
HISPANIC	5335
INTERNATIONAL	1969
WHITE	13659
Not Reported	37
Total	27237

2007 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	28
ASIAN AMERICAN	1571
BLACK	485
HISPANIC	1874
INTERNATIONAL	174
WHITE	4244
Not Reported	0
Total	8476

2007 Non-HB 588 Applicants	
Race	Total
AMERICAN INDIAN	98
ASIAN AMERICAN	2588
BLACK	1467
HISPANIC	3461
INTERNATIONAL	1795
WHITE	9415
Not Reported	37
Total	18761

2008 Total Apps	
RACE	Total
AMERICAN INDIAN	140
ASIAN AMERICAN	4344
BLACK	2234
HISPANIC	6081
INTERNATIONAL	2620
WHITE	14038
Not Reported	44
Total	29501

2008 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	30
ASIAN AMERICAN	1744
BLACK	582
HISPANIC	2218
INTERNATIONAL	234
WHITE	4440
Not Reported	5
Total	9253

2008 Non-HB 588 Applicants	
Race	Total
AMERICAN INDIAN	110
ASIAN AMERICAN	2600
BLACK	1652
HISPANIC	3863
INTERNATIONAL	2386
WHITE	9598
Not Reported	39
Total	20248

Total Number of Non-Top 10% Admits for Years 2003-2008 by Race

	Total Admits	HB 588 Admits	Non-HB 588 Admits
2003	11504	7132	4372
2004	11788	7089	4699
2005	12207	7466	4741
2006	13307	8353	4954
2007	13800	8476	5324
2008	12843	9253	3590

2003 Total Admits	
RACE	Total
AMERICAN INDIAN	37
ASIAN AMERICAN	1991
BLACK	448
HISPANIC	1795
INTERNATIONAL	348
WHITE	6852
Not Reported	33
Total	11504

2003 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	24
ASIAN AMERICAN	1250
BLACK	326
HISPANIC	1424
INTERNATIONAL	101
WHITE	4002
Not Reported	5
Total	7132

2003 Non HB 588 Admits	
RACE	Total
AMERICAN INDIAN	13
ASIAN AMERICAN	741
BLACK	122
HISPANIC	371
INTERNATIONAL	247
WHITE	2850
Not Reported	28
Total	4372

2004 Total Admits	
RACE	Total
AMERICAN INDIAN	53
ASIAN AMERICAN	2013
BLACK	569
HISPANIC	1911
INTERNATIONAL	390
WHITE	6814
Not Reported	38
Total	11788

2004 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	30
ASIAN AMERICAN	1257
BLACK	428
HISPANIC	1451
INTERNATIONAL	100
WHITE	3817
Not Reported	6
Total	7089

2004 Non HB 588 Admits	
RACE	Total
AMERICAN INDIAN	23
ASIAN AMERICAN	756
BLACK	141
HISPANIC	460
INTERNATIONAL	290
WHITE	2997
Not Reported	32
Total	4699

2005 Total Admits	
RACE	Total
AMERICAN INDIAN	59
ASIAN AMERICAN	2076
BLACK	617
HISPANIC	2183
INTERNATIONAL	495
WHITE	6748
Not Reported	29
Total	12207

2005 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	25
ASIAN AMERICAN	1302
BLACK	441
HISPANIC	1656
INTERNATIONAL	182
WHITE	3858
Not Reported	2
Total	7466

2005 Non HB 588 Admits	
RACE	Total
AMERICAN INDIAN	34
ASIAN AMERICAN	774
BLACK	176
HISPANIC	527
INTERNATIONAL	336
WHITE	2867
Not Reported	27
Total	4741

2006 Total Admits	
RACE	Total
AMERICAN INDIAN	68
ASIAN AMERICAN	2315
BLACK	683
HISPANIC	2408
INTERNATIONAL	545
WHITE	7280
Not Reported	8
Total	13307

2006 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	37
ASIAN AMERICAN	1572
BLACK	463
HISPANIC	1790
INTERNATIONAL	192
WHITE	4297
Not Reported	2
Total	8353

2006 Non HB 588 Admits	
RACE	Total
AMERICAN INDIAN	31
ASIAN AMERICAN	743
BLACK	220
HISPANIC	618
INTERNATIONAL	353
WHITE	2983
Not Reported	6
Total	4954

2007 Total Admits	
RACE	Total
AMERICAN INDIAN	52
ASIAN AMERICAN	2498
BLACK	747
HISPANIC	2532
INTERNATIONAL	649
WHITE	7310
Not Reported	12
Total	13800

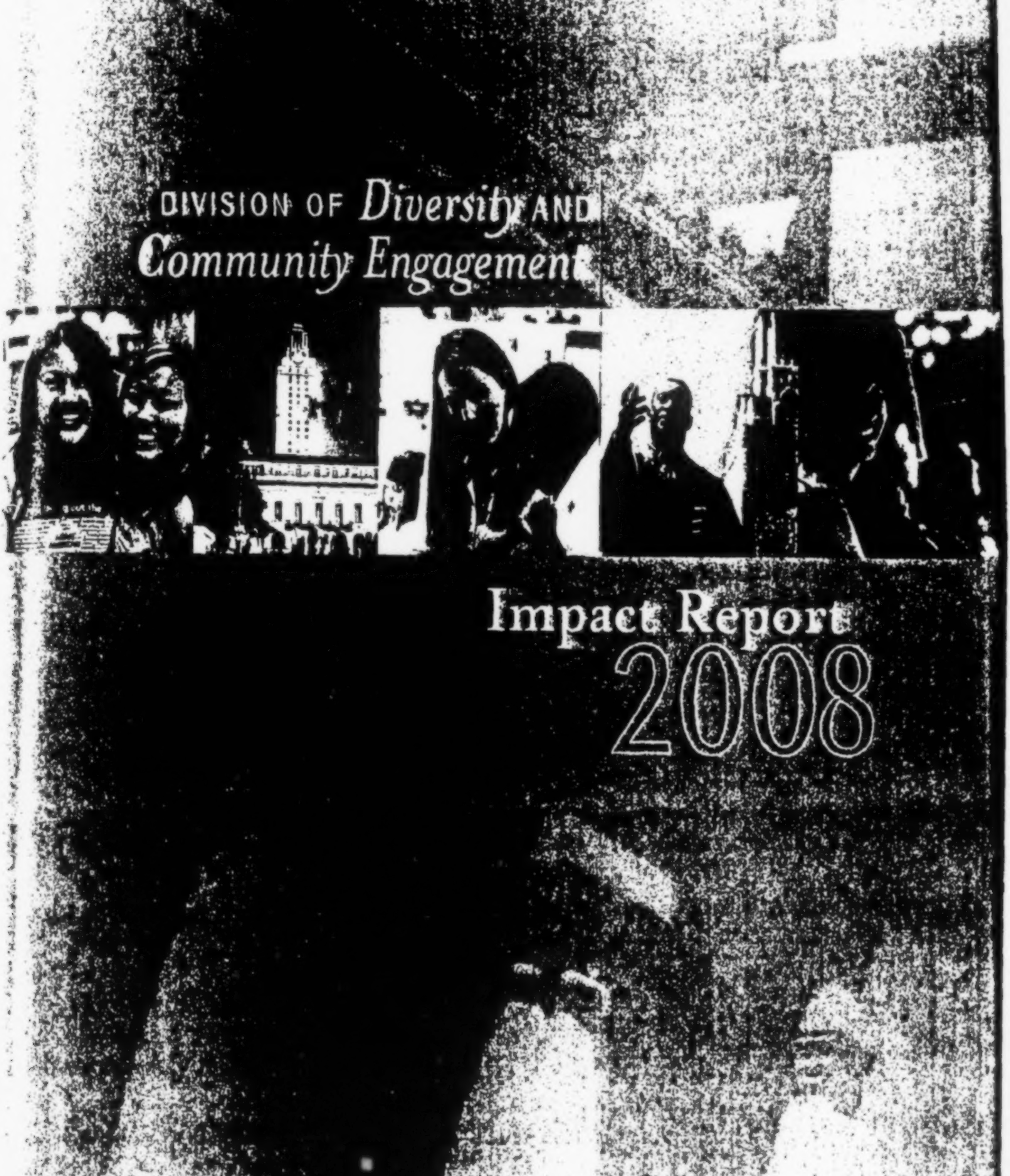
2007 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	28
ASIAN AMERICAN	1571
BLACK	486
HISPANIC	1874
INTERNATIONAL	174
WHITE	4244
Not Reported	0
Total	8476

2007 Non HB 588 Admits	
Race	Total
AMERICAN INDIAN	24
ASIAN AMERICAN	927
BLACK	282
HISPANIC	658
INTERNATIONAL	376
WHITE	3066
Not Reported	12
Total	5324

2008 Total Admits	
RACE	Total
AMERICAN INDIAN	50
ASIAN AMERICAN	2309
BLACK	728
HISPANIC	2621
INTERNATIONAL	536
WHITE	6582
Not Reported	17
Total	12843

2008 HB 588 Admits	
RACE	Total
AMERICAN INDIAN	30
ASIAN AMERICAN	1744
BLACK	582
HISPANIC	2218
INTERNATIONAL	234
WHITE	4440
Not Reported	5
Total	9253

2008 Non HB 588 Admits	
Race	Total
AMERICAN INDIAN	20
ASIAN AMERICAN	565
BLACK	146
HISPANIC	403
INTERNATIONAL	302
WHITE	2142
Not Reported	12
Total	3590



DIVISION OF *Diversity* AND *Community Engagement*

Impact Report 2008

THE UNIVERSITY OF TEXAS AT AUSTIN

[illegible]

OUR COMMITMENT TO DIVERSITY:

William Powers, Jr.

President, The University of Texas at Austin

At The University of Texas at Austin, we believe strongly in the value of a diverse campus community. Students and professors from Texas, across the nation, and more than one hundred countries enrich our learning environment. The multicultural climate at the university provides opportunities and experiences that few of us are exposed to in any other setting. Our campus life can be, and should be, a model of tolerance and understanding that influences the way we interact with others, now and for the rest of our lives.

This university has long been an intellectual gathering place for people who seek knowledge, friendship, and new perspectives. Our campus has gained strength from the richness of its many voices. As a world-class institution of higher learning, we are committed to expanding the range of voices heard on our campus--to welcoming even more cultures and ideas, and to making educational opportunity available to all.

I am excited about the work that the Division of Diversity and Community Engagement has already accomplished. Through academic courses and programs that focus on cultural issues; campus support services for women, underrepresented groups, and persons with disabilities; museums and research centers with ethnic or cultural concentrations; and student organizations that celebrate diversity, their efforts have touched future students, current students, faculty, staff, and members of our community.

By increasing diversity on our campus, we enrich the learning and life experience of everyone.

PRESIDENT WILLIAM POWERS, JR.

Dr. Steven Leslie

Provost, The University of Texas at Austin

The creation and recent expansion of the Division of Diversity and Community Engagement clearly demonstrates that The University of Texas at Austin values diversity and fosters a climate that is grounded in respect and inclusion. I am confident that these organizational changes that support our shared vision for diversity at the university will yield positive results for the entire university community. Our office fully supports the work and efforts of Vice President Gregory Vincent and the entire division.

Our mutual commitment to work toward an environment that values diversity requires that we create, promote, and maintain activities and programs which further our understanding of individual and group diversity. It is essential to create a climate that doesn't just accept differences but embraces them, providing rich opportunities for learning from those differences. While there is still much work to be done, the university has made great strides in reaching out to and recruiting underrepresented students, faculty and staff.

The advancement and promotion of diversity figure prominently in the strategic vision and plan of The University of Texas at Austin. Increasing diversity is absolutely fundamental to the success of the university.

STEVEN LESLIE

[illegible]

Dear Colleagues and Friends,

With the recent restructuring and expansion of the Division of Diversity and Community Engagement, The University of Texas at Austin has one of the most comprehensive units of its kind in higher education. Our division is committed to promoting excellence in education by attracting the most diverse mix of faculty, staff, and students, while connecting our intellectual resources to the needs of the community.

Creating a campus that is diverse and inclusive is central to the successful fulfillment of our purpose as a public research university. We want The University of Texas at Austin to be a model for other universities as they envision ways to enhance diversity and community engagement on their campuses. Tapping into the creative, intellectual, and cultural skills of a variety of people is critical to realizing this goal.

In the following pages, you will see the impact that each of our departments has made and get a glimpse of some of the exciting initiatives we are undertaking. From pre-college programs, to thematic hiring, to our Intellectual Entrepreneurship Initiative, our innovative work has attained measurable progress on campus and in the community.

The understanding of the multiple dimensions of diversity is essential and has significant social, economic, and intellectual benefits. The past year has been an amazing start, but there is more work to be done. We invite you to join us in preserving and strengthening this university's greatest asset – its community of diverse people and ideas.

Dr. Gregory J. Vincent

Vice President for Diversity and Community Engagement
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The Division of Diversity and Community Engagement

directed by DR. GREGORY J. VINCENT

Thematic Initiatives and Community Engagement

directed by

DR. EDMUND T. GORDON

... increases diversity through recruitment and retention of faculty and graduate students engaged in underrepresented subjects in pedagogy and research, and facilitates interdisciplinary teaching strategies and research across multiple university departments and programs. Community engagement initiatives promote and expand university services to communities that are historically underserved by the university.

Programs in this portfolio include the Indigenous Studies Initiatives, Art and Social Engagement, Volunteer and Service Learning Center, Regional Foundation Library, Institute for Community, University and School Partnerships (ICUSP), the Community Engagement Incubator, and Intellectual Entrepreneurship initiatives.

Pre-College Youth Development Programs and Student Diversity Initiatives

directed by

DR. WANDA L. NELSON

... serves as the hub of a wide range of programs that expand the university's scope across the state by increasing access for underrepresented students to post-secondary education. Outreach programs focus on building academic skills, especially for first-generation and low-income students, starting in elementary school through college. Programs include the Neighborhood Longhorns Program, University Outreach Centers, ChemBridge, Students Partnering for Undergraduate Rhetoric Success, Longhorn Center for Academic Excellence, IRIO Programs, PREVIEW Program, Diversity Education Institute, Gender and Sexuality Center, and the Multicultural Information Center.

Institutional Equity

directed by

MS. LINDA MILLSTONE

... ensures the fulfillment of the intent and spirit of equal opportunity laws. Among a host of services, Equal Opportunity Services investigates discrimination allegations, seeks equitable resolutions to complaints, provides confidential counseling, offers resources, and serves as a liaison with community action organizations and agencies.

EOS seeks to ensure that all hires, promotions, transfers and terminations are made without regard to sex, race, color, age, national origin, religion, disability, citizenship statues, Vietnam Era or special disabled veteran status or sexual orientation. The scope of EOS includes, but is not limited to, all policies, practices and conditions of employment.

School Partnerships

directed by

DR. ANGELA VALENZUELA

... builds partnerships to connect the university's resources to constituencies across Texas to ensure that education at all levels is effective and equitable, and is operated under the umbrella of the Texas Center for Education Policy, founded in 2006. Their work focuses on educational policy and provides a forum for school personnel and policy makers to engage with university researchers and scholars on education-related issues. The center addresses a broad range of educational issues, from drop-out prevention to teacher quality and experience, and from state accountability and assessment to college readiness. On-going lecture series and seminars cover relevant topics on subjects such as race and health policy and art education.

THE OFFICE OF THE VICE PRESIDENT FOR DIVERSITY AND COMMUNITY ENGAGEMENT

The University of Texas at Austin places high priority on diversity

Maya Angelou once said: "We all should know that diversity makes for a rich tapestry, and we must understand that all the threads of the tapestry are equal in value no matter what their color."

The University of Texas at Austin embraces and nurtures that philosophy. For university students, faculty and staff, diversity is a major priority. The university aims to set a high standard for diversity in higher education.

President William Powers Jr. emphasizes that The University of Texas at Austin and its student body, faculty and staff must reflect an array of ethnicities, cultures, socioeconomic backgrounds and political viewpoints.

"That's the beauty of a big research university. It brings together many, many voices. It makes our university stronger," Powers says. "You don't want a campus that's homogenous."

Diversity is part of Powers' four-point strategic plan, highlighting its importance to the university community as a whole. "This is one of those things you can't just talk about. You have to actually get out and roll up your sleeves and work on it," Powers says.

Early Promise, Measurable Results

That work on diversity has paid off. More than 45 percent of incoming freshman for fall 2007 are from underrepresented groups, Powers says. University-wide, fall 2007 enrollment increased for African American, American Indian, Asian American and Hispanic students. There have also been 30 new faculty appointments from underrepresented groups since 2005.

Although the university enrolled the most ethnically diverse freshman class in its history during fall 2007 — 19.7 percent Hispanic students, 19.7 percent Asian American students and 5.8 percent African American students — it strives to continue building a diverse student body, faculty and staff that truly reflect Texas and the entire country. This diversity effort involves outreach programs, admissions centers, financial aid, faculty recruitment programs and many other initiatives.

"An important part of what we've done over the decades is to educate a large part of the leadership of this state, and it is an increasingly diverse state," Powers says. "As a result, we need an increasingly diverse leadership in our economy, in our businesses, in our political institutions, and in our cultural institutions."

A Platform for Diversity

The cornerstone of the university's commitment to diversity is the Division of Diversity and Community Engagement, led by Dr. Gregory J. Vincent. Vincent came to The University of Texas at Austin in summer 2005 to fill the new position of vice provost for inclusion and cross-cultural effectiveness, created by then-President Larry R. Faulkner in response to recommendations from the university's Task Force on Racial Respect and Fairness. After Powers became president in February 2006, he promoted Vincent to the new position of vice president for diversity and community engagement.

Since arriving on campus two years ago, Vincent has hosted a series of "campus conversations" to hear concerns from students and other members of the university community. He has met with a broad range of Austin and state public officials, opinion leaders, journalists and organizations to discuss diversity and inclusion.

A History of Diversity

Vincent arrived at the university from the University of Oregon, where he had been vice provost for institutional equity and diversity and law professor since 2003. From 2000-2003, Vincent was vice provost for academic affairs and campus diversity and law professor at Louisiana State University at Baton Rouge, where he was vice provost for campus diversity from 1999 to 2000. Earlier, he was assistant vice chancellor for academic affairs and director of the Equity and Diversity Resource Center at the University of Wisconsin-Madison. He earned his law degree at the Ohio State University College of Law and his doctorate at the University of Pennsylvania.

Today, in addition to overseeing the Division of Diversity and Community Engagement, Vincent holds joint faculty appointments in the School of Law and the College of Education, where he is the W.K. Kellogg Professor of Community College Leadership. He also is an endowed faculty fellow in the Sid W. Richardson Regents Chair in Community College Leadership.

Vincent's professorship meshes well with his duties at the Division of Diversity and Community Engagement. For example, Vincent works closely with Dr. John Roueche, director of the Community College Leadership Program in the Department of Educational Administration, on mentoring graduate students, supervising doctoral dissertations,

conducting symposia and guest lectures, and participating in program development. He also teaches a seminar that is cross-listed in the College of Education and the School of Law.

"The Division of Diversity and Community Engagement is a successful model for integrating diversity into the core mission of a university and integrating community engagement into teaching, research and service," Vincent says. "The successful model combines both the strategic and operational responsibility for diversity and community engagement under one umbrella."

A New Structure, A New Name

The Office of the Vice President for Diversity and Community Engagement was expanded as the Division of Diversity and Community Engagement in early 2007 to closely align the university's structure and budgets with one of its top priorities. The new division, headed by Vincent, assumed various responsibilities to help make the campus a more inviting, inclusive environment for members of the university community and for visitors. At many colleges and universities, diversity efforts are housed within small units, whereas the Division of Diversity and Community Engagement encompasses components that already existed at The University of Texas at Austin as well as ones that are new – all under one umbrella.

The university's diversity efforts initially employed six people. Now, the Division of Diversity and Community Engagement, with an annual budget of $28 million, is comprised of over 350 employees in 15 departments, several research and policy institutes and numerous initiatives and projects.

Moving Diversity Forward

"The creation of the division itself is an achievement," Vincent says. "We are one of the most comprehensive units of our kind in higher education. That model itself is an important contribution."

For Powers, this high level of diversity-related activities at the university is not high enough.

"While we have made progress diversifying our campus, more needs to be done. Diversity is one of my highest priorities," Powers said during his State of the University speech in 2006. ❩

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New Chief of Staff, Dr. Jennifer W. Maedgen, is a dynamic force behind the scenes

Dr. Jennifer W. Maedgen
Assistant Vice President and Chief of Staff

There's no such thing as a typical day for Dr. Jennifer Maedgen, the newly appointed assistant vice president and chief of staff for the Division of Diversity and Community Engagement

"One of the things I like about my job is that there is a lot of diversity in what I am doing," Maedgen says. Officially she is charged with overseeing the development of the division, but on an average day, Maedgen is likely to be found helping a student resolve a disability issue on campus, working with various entities to finalize a lease on new office space in East Austin or collecting information from division department heads about their priorities for the coming year.

The departments Maedgen works with are just as diverse as her responsibilities. While she continues to oversee Services for Students with Disabilities, she also serves as a liaison to the Hogg Foundation for Mental Heath and the University Interscholastic League (UIL). A large part of her current role involves developing processes and systems for the division, including communication, business services, hiring and information technology. "We're like a start-up," Maedgen says. "While many of the departments have been in existence for years, we're building the division from the ground up. We're creating standardized systems for everything from HR to budget processes to global, division-wide policies." In developing this infrastructure, Maedgen is confident that the division can create some degree of uniformity that also allows the individual departments stylistic variability and flexibility.

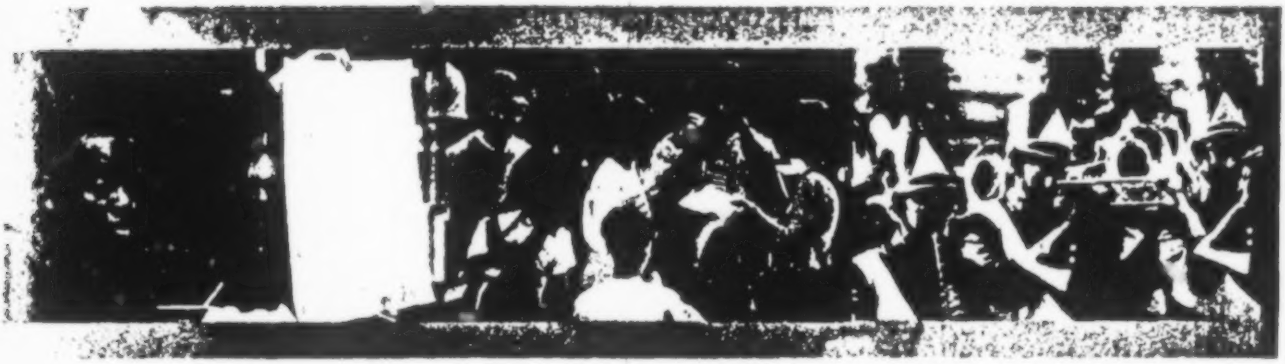
At first glance, the departments under the division's umbrella might seem to be very different, but they share many of the same goals and have a strong common thread of community engagement woven throughout their efforts. One of the departments Maedgen works with is the Hogg Foundation for Mental Health, which works to improve mental health in the state of Texas. The Hogg Foundation does much work in the community, and one of its current initiatives includes increasing access to and quality of mental health services for diverse communities. "A lot of times, people don't think of mental health as a diversity issue," says Maedgen, "but this is a very natural fit for the division and ties in well with our other efforts in community engagement."

Another area making a big impact is UIL, which coordinates athletic and scholastic competitions throughout the state of Texas. UIL has recently been working on Senate Bill 8, which requires mandatory steroid testing for high school athletes. "UIL directs a huge effort to ensure that students who want to participate can participate," Maedgen says. "It is a huge part of the community and makes a significant impact in lives across the state."

As the division moves into its second year, Maedgen looks forward to continued cross-collaboration between departments. "At the last directors meeting, we were all struck by how much potential there is for the departments to work together," Maedgen says. "For example, many of the departments engage and partner with schools – Institute of Community, University, and School Partnerships, Neighborhood Longhorns and University Outreach, just to name a few. There is so much wonderful effort within the division, and there is a lot of opportunity to combine resources and increase our impact."

[illegible]

[illegible] Units



The Hogg Foundation for Mental Health

For over 65 years, the Hogg Foundation for Mental Health has supported programs and services to improve the mental health of all Texans. Its current strategic priorities are integrated health care, cultural competence and workforce development. The Foundation envisions a Texas that leads the nation in promoting mental health and recovery from mental illness.

Core values guide the foundation's activities, and cultural relevance is central to all aspects of the foundation's work. The foundation's endowments are a living legacy of the Hogg family, particularly Miss Ima Hogg and her visionary commitment to the mental health of all Texans. The foundation strives to increase the amount and availability of mental health resources in Texas through its leadership in the philanthropic community.

MISSION

To promote improved mental health for the people of Texas through the support of effective mental health services, research, policies, and education. The Foundation works in partnership with communities, service providers, advocates, policy-makers, researchers, and educators.

IMPACT

- Distributes approximately $4.5 million a year to Texas nonprofit organizations through strategic grant making. Of that sum, close to $1.5 million is dedicated annually to the support of child and family mental health services in the Houston area.
- Focuses on efforts to benefit underserved populations and areas of the state.
- Operates internal programs, including mental health policy analysis and public education campaigns, to the benefit and enrichment of organizations and communities statewide.
- Routinely evaluates the impact of its grants as well as its own performance to ensure that the foundation is working effectively toward its mission.

CONTACT

Lake Austin Centre, 4th Floor, 3001 Lake Austin Blvd., Austin Texas, 78703
www.hogg.utexas.edu
(512) 471-5041

University Interscholastic League

Perhaps best known for its sponsorship of district, regional and state tournaments and meets for athletic, music, drama and academic contests, the University Interscholastic League (UIL) was created by The University of Texas at Austin in 1909. The UIL has grown into the largest inter-school organization of its kind in the world, and one of every two high school seniors in Texas has participated in a UIL event prior to graduation.

MISSION

To organize and properly supervise contests that prepare students for citizenship. The UIL provides healthy, character building educational activities carried out under rules providing for good sportsmanship and fair play for all participants.

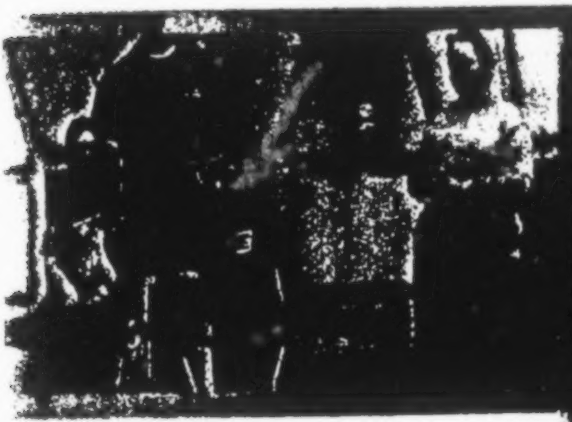
IMPACT

- Provides students with educational experiences through competition.
- Promotes good sportsmanship and cooperation among member schools.
- Works to prevent exploitation of students by special interest groups.
- Publishes the monthly Leaguer newspaper, sent to sponsors and administrators of all member schools, UIL adjudicators and officials and interested news media in Texas.
- Provides the use of speech videotapes and athletic tournament and rules films through the UT Austin Film Library and the National Federation of State High School Associations.
- Works closely with associations to provide better officiating and adjudication for UIL contests.
- Seeks to safeguard the health and welfare of students by requiring physical examinations for participation in athletics.
- Seeks to keep awards for achievement on a sensible basis by restricting the cost and type.
- Provides drama teachers with an extensive Drama Loan Library of more than 26,000 plays.
- Sponsors the Interscholastic League Press Conference.
- Administers the Texas Interscholastic League Foundation, which in 2006-2007 disbursed $1,181,575 in scholarship funds to 623 students attending 62 colleges and universities in Texas.

CONTACT

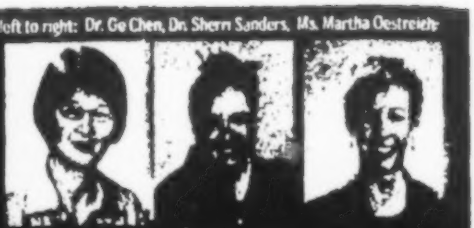
1701 Manor Road, Austin, Texas, 78722
www.uil.utexas.edu
(512) 471-5883

Division Department



Staff Spotlight

left to right: Dr. Ge Chen, Dr. Sherri Sanders, Ms. Martha Oestreich



Dr. Ge Chen

Dr. Ge Chen leads the division-wide assessment initiatives to ensure and enhance the consistency, rigor, effectiveness, and documentation of assessment processes in the division. This includes but is not limited to developing and establishing assessment plans for the learning communities to achieve and maintain effectiveness and excellence, assisting in creating and establishing goals and objectives for optimum student learning, reviewing and assisting in program self assessment and reports for changes and improvement, developing and coordinating training and professional development opportunities on assessment, and providing resources to support assessment related activities and efforts. She previously served as the Assistant Dean of Students in the area of Academic Enrichment Services (AES) in the Office of the Dean of Students at UT Austin since 2003, where she directed seven academic service programs geared towards facilitating the growth and development of under-represented college students. Born in China and an immigrant to United States in the late 1980s, Dr. Chen has taught and administered in higher education across two cultures for over two decades. She co-founded and currently serves as an officer for the Asian and Asian American Faculty and Staff Association at the University of Texas at Austin. She earned her bachelor of arts degree from Jilin Normal University in Siping, China, and her master's degree and doctorate from the University of Arkansas College of Education, Fayetteville, Arkansas.

Dr. Sherri L. Sanders

As a member of the DDCE staff, the responsibilities of Dr. Sherri L. Sanders span across the division and the university as well as into the community. Dr. Sanders serves as the primary point person in the development and implementation of the institution's diversity plan along with the development of the division's strategic plan. In addition, she works closely with Dr. Vincent in his role as a member of several management boards including the UT Elementary School, Communities in Schools, E3 Alliance, Envision Central Texas, and SkillPoint Alliance. In January 2008, she assumed a key role in the continued implementation of the Central Texas Leadership Alliance Grant through the Department of Education and the Texas High School Project Grant through Communities Foundation of Texas. She also serves as a policy analyst and developer, plays a key role in gender equity issues and programs, collaborates closely with the division's team of graduate research assistants, and oversees the Barbara Jordan Statue Project. Finally, she serves as a clinical associate professor within the Department of Educational Administration where she teaches a graduate-level course on student development theory. Dr. Sanders began her tenure at The University of Texas at Austin in 1988 and has served in a variety of positions in the Office of the Dean of Students including assistant to the dean, assistant dean, and associate dean. Dr. Sanders received her Ph.D. from The University of Texas at Austin, her master's degree from Bowling Green State University, and her bachelor's degree from Louisiana State University.

Ms. Martha L. Oestreich

Martha L. Oestreich provides strategic direction and oversees the development operations for the division. Additionally, she designs and analyzes strategies utilized in the solicitation of funds from individuals, corporations and foundations. Her list of accomplishments includes fifteen years of sales and marketing with IBM and eleven years of development and fundraising experience in the nonprofit sector. Ms. Oestreich served as the director of development for the Lady Bird Johnson Wildflower Center and was the founding executive director of the San Antonio River Foundation. She serves as the chair of the board of Equality Texas and was the board secretary for the Association of Fund Raising Professionals. In 2005, Ms. Oestreich founded the San Antonio Alliance for Social Justice, a group dedicated to inclusion and diversity. She has developed and conducted numerous workshops with over thirty nonprofit organizations throughout Texas. Ms. Oestreich earned her executive masters of business administration degree from the University of Texas at San Antonio, her masters of arts degree from St. Mary's University and her bachelor of arts degree in Sociology from Texas Lutheran University.

Services *for* Students *with* Disabilities

Services for Students with Disabilities provides assistance to students with a variety of disabilities, including those who are deaf and hard of hearing and those with Attention Deficit Hyperactivity Disorder, learning or psychological disabilities, traumatic brain injuries, visual or mobility impairments, temporary disabilities, and other chronic medical disabilities.

MISSION

Based in the philosophy that all students should be assured equal access and opportunity, Services for Students with Disabilities works to eliminate physical, instructional and attitudinal barriers by providing reasonable accommodations and fostering awareness within the university community.

IMPACT

- Provides a variety of services for eligible students who register with the department, including
  - Alternative Text
  - Adaptive Testing
  - [illegible]
  - Sign Language Interpreters
  - Communication Access Realtime Translation (CART)
  - [illegible]
- Trains students in assistive technology via the ATEC lab
- Serves as a resource for scholarships available to students with disabilities.
- Offers either online or downloadable forms needed for documentation guidelines and interpreter/captioning requests by students.

FIND IT

4.104 Student Services Building
M-F 8-5 p.m.
www.utexas.edu/diversity/ddce/ssd
(512) 471-6259
Video Phone: (866) 327-8877,
then (512) 232-2937

Campus Fusion

Campus Fusion was founded in the summer of 2003 as a joint venture between Student Government and the Multicultural Information Center. The idea for Campus Fusion was based on President Clinton's "One America" Initiative on Race, which spurred the "Week of Dialogue" for college campuses across the nation. Campus Fusion became a week-long series of events featuring guest speakers, arts events, campus town hall meetings and socially conscious performers. With the formation of the Division of Diversity and Community Engagement in 2006, Campus Fusion found a new home within the fabric of the institution. Together with the resilience of student leadership from the Multicultural Information Center and Student Government and an administrative home in the division, Campus Fusion exists as a testament of the university's commitment to diversity. The 2007 event drew more than 2,000 students and featured nationally known speakers and performers.

campus fusion
Week of Dialo

[illegible]

[illegible]

Barbara Jordan Historical Essay Competition

Since its inception in 1995, the Barbara Jordan Historical Essay Competition has awarded over $70,000 in college scholarships to Texas high school students. Last year, over 200 students entered the competition, focusing on the theme of African Americans in Texas: Past and Present. Conducted as a statewide competition, high school students research and write about the influence and contributions of African Americans in Texas, a historically under-represented area of documentation. In this unique competition, students gather information about individuals and historical events through interviews with relatives, friends and community leaders. Such personal interactions offer students an opportunity to document invaluable knowledge directly from witnesses of history. Essays are judged in 10 geographical regions, resulting in 30 essays selected for the state competition. Winners receive $2,500 for the first place essay, $1,500 for the second place essay and $1,000 for the third place essay. Students may use the scholarships at the college or university of their choice.

Roundtable Discussions

The division's Roundtable Discussions began shortly after Dr. Gregory J. Vincent came on board in 2005. As facilitator, Vincent has served as a subject matter expert and internal consultant to the campus on issues of diversity and inclusion. Topics including campus climate, bridging diversity gaps, and faculty and student recruitment were discussed in an inviting, informal setting. Roundtable discussions were hosted in several different venues, both as open sessions for the student body at large, and also in various departments and centers including Student Government, the Gender and Sexuality Center and the Multicultural Information Center. The sessions have had a strong turnout and have been very well-received by those in attendance.

Intellectual diversity: Thematic hiring finds the best people for the job

When Dr. Ted Gordon was deciding whether to accept a tenured-track position in the Department of Anthropology at The University of Texas at Austin, his main concern was being the only African American faculty member in the department. "I did indeed take the position on the condition that the department would actively seek to hire another faculty member of color," Gordon said. This was in 1988, and since then, much has changed. In fact, the department has become significantly more diverse, both in terms of faculty and graduate students.

Gordon recently was promoted to associate vice president for thematic initiatives and community engagement. "Our short-term goal is to expand the thematic hiring process into different areas," says Gordon. These areas include African and African American Studies, Mexican and Mexican American Studies, Asian and Asian American Studies, and Women and Gender Studies, among others. "It is important as well to look at diversifying the hard sciences more in terms of gender and ethnicity," he reports. He sees an "environmental justice" theme as a potentially effective means to diversify the sciences.

"This will diversify our intellectual community and strengthen the university as a whole."

[illegible]

Soon after Gordon's arrival at the university, he began consulting with others to develop a strategy to attract more faculty from historically underrepresented groups. "We had to come up with a strategy because people of color, particularly African Americans, were reluctant to apply here based on preconceived notions of Texas and the South in general," said Gordon. After reviewing areas of scholarship that were underdeveloped at the university, Gordon and other concerned faculty decided to take steps to fill these intellectual gaps. A thematic hiring program was initiated to actively seek scholars who specialized in the African Diaspora. "The thematic program became of political and intellectual interest to scholars and graduate students throughout the country. It has really flourished," says Gordon.

He emphasized this process is not based on race but rather on expertise in a particular thematic area. "The job announcements placed were based on a particular area of focus, with the African Diaspora being one thematic section. We found that there were a significant number of qualified candidates from underrepresented groups," says Gordon. "Thematic focus is effective because diversity is not just about skin color. It is about intellectual interests and academic expertise. In the end, you want a university that is not only diverse racially and ethnically but also intellectually." Gordon's efforts have helped diversify the university, and at the same time created and fostered a vibrant intellectual community.

Expanding the program

In 2000, Gordon became the director of the Center for African and African American Studies (CAAAS). The center sought to partner with various departments, including history, English, sociology, and government, to hire faculty with research interests in the African Diaspora. As a result, The University of Texas at Austin has one of the most comprehensive centers for African and African American studies in the nation. Its continued success and growth also is attributed to the fact that the center is widely known and attracts scholars from across the country. Additionally, CAAAS has partnered with the dean of the College of Liberal Arts and the provost to help make student and faculty ratios more balanced.

Progress now and in the future

Since 2005, there have been approximately 30 faculty hires based on the initiative, with another eight planned for the 2007-08 academic year. Hires have been made in the School of Architecture, African American Art and Art History, Special Education, Asian American Studies, History, and Mexican American Studies.

In order to be effective in implementing a more comprehensive thematic hiring process, Dr. Gordon believes it is imperative that the division do the research to see what is out there in terms of cutting-edge research and scholarship. "Knowing what is innovative in regards to scholarship is definitely part of our strategy," he says.

Equally important is mobilizing various academic networks, including collaborating with various colleges and academic units. Working with the deans also is very significant to identifying those departments and schools where thematic hires would be most effective. Gordon is optimistic about the future of the program, saying, "The creation of the division and its resources will be a huge factor in our successful implementation of thematic hiring and its expansion into different areas."

Success via critical mass

The notion of creating a "critical mass" of scholars in a particular thematic cluster is essential for the strategy to be successful. "The thematic process doesn't work unless there is a commitment to creating a critical mass. Otherwise, there is not the concentration necessary to make it successful," says Gordon.

Dr. Gregory Vincent, vice president for the division, agrees with this notion. "The division is committed to recruiting and hiring faculty that will continue to diversify the university community," he said. Vincent also conveyed that retaining and promoting strong faculty is a high priority.

Dr. Gordon emphasized that thematic hiring is absolutely not about tokenism. In fact, he believes it is the polar opposite, stating, "It is about creating a critical mass and a thematic focus. This will diversify our intellectual community and strengthen the university as a whole."

Division Departments

The Volunteer *and* Service Learning Center

The Volunteer and Service Learning Center provides volunteer opportunities for students at The University of Texas at Austin. The center serves the needs of the community while enriching the lives of participants. Volunteering is one of the most effective ways for students to apply philosophies, skills, and theories learned in class. Following the university's core purpose, the center serves "to transform lives for the benefit of society" through leadership and service.

MISSION

To promote, organize, facilitate, support and reflect on community service for the The University of Texas at Austin community, especially students.

IMPACT

- Recruits over 6,000 student volunteers each year.
- Focuses on students' cognitive, moral, ethical, social and democratic development through service activities.
- Strengthens healthy relationships between students and their communities.
- Facilitates the Student Volunteer Board, The Project Service Event, and student organizations that promote and coordinate community engagement activities and events for the whole campus, and provide students opportunities to make a difference in the community.
- Provides resources and logistical support for students interested or enrolled in service-learning courses, for faculty currently teaching or desiring to teach a service-learning course, and for community agencies interested in partnering with UT faculty and service-learning students.

A Beautiful Partnership

One example of a successful program is the partnership with Keep Austin Beautiful. Since 1999, more than 9,000 student volunteers have provided more than 36,000 hours working in four Austin neighborhoods. In the first five years of the event, students have painted or landscaped more than 70 local homes, five schools, two community centers, and a public housing complex, among other sites.

FIND IT

Student Services Building 4.400
100 West Dean Keaton Street Austin, TX 78722
www.utexas.edu/diversity/ddce/vslc/
(512) 471-6161

Regional Foundation Library

For over 45 years, the Regional Foundation Library has served individuals and organizations in need of educational or special project funding. Its patrons include representatives of nonprofit programs and services, educational entities, charitable organizations, faith-based programs, and governmental entities, as well as individuals. The library opened its doors in 1962, making it the fifth Cooperating Collection in the Foundation Center's national network. It contains core publications from the Foundation Center as well as other major materials in fund development, grants and nonprofit management. The library is open to everyone, free of charge.

MISSION

To provide comprehensive education and resources to all individuals and organizations involved in grant-making, grant-seeking and funding development.

IMPACT

- Promotes the highest standards in philanthropy by serving as a bridge between the grant-seeking and the grant-making communities.
- Offers in-depth personal assistance, orientations and community workshops to enhance access to their vast collections.
- Provides a full range of print materials and a growing number of electronic resources.
- Information and resources are accessible to all community members.

Community Outreach

The Regional Foundation Library offers orientations to the collection, information sessions on funding research, classes on K-postgraduate educational funding, and local community workshops. These are available throughout the year, on demand.

FIND IT

3001 Lake Austin Blvd., 4th Floor, Austin, TX 78703-4200
www.utexas.edu/diversity/ddce/rfl/
(512) 475-7373

The Intellectual Entrepreneurship Pre-Graduate School Internship

Dr. Richard Cherwitz

The Intellectual Entrepreneurship Pre-Graduate School Internship offers students an opportunity to discover their passions and professional aspirations and to have greater ownership of their education. The Pre-Graduate School Internship program is one of the Intellectual Entrepreneurship Consortium initiatives that began from a philosophy geared toward increasing students' awareness of the value of academic work done in and across disciplines and enabling them greater voice in and accountability for their education.

Founder and Director Dr. Richard Cherwitz discovered that, because of its ability to demystify graduate education and help students see how advanced study enables them to contribute to their communities, the consortium had unintended yet very significant consequences for two important populations: underrepresented students of color and first-generation college students.

"The consortium moves the mission of institutions of higher learning from 'advancing the frontiers of knowledge' and 'preparing tomorrow's leaders' to also 'serving as engines of economic, social, political and cultural development,'" Dr. Cherwitz says. "It is a philosophy and vision of education viewing academics as innovators and agents of change; it shifts the model and metaphor of higher education from one of 'apprenticeship-certification-entitlement' to one of 'discovery-ownership-accountability.'"

The internship, best thought of as an "entrepreneurial incubator," brings students into the graduate school pipeline and helps them select an appropriate field of study. Collaborating with graduate student mentors and faculty supervisors, internship students tailor education to fit their personal, academic and professional interests—a truly transformative approach to education.

Since the program was piloted in 2003-2004, over 200 students have participated in the Pre-Graduate School Internship. Almost half of them are first-generation or underrepresented students of color. In spring 2007, 70 interns were enrolled—and this fall nearly 90 interns will participate. All receive academic credit. Assisting them in 2006-2007 were more than 60 faculty members and 80-plus graduate students. Involvement in the program represents all colleges and schools and more than 40 academic departments.

Over and above "educating citizen-scholars," long-term goals of the cross-disciplinary Consortium include increasing faculty diversity by expanding the number of underrepresented groups who attend and complete graduate school, instigating learning across disciplinary boundaries, generating collaborations between the academy and community to help solve some of society's most challenging problems, and reducing attrition and time to degree through more authentic student decision-making. ●

For more information please visit [illegible]

Institute for Community, University, and School Partnerships

The Institute for Community, University and School Partnerships, directed by Dr. Kevin Foster, assistant professor in the Department of Curriculum and Instruction, is a faculty and student-based collaborative and action research center. The institute applies social, cultural, and educational theories to school and community programs, and builds community partnerships to increase student achievement and college-readiness in students who typically would not consider college a viable option.

The institute's first major project is a collaboration with the Austin-based Community of Brothers in Revolutionary Alliance (COBRA) to promote academic motivation and achievement in students who have been identified as high risk of dropping out of school. Started in 2006 by Foster and LBJ High School Principal Patrick Patterson, the program introduces high school students to the university and to businesses and successful role models and mentors. In the current school year, the institute will expand this program in the Austin Independent School District to include Kealing, Pearce and Webb middle schools and Reagan, McCallum and Travis high schools. In all, the institute plans to expand to 12 chapters on 10 campuses, with the high school chapters called COBRA and the middle school chapters called Young Knights.

Other initiatives include:

- A lecture series for advanced educational practitioners.
- A graduate research internship that connects university students to local schools and students.

While the university is a significant intellectual resource for teaching and learning initiatives across the region and state, Foster believes that the work is mutually beneficial. "Community organizations and schools have a great deal to teach us as well," added Foster. "The institute will only be effective if it is collaborative in both philosophy and in daily actions."

Special Projects *and* Events

Lecture Series

By bringing in top-notch speakers from across the nation, the division Lecture Series was created by Dr. Vincent as a way to inform and enrich both the campus and entire Austin community. Some examples of speaker events include:

- Dr. Seema Kapani, of the University of Wisconsin at Madison, facilitated programs focusing on equity and diversity issues, and shared aspects of best practices during the two-day lecture.
- Dr. Hanes Walton Jr., University of Michigan, is among the nation's most distinguished political scientists. His lecture on African American Senatorial Candidates throughout history was especially timely given the interesting senatorial races involving African Americans that were occurring at the time of his visit.
- Dr. Leonard Moore, then Louisiana State University professor and now university professor and assistant vice president, led an honest dialogue about race and popular culture. His candid discussion on racial caricatures and stereotypes was effective and well received by the university community.
- Dr. Mia Tuan, University of Oregon, gave an informative lecture on Asian transracial adoption. Her extensive knowledge on this topic provided the audience with a better understanding of transracial adoption.
- Women in senior levels of administration at the university shared their path to leadership.

The Heman Sweatt Symposium on Civil Rights

Since 1987, the Heman Sweatt Symposium on Civil Rights has been presented annually each spring. Free public events are organized by the university students, faculty and staff. The symposium honors Heman Sweatt, the first African American admitted to The University of Texas at Austin Law School. Sweatt applied for admission to the law school in 1946, but was denied admission on the basis of race. With assistance from the NAACP, he brought successful legal action against the university to be admitted to the law school, providing the legal precedent for desegregation. Examples of past symposium themes and speakers have included:

- **From Sweatt to Hopwood to Success: Solutions for Creating a Diverse University**
  Keynote: The Honorable Wilhelmina Delco
- **The Role of Art and Artists in the Struggle**
  Keynote: Nikki Giovanni
- **The New Civil Rights: Fifty Years After The Sweatt Decision**
  Keynote: Dick Gregory
- **Capital Punishment in Texas: Is Justice Served?**
  Keynote: John Artis
- **Reparations: Does America Owe African Americans a Debt?**
  Keynote: Johnny Cochran
- **Progression versus Regression: The State of the African American Community**
  Keynote: Ed Gordon, Host of BET Tonight

For more information, please visit
[illegible]

Programs in the Thematic Hiring and Community Engagement portfolio include:

- **Indigenous Studies Initiatives Series**
  Dr. Shannon Speed, Director
  … seeks to make the university a unique and outstanding center for engaged research and dialogue with indigenous peoples throughout the hemisphere through a collaborative project of an interdisciplinary core group of faculty from Liberal Arts, Education, Information Sciences, and Law that conducts a speakers series and offers a graduate portfolio in the M.A. and Ph.D. levels in Indigenous Studies.
- **Art and Social Engagement**
  Dr. Deborah Paredez, Director
  … creates networks to unite faculty and community members interested in the arts, launching with a series of Art and Social Engagement Happy Hours.
- **Volunteer and Service Learning Center**
  Glen Baumgart, Director
  … provides volunteer opportunities for university students, and recruits over 8,000 student volunteers each year.
- **Regional Foundation Library**
  Allison Chandler Supancic, Librarian and Collections Supervisor
  … provides comprehensive education and resources to all individuals and organizations involved in grant-making, grant-seeking and funding development.
- **Institute for Community, University and School Partnerships**
  Dr. Kevin Foster, Director
  … builds community partnerships to increase student achievement and college-readiness in students who typically would not consider college a viable option through an action research center and through a faculty and student-based collaborative.
- **Community Engagement Incubator**
  Dr. Thomas Darwin, Director
  … seeds new community engagement initiatives and accelerates existing ones, and establishes networks of people and organizations interested in research to benefit the community.
- **Intellectual Entrepreneurship**
  Dr. Richard Cherwitz, Director
  … focuses on creating cross-disciplinary and multi-institutional collaborations designed to produce intellectual advancements with a capacity to provide real solutions to society's problems and needs. The program features internships, courses, mentoring and career resources for both graduate and undergraduate students.

DIRECTED BY MS. LINDA MILLSTONE

Institutional Equity seeks proactive measures to ensure equity in the workforce and community environment

Equal Opportunity Services (EOS) ensures the fulfillment of the intent and spirit of equal opportunity laws. Among a host of services, EOS investigates allegations, seeks equitable resolutions to complaints, provides confidential counseling, offers resources, and serves as a liaison with community action organizations and agencies

Although her job often requires her to respond to allegations of discrimination and harassment, Linda Millstone, associate vice president of institutional equity and workforce diversity, makes every effort to avoid situations that can escalate whenever possible. "My primary goal is to create an environment where people can talk and resolve their differences before the issue becomes adversarial and polarizing. If we simply wait for the complaint, it is too late and we have missed an opportunity to be proactive," says Millstone.

EOS has the responsibility of considering all existing and emerging equality legislation and therefore is a vital component to the Division of Diversity and Community Engagement's strategic planning initiatives. Simply put, it keeps the university in compliance with federal regulations.

There are several laws that prohibit discrimination in the workplace, with the most prominent being Title VII of the Civil Rights Act of 1964. This statute forbids discrimination in all areas of the employer-employee relationship, from advertisement for new employees through termination or retirement, on the basis of race, color, sex (including pregnancy and sexual harassment), religion, and national origin. The Americans with Disabilities Act of 1990 is also significant because it requires the university to provide qualified applicants and employees with disabilities with reasonable accommodations that do not impose undue hardship and to prohibit discrimination on the basis of disability. The university's nondiscrimination policy also includes a prohibition on discrimination based on age and sexual orientation.

"As a major employer and a federal contractor, we have legal obligations to maintain learning and working environments that are free from impermissible discrimination and are accommodating to all members of the campus community," says Millstone. Diversity carries a compliance component, which has long been established based on legislative and judicial action. EOS serves as the unit authorized by the president to handle complaints of discrimination and harassment. "While it is critical to resolve these complaints and ensure the environment is respectful and free from discrimination, complaints present an opportunity for self-examination," she added.

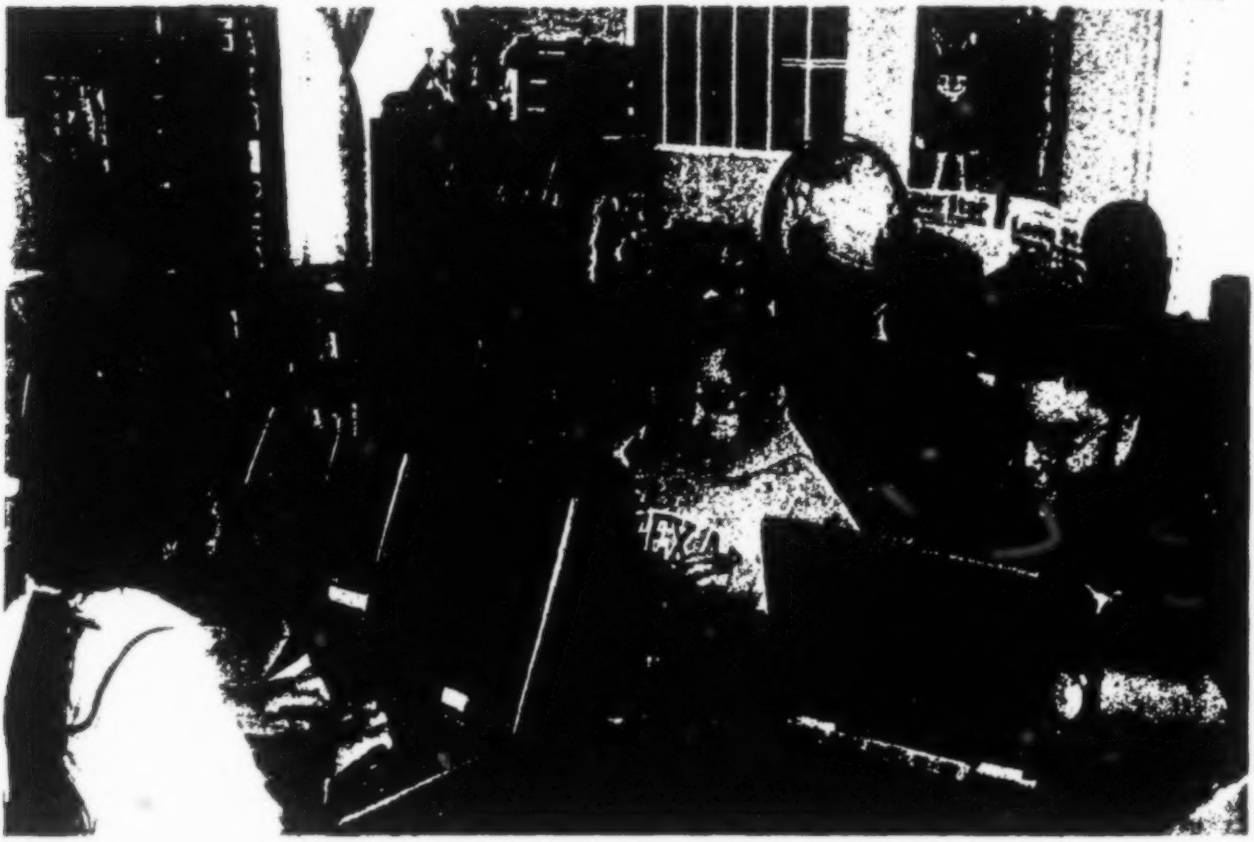
Ms. Linda Millstone, Associate Vice President for Institutional Equity and Workforce Diversity

This past April, the university hosted the American Association for Affirmative Action's 33rd annual conference, "Diversity and Affirmative Action: Where Do They Meet." The conference featured outstanding diversity and civil rights specialists and offered training on initiatives to bridge the opportunity gaps in the workplace. The symposium participants also discussed strategies to promote affirmative action in the face of legal and legislative efforts to end it. In recent years, affirmative action has been challenged at top universities across the country, most notably at the University of Michigan. "This conference was extremely beneficial and we are exploring ways to incorporate some of the innovative strategies discussed," says Millstone.

Millstone, a university employee for over 30 years, has seen many positive changes occur over the years, including greater diversity and more individuals from historically underrepresented groups occupying high-level positions on campus. "The creation of the Division of Diversity and Community Engagement demonstrates our university's commitment to diversity and will provide resources that will strengthen the university's ability to attract the best faculty and staff," says Associate Vice President Millstone.

[illegible]

Students at The University of Texas Elementary School



Texas Center for Education Policy makes its mark

The Texas Center for Education Policy, part of the Division of Diversity and Community Engagement at The University of Texas at Austin, is only a year old but already has matured into a respected authority on education, from pre-kindergarten through college.

A Resource for the Legislature

During Texas lawmakers' 2007 session, the center helped craft a successful $120 million legislative package designed to sharply reduce the state's high school dropout rate and expand support networks for at-risk students. Under the legislation, a pilot program will finance student-club activities for school children who are at risk of dropping out. Every year, an estimated 120,000 students drop out of Texas schools.

The center, which promotes equity and excellence at all levels of education, was asked to assist with the legislation after about 50 lawmakers attended a dropout prevention conference co-sponsored by the center. Dr. Angela Valenzuela, director of the center, associate vice president for the Division of Diversity and Community Engagement, and professor in the Department of Curriculum and Instruction in the College of Education, says she hopes Texas lawmakers will continue to turn to the center for expertise on education policy.

"The Legislature has expressed a desire for thoughtful analyses of research and intelligent guidance and input as they review proposed legislation," Valenzuela says. "It's very gratifying to know that they see the center as a resource for that analysis and guidance."

> "This is a great example of community engagement: connecting the resource's of the university to the needs of the community."

Helping Across the [illegible]

Others are turning to the center for analysis and guidance as well:

- The center convened a November 2006 gathering on college readiness. Education leaders from throughout Texas assembled to discuss the crises and policies regarding students' under-preparedness for higher education.
- The center hosted the K-12 Arts Education Summit in April 2007.
- Last fall, the center, in collaboration with the College of Education, joined an effort spearheaded by Dr. Gary Orfield, co-founder of Harvard University's Civil Rights Project, to study the impact of race-conscious policies and their alternatives.
- In spring 2008, the center will bring together Texas health policy experts to discuss some of the myriad health issues affecting the state's schoolchildren.

"We want to tackle difficult issues like distributing education funds more equitably and reducing teacher and principal attrition rates," says former state Senator Carlos Truan, a member of the center's advisory board. "This can be done, we believe, by drawing on the best research available, tapping into the best minds on education-related issues and sharing our conclusions and findings with policymakers."

An Advocate for Education

Over the years, a number of people had envisioned a university-wide education policy center. Among them were College of Education professors Dr. Alba Ortiz, Dr. Pedro Reyes, Dr. Jay Scribner, and School of Law Professor Gerald Torres, College of Education Dean Manuel Justiz and University of Texas System Chancellor Mark Yudof. Anne Maury and her husband, the late Texas Supreme Court Justice Oscar Mauzy, shared that vision. In 2002, two years after the judge's death, the Oscar and Anne Mauzy Endowment for Educational Policy Studies and Research was established at The University of Texas at Austin.

"We talked about what the needs were around here before we decided where we wanted to put our money when we died, and this is what we decided on," Anne Mauzy, now a member of the center's advisory board, told the university's student newspaper, the Daily Texan. "There were a lot of policy questions that we needed answers to."

A Leader at the Helm

In 2005, the University of Georgia tried to recruit Valenzuela as director of an education policy center that would focus on bringing Mexican immigrants into higher education. The University of Texas at Austin countered with an offer that included establishment of a university-wide policy center to advance research-based policies that promote equity and excellence in public elementary, secondary and higher education. With Valenzuela at the helm, the university's center opened in 2006.

Dr. Angela Valenzuela, Associate Vice President for School Partnerships

Valenzuela, an expert on academic achievement among Latino youth, was recently awarded a Fulbright scholarship that will enable her to travel to Mexico to study how Mexican and U.S. institutions can work to expand human rights, particularly educational opportunities, to immigrants in the United States. Dr. Pedro Reyes, professor of educational administration, will serve as interim director during her absence.

Dr. Gregory Vincent, vice president of the Division of Diversity and Community Engagement, says, "The Texas Center for Educational Policy is a great example of community engagement and fulfills one of our strategic initiatives to connect the intellectual resources of the university to the needs of the communities it serves."

STRATEGIC AREA: PRE-COLLEGE YOUTH DEVELOPMENT AND STUDENT DIVERSITY INITIATIVES

[illegible] Dr. Wanda L. Nelson

Students in the Neighborhood Longhorns Program celebrate their academic success

From high school to higher education:

pre-college programs help students find their way

If you think of students at The University of Texas at Austin as age 18 to 22, think again. The university fulfills the mission of its name, from universitas, or "the whole world," by engaging students of all ages and backgrounds across the state. Under the aegis of the Division of Diversity and Community Engagement many successful outreach programs are under way.

Among issues addressed by the division, pre-college youth development and student diversity initiatives are a major emphasis. "We must connect our intellectual resources to communities across Texas and offer education to those who may face the greatest challenges to accessing it," says Dr. Gregory J. Vincent, vice president for diversity and community engagement. "We are dedicated to the educational development of a diverse population that will foster humanity and the economy."

Helping those who need it most

Many division programs are designed to help first-generation and low-income students prepare for university-level academic work to assist them in graduating from high school and subsequently succeeding at an institution of higher education. The pre-college youth development and student diversity initiatives portfolio serves as an umbrella for a group of programs that offer a continuum of services from elementary school through graduate school designed to help first-generation and low-income students prepare for university-level academic work, successfully transition to the university campus, and find support systems that allow them to succeed academically.

Partnering with target schools across the state, the primary focus is increasing math, science and reading skills as well as mentoring, tutoring and personal growth with the expressed goal of students graduating from high school and then college. Parents and community leaders are also involved to reinforce the success of services.

A passionate leader

Leading the effort is Dr. Wanda L. Nelson, associate vice president for pre-college youth development programs and student diversity initiatives. "We want youth not only to excel in school, but also to ignite their love of learning and eventually guide them to higher education," she says. "It is crucial that college access information is available to those who need it most."

Dr. Nelson has worked in the field of education for 35 years. In 1989, she joined the university in the position of Assistant Dean of Students for Retention Services, then served as an Associate Dean of Students, and was then promoted to Assistant Vice President and Executive Director of the University Outreach Centers. Her passion has established and nurtured many successful programs that increased the number of underrepresented students in the pipeline for post-secondary education.

Reaching out to underrepresented students

The University Outreach Center (UOC) is one model of success in increasing graduation rates for underrepresented students. The five-year college preparatory program is offered to students in grades 8 to 12 through five centers targeting 57 schools across the state.

"A road to success or a road to nowhere were two of the options many of my peers and I faced when we were growing up," says Ismael H. Rodriguez, Jr., who

Dr. Wanda L. Nelson, Associate Vice President for Pre-College Youth Development and Student Diversity Initiatives

received a degree from the University of Texas at San Antonio five years ago, and a graduate of the UOC. Rodriguez attributes a large measure of his success to the services he received through the center.

The center has assisted thousands of students who may not have considered college as a viable option. According to statistics provided by the Texas Higher Education Coordinating Board, 100% of the center's 2007 seniors graduated from high school compared to 84% statewide. Nearly 84% enrolled in an institution of higher education and 96% of these enrolled in a Texas college or university.

The Houston center this year touted five valedictorians in five of its six target high schools. Lewis Forero, valedictorian at Jones High School, now attends West Point Military Academy. "The center taught me how to deal with the transition from high school to college and what to expect in college," he says. His center director, Kenya White, concurs. "I believe any student can attend college if given the information about the college planning process and if someone is there supporting and guiding them along that way," she says.

Two more Houston seniors each received $20,000 scholarships to The University of Texas at Austin because they excelled in the program for its full five-year course. Irwin Cortez and Brittany Cook both chose the university after visits that were part of their center experiences.

The center conducts workshops during non-school hours to focus on student skills enhancement or clarify new information, with parents included in the process. Students also participate in a summer four-week academic skills enhancement session following completion of grade 8. After reviewing courses in math and science, instruction in reading and public speaking, and field trips to businesses, students compete in an "Academic Challenge" similar to a traditional college bowl during an overnight visit to the university.

Visits to colleges and universities are also an inspirational and necessary part of the process. Center staff accompany students to help them navigate the process of finding the college that is the best fit for them. "It's great if the students in our pre-college programs choose to come to our campus, but we are happy when they pursue higher education at whatever school is selected," says Dr. Nelson.

Programs in the Pre-College Youth Development and Student Diversity Initiatives portfolio include:

- **ChemBridge**
  _ offers a web-based chemistry program designed to provide college-level science curriculum to previously underserved urban high school students, and is a collaborative program between the College of Natural Sciences, DDCE, and participating high schools in the state of Texas.
- **Students *Partnering* for Undergraduate Rhetoric Success**
  _ prepares underrepresented and economically disadvantaged students for college-level coursework as well as increases writing and analytical thinking skills and increases their ability to learn through the use of technology.

Office of Assistant Vice President for Pre-College Youth Development and Student Diversity Initiatives
Directed by Dr. Leonard Moore, Assistant Vice President and Executive Director - Longhorn Center for Academic Excellence

- **Longhorn Center for Academic Excellence: Gateway Scholars – Michelle Monk, Director**
  _ maximizes the academic and personal success of first generation and traditionally underrepresented students, and includes the ACE program, Faculty/Staff Mentors, UTransition, Welcome Program, and Preview.
- **Longhorn Center for Academic Excellence: TRIO Programs – Michael Nava, Director**
  _ provides opportunities for academic development, assists students with basic college requirements, and serves to motivate students towards the successful completion of their post secondary education, and includes the *Longhorn Link Program*, and the McNair Scholarship Program.
- **Neighborhood Longhorns *Program* – Celina Ruiz-Snowden, Director**
  _ increases student achievement through an educational incentive program operated in partnership with the Austin Independent School District in 28 Title 1 elementary schools and middle schools to *improve overall grade performance*
- **University Outreach Centers – Kenya White, Executive Director**
  _ assists underrepresented students in grades 8-12 to excel academically, take college entrance exams, graduate high school, complete college admissions and *financial* aid applications, and enroll at an institution of higher education.

Office of Assistant Vice President for Diversity Education Initiatives
Directed by Dr. Michele R. Guzmán, Assistant Vice President

- Diversity Education Institute – Dr. Michele R. Guzmán (Interim Director)
  _ promotes learning that critically *examines multiple identities* and *perspectives* in order to foster a climate of inclusiveness at the university and surrounding communities and functions in partnership with the School of Social Work at The *University of* Texas at Austin
- *Gender and Sexuality Center – Ixchel Rosal, Director*
  _ provides a safe space for all members of the university community to explore, organize, and promote learning around issues of gender and sexuality, and supports the needs of women and the lesbian, gay, bisexual, transgender, and questioning (LGBTQ) communities through education, outreach and advocacy.
- **Multicultural Information Center – Brenda Burt, Director**
  _ develops and prepares students for the multicultural society of today and the future by providing diverse educational opportunities and support services for all students.

Talking with Dr. Leonard Moore:

Pre-College Youth Development

"Developing the premier K-16 student recruitment and enrichment programs is the most critical goal that will guide the direction and work of our portfolio," according to Dr. Leonard Moore, the newly appointed Assistant Vice President for Pre-College Youth Development and Student Diversity Initiatives.

photo by Marsha Miller

Dr. Leonard Moore, Assistant Vice President and Executive Director for the Longhorn Center for Academic Excellence

Dr. Moore supervises the division's K-16 programs that are housed on campus and across the state, and include the University Outreach Centers, Neighborhood Longhorns Program, Longhorn Center for Academic Excellence, TRIO Programs and Pre-Doctoral Scholars Program.

"Our goal is to create model programs that create a seamless pipeline from elementary school though college graduation," says Moore. Another major goal is to establish new initiatives that will increase the number of underrepresented students receiving advanced degrees.

According to a report released by the National Opinion Research Center and a variety of government agencies, The University of Texas at Austin granted the largest number of doctorates to underrepresented students of color in 2006. As well, the report found that 20% of U.S. citizens awarded research doctorates from American universities in that year were underrepresented students of color, making that percentage the highest in U.S. history.* Vice President Vincent is encouraged by this increase and believes even larger gains will be made in the future. "We have made great strides in our efforts to increase diversity in higher education and believe our outreach programs will help produce even greater gains.

The outlook for these programs is very promising. This past September the university's TRIO program was awarded the prestigious Ronald E. McNair Scholars Program grant by the U.S. Department of Education. The university scored in the top 10% of all applicants and will receive over $1 million over a five-year period. The division will use the grant funding to annually identify, recruit, and prepare 25 eligible college students from low-income, first-generation and other groups underrepresented in graduate education.

The TRIO program prepares participants for doctoral studies through involvement in research and other scholarly activities. The McNair Scholars Program will work closely with participants as they complete their undergraduate requirements. "This grant will have a tremendous impact in increasing the number of underrepresented groups in graduate education, especially in certain areas of mathematics and science. This is critical in providing students opportunity to enter fields that traditionally lack gender and ethnic diversity," says Dr. Vincent.

The university continues to excel as a public institution of higher learning and is recognized worldwide for the impact of its research, teaching, and service. The programs housed within the Pre-College Youth Development portfolio will play a central role in expanding upon an already outstanding reputation and maximizing the university's resources to meet the challenges of addressing the inadequate participation of underrepresented groups in higher education. ◆

Dr. Moore frequently speaks to groups about his research on mentoring African American student athletes.

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* Hoffer, T.B., M. Hess, V. Welch, Jr., and K. Williams. 2007. Doctorate Recipients from United States Universities: Summary Report 2006. Chicago: National Opinion Research Center. (The report gives the results of data collected in the Survey of Earned Doctorates, conducted for six federal agencies: NSF, NIH, USED, NEH, USDA, and NASA by NORC.)

Dr. Michele R. Guzmán expands diversity education on campus

For Dr. Michele R. Guzmán, Assistant Vice President for Diversity Education Initiatives, educating the campus community on issues regarding diversity and social justice is of the utmost importance.

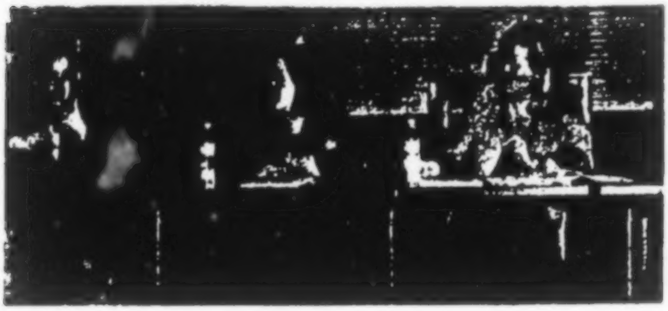
Dr. Michele R. Guzmán, Assistant Vice President for Diversity Education Initiatives

The departments in her portfolio, the Multicultural Information Center (MIC), the Gender and Sexuality Center (GSC), and the Diversity Education Institute (DEI), are charged with providing comprehensive and effective diversity education. "My vision is to have the three units work collaboratively to foster a climate of acceptance, appreciation and respect for diverse individuals on campus and in the Austin community," says Dr. Guzmán.

While both the MIC and GSC work to educate the entire campus community, their primary focus is on students. According to Guzman, the Diversity Education Institute (DEI), formerly the Diversity Institute, will fill the gap by providing diversity education to faculty and staff. "We also will be looking at opportunities for the institute to support the diversity efforts of agencies in the greater Austin community," Dr. Guzmán says. The DEI will remain in collaboration with the School of Social Work, which founded the Diversity Institute in 1995. "Bringing the DEI under the Division of Diversity and Community Engagement will give it the resources it has long needed to fulfill its mission," Guzmán added.

The DEI will engage in at least two areas of signature programming. One will be the continuation of the division's highly successful "Roundtable Discussions," started by Vice President Vincent shortly after his arrival in 2005. "With the institute, we will continue with the spirit of promoting conversation, but will give the roundtables an educational focus as well," says Dr. Guzmán. This will be accomplished by identifying a topic and delivering information about it before engaging in dialogue. During the 2007 fall term, the institute hosted a roundtable discussion in conjunction with the division's five-week official launch and held a very well-attended roundtable discussion on internalized racism in partnership with the university's Division of Housing and Food Service.

The other programming area will be a set of courses open to faculty, staff and students, to provide diversity education at various levels. One will be a course that will run every semester, promoting awareness and providing information about diverse identities in society, as well as discussions on issues of privilege and disadvantage. Two additional classes will be offered to support those educators who engage in diversity education on campus: one for the novice and the other for the more experienced educator. According to Dr. Guzmán, "These courses will include everything from developing effective assignments to handling the crossfire of challenging discussions in the classroom."



Dr. Guzmán moderates a panel on the university's response to bias incidents, including Dr. Margarita Arellano, senior associate dean of students, and Dr. Jennifer Hammat, assistant vice president for student affairs

Division Departments

BET. CHI THETA

University Outreach Centers

Since their inception in 1987, University Outreach Centers have assisted thousands of students who may not have considered college as a viable option. The Texas Higher Education Coordinating Board confirms that 100% of 2006 center seniors graduated from high school compared to 84% statewide. Nearly 85% enrolled in an institution of higher education, and 96% enrolled in a Texas college or university.

MISSION

To assist students in grades 8-12 to graduate from high school and enroll in an institution of higher education.

IMPACT

- Offers a college preparatory program with group and individual services that enhance academic success and ensure students are college-admissible upon high school graduation. Staff assists with potential barriers such as entrance exam deadlines and equips students with tools to negotiate the college admissions process successfully.
- Guides students through a college preparatory curriculum via a step-by-step approach that makes covering core activities less complicated.
- Provides a bridge between middle and high school through University Jumpstart, a four-week summer skills enhancement program with review courses in math, science and language arts, including reading and public speaking. Students also receive instruction in personal development and early college planning.
- Inspires rising juniors and seniors through Longhorn Round-Up, a summer overnight camp where students travel to the university to get first-hand experience of life as a Longhorn.
- Facilitates college visits to institutions of higher learning throughout Texas. Staff makes arrangements and accompanies students to help them navigate the process of finding the college that is the best fit. Comparisons between large and small schools, public and private, coed and non-coed are some characteristics considered.
- Shares knowledge with parents and students through focused workshops such as Algebra and Geometry Clinics, Scholarship Search, ACT/PSAT/SAT Prep, Savvy Senior Saturdays and College 101.

Helping High Schoolers Find Their Horns

One of the University Outreach Centers' most popular college prep programs is the Longhorn Round-Up, where high school students spend the night at Jester Dormitory on campus to get first-hand experience of life as a Longhorn. Austin native Marco Rico attended Longhorn Round-Up in 2007. "They really gave us lots of good insight on what college life is really like," says Rico. Students got practical advice on everything from choosing a major to studying abroad. Rico says, "I want to go to UT, and I'd love to study programming in Japan someday. And Longhorn Round-Up let me know that I can do it."

FIND IT

6207 Sheridan Avenue, Austin, TX 78723
www.uoc.utexas.edu
(512) 232-4630

The Neighborhood Longhorns Program

The Neighborhood Longhorns Program provides volunteer student tutors and mentors to 25 elementary and three middle school campuses in Austin, impacting the lives of more than 4,000 students. The program serves economically disadvantaged youth in grades 2 through 8 who are at high risk of experiencing academic difficulties. In addition to tutoring students in academic subjects and TAKS preparation, these student volunteers serve as positive role models who encourage students to stay in school, graduate from high school and obtain a college education. The Neighborhood Longhorns Program is a successful model of a university community partnership that ensures students are prepared to enter the pipeline for higher education.

MISSION

To link community with education to create learning environments to improve basic reading, math, science and language arts skills, encourage school attendance, and engage students in extracurricular activities to broaden social skills and self-confidence.

IMPACT

- Since the program's inception, approximately $500,000 has been awarded to program participants.
- In 2006, 286 University of Texas at Austin students provided 5,141 hours of volunteer tutoring to nearly 400 AISD students, representing a contribution of at least $50,000.
- Provides educational incentives and prizes to encourage academic performance.
- Organizes events such as Bevo's Grand Slam Reading Program and SpringJam!
- Invites program participants to attend sports events as well as university and community cultural events.

FIND IT

6207 Sheridan Avenue, Austin, TX 78723
www.utexas.edu/admin/neighbor
(512) 232-4650

Division Departments

ChemBridge

ChemBridge is an innovative, first of its kind program, allowing high school students the opportunity to earn college chemistry credit upon completion of the course. Additionally, students earn high school credit for an accelerated science class that serves as an Advanced Measure under the Texas Education Agency Distinguished Achievement Program.

MISSION

To provide a ground-breaking science program while also bridging the gap between high school and college.

IMPACT

- Engages students in high-need learning communities in a rigorous science curriculum that will better prepare them for college-level science coursework.
- Delivers a range of professional development activities to improve the instructional ability of chemistry teachers in the partner schools through interactive curriculum design and collaboration with national experts in the field.

FIND IT

6207 Sheridan Ave. Austin, TX 78723
http://chembridge.cm.utexas.edu/
(512) 232-4601

Students Partnering for Undergraduate Rhetoric Success *(SPURS)*

Students Partnering for Undergraduate Rhetoric Success (SPURS) is a partnership between the Department of Rhetoric and Writing at the University of Texas at Austin, the DDCE and public school districts in Texas. The program pairs lower-division writing classes at the university with 11th grade AP English Language and Composition classes from underrepresented high schools in Texas.

MISSION

To foster improved reading and writing skills among high school students hoping to enter college and to connect students from underrepresented high schools to an academic community of collegiate readers and writers.

IMPACT

- Provides a smoother transition from high school to college for numerous students throughout the State.
- Students learn the principles of rhetorical analysis and become more sophisticated writers, which allows for greater success upon entering college.

FIND IT

6207 Sheridan Ave. Austin, TX 78723
http://spurs.drw.utexas.edu/
(512) 232-4601

Longhorn Center for Academic Excellence

The Longhorn Center for Academic Excellence (LCAE) offers a variety of programs and services to assist students in reaching their maximum potential. The LCAE includes Gateway Scholars, TRIO Programs, and the Preview Program.

MISSION

To empower students in their pursuit of academic and personal excellence through academic support, leadership development, community building, cultural appreciation, and civic engagement.

IMPACT:

Gateway Scholars Programs (Gateway, Welcome, Achieving College Excellence (ACE), Grad Prep, and UTransition)

- The Gateway Program creates smaller learning communities for students, introduces students to the university's vast resources, and encourages each student to take full advantage of all opportunities available.
- The Welcome Program connects incoming students from diverse backgrounds to inform and educate and to make their first year's experience more enjoyable academically and personally.
- The Achieving College Excellence (ACE) Program provides free tutoring and academic success workshops for students who want to enhance their academic performance.
- The Grad Prep Program offers a series of workshops each semester to educate students about graduate study.
- UTransition introduces transfer students to academic and social support services available such as tutoring, personal support, study skills workshops, and peer mentoring.

TRIO Programs (Longhorn Link Program and McNair Scholars Program)

- The Longhorn Link Program, a federally funded TRIO program, provides academic services, learning support, leadership development and enrichment opportunities to ensure academic excellence and graduation.
- The McNair Scholars Program, a federally funded TRIO program, identifies, recruits, and prepares college students from low-income, first-generation backgrounds and groups underrepresented in graduate education to successfully enroll in and complete a doctoral degree.

Preview Program
The Preview Program assists students as future leaders of their communities and provides a peer advisor, a summer residential program, summer sessions with a stipend to help cover costs and free tutoring.

FIND IT

4.400 Student Services Building, 100 West Dean Keeton
http://www.utexas.edu/diversity/ddce/aes/
(512) 471-1205

Division Departments

Gender *and* Sexuality Center

The Gender and Sexuality Center supports the needs of women and lesbian, gay, bi-sexual, and transgendered communities through education, outreach and advocacy. Guided by an advisory and working group of students, faculty, staff and administrators, the center helps to create a strong, welcoming community and a safe supportive environment that allows everyone to reach academic and personal goals. The center works to diminish prejudice that impairs educational experiences and safety. Women and LGBTQ leaders receive support, and students have a forum to discuss aspirations and concerns. Though the center was set up to serve the university community, it welcomes all members of the Austin community.

MISSION:

To provide safe spaces for all members of the university and Austin community to explore, organize, and promote learning around issues of gender and sexuality.

IMPACT:

- Assists with the development and planning of LGBTQ Pride Month programming, the Vagina Monologues and other student-initiated programs.
- Facilitates an active training and workshop series that presents to classes, student organizations, resident assistant training sessions, and residence hall meetings.
- Offers a number of services and programs regarding women's issues, the LGBTQ community and ally development.
- Manages a large lending library of books, magazines, videotapes and DVDs.
- Sends out weekly emails with information on events, scholarships, pertinent news and meetings.

FIND IT:

Ground Floor, Student Services Building
100 West Dean Keaton
M-Th, 8am-7pm, Fr 8am - 5pm
www.utgsc.com
(512) 232-1831

The Multicultural Information Center

The Multicultural Information Center assembles, processes, and disseminates information relevant to the retention and educational experience of African American, Latino, Asian American and Native American students at The University of Texas at Austin.

MISSION:

To develop and prepare students for the multicultural society of today and the future by providing diverse educational opportunities and support services for all students.

IMPACT:

- Created and maintains a comprehensive scholarship index.
- Aids individuals and organizations with event planning and fundraising, as well as providing printing and graphic design resources and a large workspace.
- Facilitates diversity workshops to increase awareness of various issues in our multicultural society for groups including First-Year Interest Groups, mentors, orientation advisors, and resident and academic advisors.
- Helps with outreach to Texas middle and high schools through tours and workshops.
- Organizes the Multicultural Leadership Institute, a weeklong program where participants from all walks of life work together to create a program designed to teach middle school students and their parents about preparing for college. The institute enhances students' leadership skills and encourages diversity in all aspects of campus life by helping students find their individual cultural context as they explore those of others.

One Student's Story

After attending the Multicultural Leadership Institute in Spring 2006, San Antonio native Peace Manuagwu was selected to be a co-coordinator for the institute in Spring 2007. "Participating in the institute has shown me that college students serving as mentors can really make a difference. The elementary, middle and high school students from inner-city, low-income areas that we worked with believed that college was not a possibility until they worked with college students from similar backgrounds who were successfully attending college."

FIND IT:

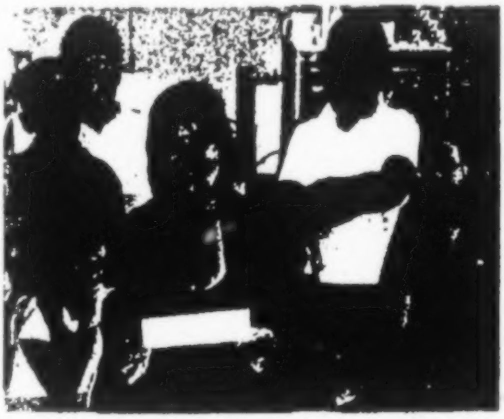
Student Services Building 1.104
www.utexas.edu/student/mic
(512) 232-2958

The Urban Education Pilot Program aims to better prepare teachers for success in urban educational settings

Teaching in inner-city classrooms presents a complex set of challenges. While it is clear that all children need effective education in a safe and nurturing learning environment, issues such as economic inequities, high teacher turn-over and lack of access to new technologies are among the challenges in urban educational settings. Realizing there was a need for an educational alternative, The University of Texas Elementary School was opened in 2003. The school, located in East Austin, primarily serves children of color from socio-economically disadvantaged households. It launched the first university-school-community partnership of its kind in the state and allows public school educators the exciting opportunity to apply new knowledge garnered in the academic setting directly to the classroom. The success of this program has been immense and it is currently the only school in East Austin to have earned an exemplary rating under the Texas Education Agency assessment system in the last 5 years.

The Urban Education Pilot Program, which is set to begin in fall 2008, proposes to extend the school's mission to other urban schools. "The program will build on what we have learned at the UT Elementary School in our first four years of operation," says principal and CEO, Dr. Ramona Treviño. "It will also take advantage of the school's role as a demonstration site for implementation of best teaching practices."

Planning for the pilot program is well underway and a grant has been written to create a best practices manual. Once funded, a hands-on teaching manual that incorporates best practices demonstrated at the UT Elementary School will be created and used as a curriculum resource for the program. The manual will be designed for use by university students in the Urban Education Pilot, as well as for dissemination to teachers in partner schools that will host these students in their teaching practicum. "This is the first time all professors who are involved in the pilot will be in alignment in their methods classes," Dr. Treviño said. University professors will be trained to implement the pilot and approximately 25 undergraduate students will enroll in the cohort in fall 2008.



Dr. Ramona Treviño (center) is the principal and CEO of The University of Texas Elementary School

[illegible] East Austin families, [illegible] site for university students, and as a model of an exemplary [illegible] program for diverse learners.

The two methodologies that will be emphasized in the professional development training include: Response to Intervention (RTI) and Social/Emotional Learning (SEL). The RTI method prescribes early and frequent assessment of each student, which allows for prompt identification of learning difficulties and concepts that need strategic intervention. SEL is a vital element in the education of young children, particularly in inner-city classrooms. It is designed to promote skills such as respect, problem solving, empathy, communication and teamwork. Both methods have been successfully implemented at the UT Elementary School.

The program will work in collaboration with the College of Education, UT Elementary School, Division of Diversity and Community Engagement and the Austin Independent School District. In addition to Dr. Treviño serving as the project coordinator, Ms. Dottie Riemer Hall will serve as coordinator for university faculty participating in the cohort and is the pilot's lead designer.

Dr. Gregory J. Vincent, vice president for diversity and community engagement, avidly supports the project. "I believe strongly in this pilot program and feel it will be extremely effective in preparing teachers for a society that is increasingly urban and diverse." ◑

"I believe strongly in this pilot program and feel it will be extremely effective in preparing teachers for a society that is increasingly urban and diverse." — Dr. Gregory J. Vincent

Division Sponsorships *for* University, Community *and* Student Organizations

The Office of the Vice President for Diversity and Community Engagement contributed more than $750,000 in sponsorships for the 2006-2007 academic year alone.

Examples of Sponsored University and Student Organizations and Events

Kappa Alpha Psi Fraternity, Inc.: 2005 and 2006 TAKS Carnival

Black Ink/Publish newspaper

Black Student Alliance/Big XII Council on Black Student Government

Umoja Black Women's Symposium

Kappa Alpha Psi Fraternity, Inc.: Miss Black UT

Black Senior Week Planning Week Committee Black Graduation

Alpha Kappa Alpha Sorority, Inc.: Pink and Green Pages

Student African American Brotherhood/ African American Male Summit

Black Graduate Student Association BGSA Dinner

Umoja Shades of Mahogany Dinner

Committee For Black Unity 3rd Annual Black & White Affair

Alpha Phi Alpha Fraternity: 2006 Ms. Black and Gold

Black Student Advisory Committee: Black Essence Awards

Black Student Alliance Big XII Conference-Books

Student African American Brotherhood NASPA Conference

Alpha Phi Alpha-Epsilon Iota: Found Money Week

Black Student Advisory Committee: Malcom X Lounge renovations

Kappa Phi Gamma Sorority, Inc: EMPOWER

Muslim Student Association: The Islamica Series

Kappa Phi Gamma Sorority, Inc: Philanthropy Week

Vietnamese Student Association: 28th Annual Asian Olympics of TX

Lambda Theta Phi-Latin: Fraternity Founder's Week

Texas Blazers Endowment Dinner

Voices Against Violence Take Back the Night

Order of Omega Awards Banquet

Longhorn Center for Academic Excellence: Dean of Students Summer Welcome Program

LBJ School Barbara Jordan Forum

Apathy or Action: Genocide Symposium

The White Rose Society

Campus Fusion/Guest Speaker, Jane Elliot

Celebration of Excellence: Diversity Graduation Ceremony

Keep UT Hate Free

Student Government Lectureship Series:
Guest Lecturer: Dr. Seema Kapani
Guest Lecturer: Dr. Hanes Walton, Jr.
Guest Lecturer: Dr. Leonard Moore

Roundtable Discussions: Co-sponsorship with the Multicultural Information Center and the Gender and Sexuality Center

Kwanzaa Celebration

Black Student Leadership Conference

FuFu BBQ

Asian American Leadership Institute

Asian American Heritage Week

Sabado Gigante

Latino Leadership Summit

Longhorn American Indian Council 9th Annual Powwow

Safe Space Workshops

Living with Pride Series

Creating Change Conference

Queer Texas Conference

2006 Professional Development Day

Black Faculty Staff Association: Professional Development Day

Martin Luther King, Jr. Day City-wide Celebration

Diversity & Community Symposium

Town Hall Meeting

Division of Housing and Food Services: Diversity Committee Training Workshops

Asian American/Black Faculty Staff Association/ Hispanic Staff and Faculty Leadership Symposium

Example of Dr. Vincent's Speaking Engagements

Hispanic Faculty Staff Association

Department of Educational Administration Luncheon

Fox 7 News Interview

Academy of Distinguished Teachers Banquet

Martin Luther King, Jr. Day Reception

6th Annual Multicultural Leadership Institute

Texas Monthly Talks

APSA, Diversity—A Compelling State Interest

Thurgood Marshall Legal Society Banquet

Student Government Inauguration Ceremony

Student African American Brotherhood Banquet- 10-Year Anniversary

7th Annual End of Year Parent and Community Volunteer Awards Ceremony

Graduation Reception for graduating students of color

Spring Commencement Activities

HR/ Diversity Affinity Group

A Call for Social Justice: Mentoring for Leadership

Opening Address Hall Coordinator Training

Greater Hispanic Chamber of Commerce

In-Roads Banquet

KAZI FM 88.7 – Educating Our Children radio interview

Ford International Fellowship Reception

Martin Luther King, Jr. Statue Rededication

Texas Diversity Luncheon

Longhorn Scholars Welcome Reception

McCombs Diversity Council – Diversity Dialogue Dinner

John Allen, Desmond Tutu's biographer – Welcome Remark

Texas Center for Education Policy Conference

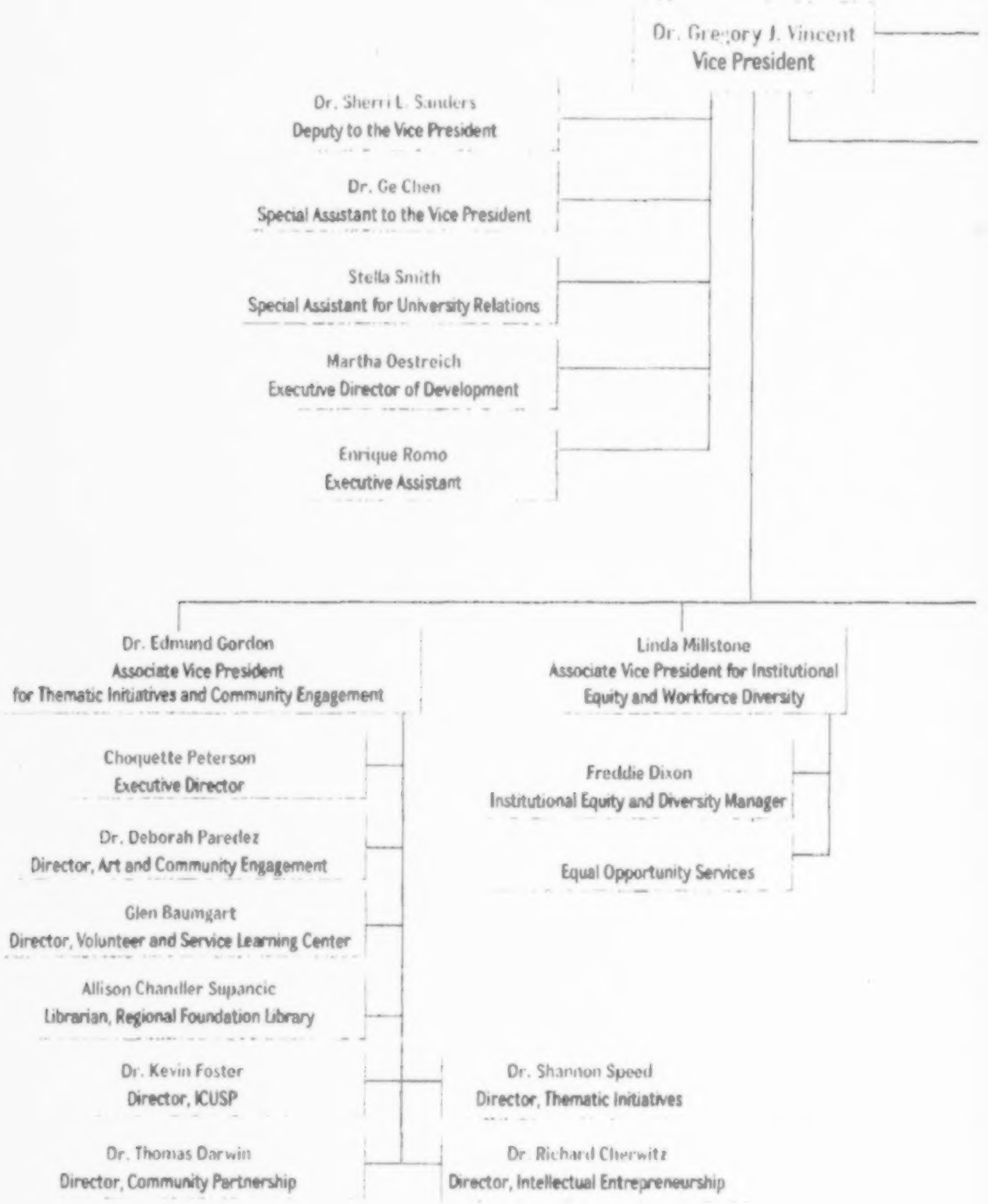
Texas Exes Ring Ceremony

NAACP Freedom Fund Banquet

AISD-MLK Project

Leadership Austin- Leadership/Diversity Session

Division of Diversity *and* Community Engagement



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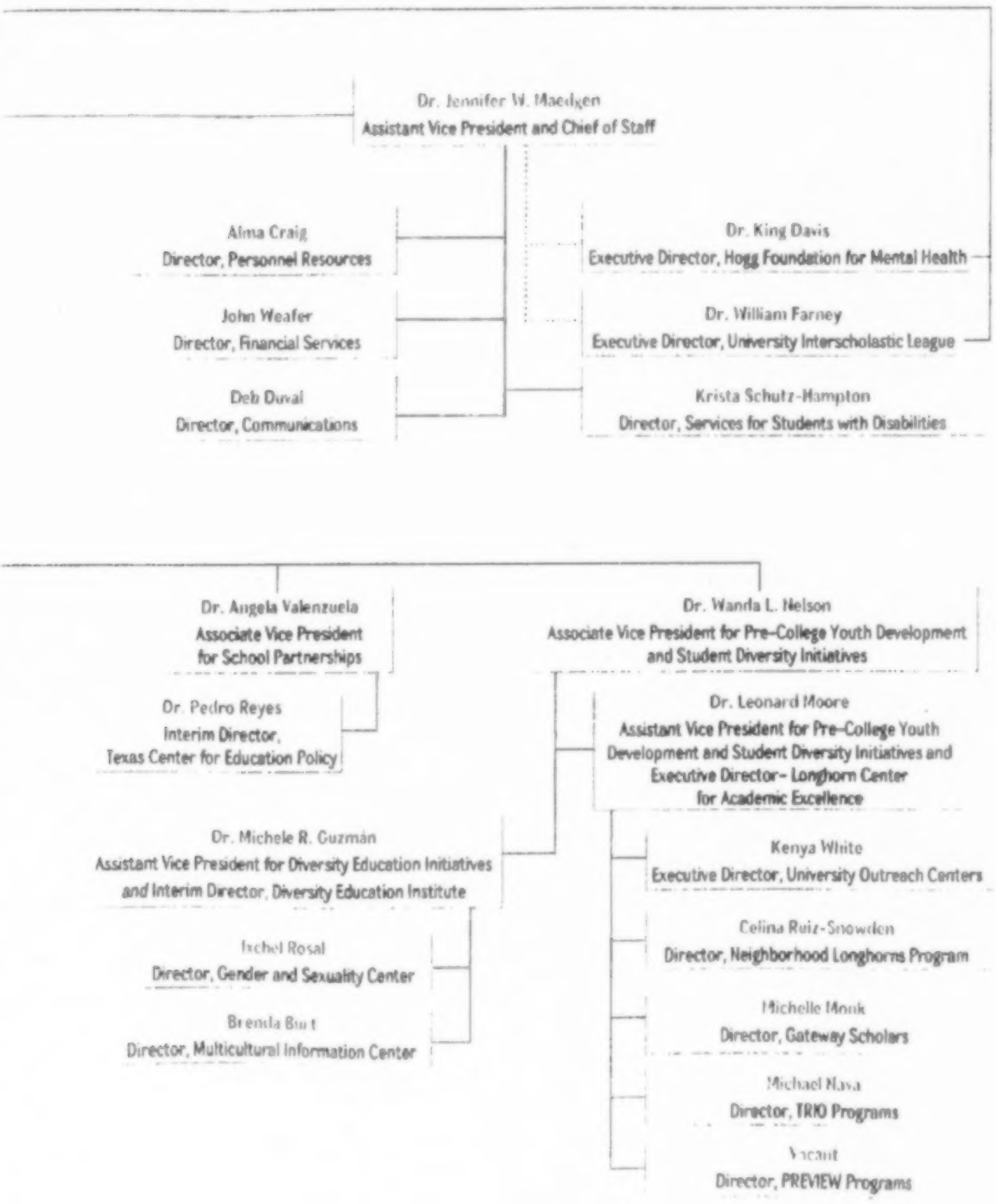
    - Equal Opportunity Services

DIVISION ORGANIZATION



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Director, TRIO Programs

Vacant
Director, PREVIEW Programs

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the University of Texas at Austin's use of race in undergraduate admissions decisions is lawful under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Abigail Noel Fisher.

Respondents are the University of Texas at Austin; David B. Pryor, Executive Vice Chancellor for Academic Affairs in His Official Capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; James R. Huffines, as Member of the Board of Regents in His Official Capacity; Janiece Longoria, as Member of the Board of Regents in Her Official Capacity; Colleen McHugh, as Chair of the Board of Regents in Her Official Capacity; Robert L. Stillwell, as Member of the Board of Regents in His Official Capacity; James D. Dannenbaum, as Member of the Board of Regents in His Official Capacity; Paul Foster, as Member of the Board of Regents in His Official Capacity; Printice L. Gary, as Member of the Board of Regents in His Official Capacity; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; Francisco G. Cigarroa, M.D., Interim Chancellor of the University of Texas System in His Official Capacity.

Plaintiff-Appellant below Rachel Multer Michalewicz is no longer involved in this case.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 631 F.3d 213 and is reproduced in the appendix to the Petition for Certiorari ("App.") at 1a. The order of the United States Court of Appeals denying rehearing en banc and the opinion dissenting from the denial of rehearing en banc are reported at 644 F.3d 301 and are reproduced at App. 172a. The opinion of the United States District Court for the Western District of Texas is reported at 645 F. Supp. 2d 587 and is reproduced at App. 115a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its decision on January 18, 2011. Joint Appendix ("JA") 10a. A timely petition for rehearing en banc was denied on June 17, 2011. JA 14a. This Court granted a timely petition for certiorari on February 21, 2012. JA 15a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend XIV, § 1.

STATEMENT

Petitioner Abigail Fisher, a White female, applied for undergraduate admission to the University of Texas at Austin ("UT") in 2008. Petitioner was not entitled to automatic admission under Texas's Top Ten Percent Law ("Top 10% Law"). She instead competed for admission against other non-Top 10% in-state applicants under a system in which UT expressly considered race in order to increase enrollment of Hispanic and African-American applicants. Although Petitioner's academic credentials exceeded those of many admitted minority candidates, UT denied her application. Having "suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection," *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (quotation omitted), Petitioner filed this lawsuit challenging the constitutionality of UT's use of race in undergraduate admissions decisions. Affirming the district court, the Fifth Circuit rejected that legal challenge and denied en banc review by a vote of 9-7. This Court granted certiorari on February 21, 2012.

A. History Of UT's Admissions Program

UT is a "highly selective university, receiving applications from approximately four times more students each year than it can enroll in its freshman class." App. 119a. Because admission to UT does not guarantee admission to an applicant's preferred program of study, applicants also must compete for admission to their preferred school or major. App. 130a; JA 164a. The role of an applicant's race in this process has changed several times during the past two decades in response to judicial and legislative decisions. App. 14a.

Until 1996, "race was considered directly and was often a controlling factor in admissions" to UT and its programs of study. App. 16a. Admission was based on an applicant's Academic Index ("AI"), which was calculated from high school class rank and standardized test scores, and was then adjusted to assist "underrepresented" minorities. App. 15a. In 1996, the last year that UT employed this system, the enrolled freshman class was 18.6% African-American and Hispanic. App. 122a.

After UT was prohibited from using race in admissions following *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), UT added a new metric—a Personal Achievement Index ("PAI")—to its admissions calculus. The PAI was designed, at least in part, to increase minority enrollment through race-neutral means. App. 17-18a.[1] The PAI is a composite of scores received on two written essays that an applicant must submit and the applicant's "personal achievement score." App. 27a. The "personal achievement score" takes into account several "special circumstances," some of which "disproportionately affect minority candidates," such as "the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household." App. 121a.

Once an applicant's AI and PAI scores are calculated, UT plots them on a grid (AI on the horizontal axis, PAI on the vertical), which it uses to make its admissions decisions. App. 135a. This system, first used for the 1997 entering class, then resulted in an enrolled class that was 15.3% African-American and Hispanic. App. 121a-122a.

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[1] UT also "instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment [and] expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state." App. 122a.

That same year, also in response to *Hopwood*, the Texas legislature enacted the Top 10% Law, requiring UT to admit all Texas high school seniors ranking in the top 10% of their classes. H.B. 588, Tex. Educ. Code § 51.803 (1997). Starting with the incoming class in 1998, UT began implementing the Top 10% Law in conjunction with its extant admissions system. App. 19a. Thus, for in-state applicants who were not in the top 10% of their high school class nothing changed: AI and PAI scores determined admission to UT and to particular programs of study. App. 129a. For other in-state applicants, the Top 10% Law guaranteed admission to UT, but AI and PAI scores still determined whether the applicant would be admitted to a particular program of study. *Id.*[2]

The Top 10% Law had an immediate and positive effect on minority enrollment. App. 19a. UT announced that its 1999 "enrollment levels for African American and Hispanic freshman … returned to those of 1996, the year before the *Hopwood* decision." JA 343a. On top of that, "minority students earned higher grade point averages [in 1999] than in 1996 and ha[d] higher retention rates." *Id.* Thus, UT announced that the Top 10% Law had "enabled [UT] to diversify enrollment … with talented students who succeed." *Id.* Indeed, "[a]n impressive 94.9

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[2] Because of special portfolio, audition, and other requirements, the Top 10% Law does not apply to the School of Architecture, School of Fine Arts, or honors programs. App. 30a. Other programs, such as the School of Business, School of Nursing, School of Engineering, and College of Communications, cap the number of students they admit under the Top 10% Law. App. 130a.

percent of 1998 African American freshmen returned to enroll for their sophomore year in 1999." *Id.* Consequently, UT credited the Top 10% Law for producing "a more representative student body and ... students who perform well academically." *Id.*

This upward trend in minority enrollment continued in the years that followed. In 2003, UT declared that it had "effectively compensated for the loss of affirmative action." JA 346a. That year, UT "brought a higher number of freshman minority students—African Americans, Hispanics and Asian Americans—to the campus than were enrolled in 1996." JA 348a. The percentages continued to increase the next year. In 2004, the freshman class was 21.4% African American and Hispanic, and 17.9% Asian American. App. 20a.

Despite the success of its race-neutral admissions system in increasing minority enrollment, UT promised to restore race as a factor in admissions decisions on the very day that this Court decided *Grutter.* Mere hours after this Court issued its decision, then-UT President Dr. Larry Faulkner announced that UT would "modify its admissions procedures to ... combine the benefits of the Top 10 Percent Law with affirmative action programs that can produce even greater diversity." JA 356a-357a.

B. UT's Proposal To Consider Race In Admissions

Having already announced it would restore race in its admissions system, UT accepted the invitation of its Board of Regents to inquire "whether to consider an applicant's race and ethnicity ... in accordance with the standards enunciated in" *Grutter.* App. 21a. UT produced two studies primarily focused on diversity at the classroom level. The first study "surveyed undergraduates on their impressions of diversity on campus and in the classroom." App. 22a. A majority responded that they "felt there was insufficient minority representation in classrooms for the full benefits of diversity to occur." *Id.* The second study "examined minority representation in undergraduate classes," App. 21a, to determine whether UT had sufficient classroom diversity, which it defined as more than one African-American student, more than one Hispanic student, and more than one Asian-American student, Supplemental Joint Appendix ("SJA") 25a-26a. This study focused on "classes of 'participatory size,' which [UT] defined as between 5 and 24 students," App. 21a, thus requiring, in many cases, a majority of minority students to meet UT's classroom diversity definition. Unsurprisingly, UT found that the majority of small classes did not have "sufficient diversity." SJA 25a.

UT acknowledged that its purported lack of classroom diversity resulted in part from an increase in the number of small classes offered. SJA 70a. UT explained that because, over time, it had added class sections "(from 4,742 in 1996 to 5,631 in 2002)," minority students were "'spread out' in more classes, leaving many sections with little or no representation." *Id.* Indeed, while UT's minority enrollment steadily increased, the number of classes it deemed to have "sufficient diversity" actually decreased. SJA 71a, 73a.

Invoking these studies and "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population," UT proposed to its Regents that race be restored as a factor in undergraduate admissions. SJA 24a. UT asserted that the campus survey, classroom study, and demographic imbalance between its freshman class and the Texas population proved that it had not "achiev[ed] a critical mass of racial diversity." SJA 24a-25a. It further claimed that racial preferences in admissions were needed because its existing race-neutral policies, including the Top 10% Law, while "very useful in producing a student body of strong academic ability," SJA 39a, "failed to improve diversity within the classroom," SJA 25a.

UT's proposal, which the Board of Regents accepted, maintained the same basic admissions criteria, but added race to the list of "special circumstances" that make up an applicant's personal achievement score. JA 432a-433a; SJA 29a. UT claimed that its use of race would be part of an individualized and holistic approach to admissions, which it considered "[t]he major requirement of [*Grutter*]." SJA 15a. UT decided that it would use race to benefit African-American and Hispanic applicants, groups that it considers "underrepresented." SJA 25a. Though there are fewer Asian Americans than Hispanics at UT, UT deems Asian Americans "overrepresented" because UT uses state racial demographics as its baseline for determining which minority groups should benefit from its use of race. In other words, although UT includes Asian Americans as minorities in its diversity statistics, marketing materials, and classroom analysis, it employs race in admissions decisions to the detriment of Asian Americans, thus subjecting them to the same inequality as White applicants. JA 305a.

In restoring race to its admissions system, UT declined to establish a "specific goal ... in terms of the numbers of [underrepresented minority] students" that it would seek to admit. SJA 29a. Nor did UT identify a projected date at which it would cease using race in admissions decisions. SJA 32a. Rather, it stated that it would review its admissions policy "every five years" beginning in Fall 2009 in order "to assess whether consideration of an applicant's race is necessary in order to create a diverse student body, or whether race-neutral alternatives exist that are able to achieve the same results." *Id.*

C. UT's Current Admissions System

UT's current system, which uses race as a factor both for admission and placement, was first employed during the 2005 admissions cycle. While the bulk of UT's in-state admissions (approximately 70% to 80% during the relevant period) are pursuant to the race-neutral Top 10% Law, access to particular programs of study is still determined by AI and PAI scores—with race now part of the PAI scoring. App. 30a-31a. Non-Top 10% law applicants, like Petitioner, are both admitted to UT and to particular programs of study based on their AI and race-affected PAI scores. App. 31a. Hence, race is a factor in admission, placement, or both for every in-state undergraduate applicant. *Id.*[3]

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[3] During the pendency of this litigation, the Texas legislature amended the Top 10% Law to cap the number of mandatory admissions at 75% of UT's overall freshman class. Tex. Educ. Code § 51.803(a-1). However, were a court ruling to prohibit UT from considering race in admissions decisions, the 75% cap on the Top 10% Law would be lifted. *Id.* § 51.803(k)(1).

Each applicant's race appears on the front of the application file and "reviewers are aware of it throughout the evaluation." App. 134a. UT does not record how race affects a specific PAI score or admissions decision, nor can it track or measure the impact that using race has had on enrollment. App. 32a-33a. But UT officials have confirmed that race "can make a difference" in individual admissions decisions. App. 33a.

Notwithstanding UT's failure to measure the impact of using race on its enrollment numbers, App. 104a, it is clear that impact is negligible, SJA 157a. By design, race can be determinative only for in-state underrepresented minority students not admitted under the Top 10% Law, a segment of the class that is dwarfed by the Top 10% enrollees. For example, in 2008, when Petitioner applied, 6,322 in-state students enrolled: 5,114 under the Top 10% Law and 1,208 under the race-affected AI/PAI regime. *Id.* Of the non-Top 10% enrollees, 216 were African American or Hispanic, representing only 3.4% of the enrolled in-state freshman class. *Id.*

Moreover, it is undisputed that many of the 216 non-Top 10% minority enrollees would have been admitted without regard to their race. Some were admitted based solely on high AI scores. App. 103a; JA 410a. Many more would have been admitted under an AI-PAI system unaffected by race. App. 104a. To illustrate, when race was not a factor in the PAI calculus, 15.2% of the non-Top 10% Texas enrollees in 2004 were African American or Hispanic; in 2008, when race was considered, 17.9% were African American or Hispanic. SJA 157a. Thus, even if the entirety of the increase between 2004 and 2008 is attributed to race, it would have been decisive for only

2.7% of the 1,208 non-Top Ten enrollees in 2008—or 33 African-American and Hispanic students combined. *Id.* If so, race would have accounted for 0.5% of the 6,322 in-state freshman class in 2008. In other words, UT's "use of race has had an infinitesimal impact on critical mass in the student body as a whole." App. 107a (Garza, J.).

At the same time, the Top 10% Law has continued to increase minority enrollment at UT. App. 127a. During the ten years from 1998 to 2008, the percentage of African-American and Hispanic students who enrolled in the incoming freshman class at UT increased from 16.2% to 25.5%, with most of the increase attributable to the Top 10% Law. SJA 156a. Indeed, over the same ten-year period, the percentage of African-American and Hispanic students enrolling through the Top 10% Law increased from about 44% to almost 86%. SJA 156a-157a. The trend has continued. As recently as 2010, UT officials credited "changes in the demographics of Texas" for its success in enrolling a majority-minority freshman class.[4] And, UT's President recently announced that "[f]ifty-two percent of our [2010] freshmen are minority students, including 23 percent who are Hispanic, reflecting the changing demographics of the state." 2010-2011 Impact Report at 6.[5] Provost Steven Leslie also noted the success, applauding the fact that "[t]he university's student population is beginning to truly reflect the demographics of the state of Texas." *Id.* at 4.

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[4] *Class of First-Time Freshmen Not a White Majority This Fall Semester at [UT]* (Sept. 14, 2010), *available at* www.utexas.edu/news/2010/09/14/student_enrollment2010/ (last visited May 21, 2012).

[5] *Available at* www.utexas.edu/diversity/pdf/DDCE_ImpactReport.pdf (last visited May 21, 2012).

Nevertheless, UT's reliance on race in admissions shows no signs of stopping. In fact, UT promised that "[a]lthough the university enrolled the most ethnically diverse freshman class in its history during fall 2007 (19.7 percent Hispanic students, 19.7 percent Asian American students and 5.8 percent African-American students) it [would] striv[e] to continue building a diverse student body, faculty and staff that truly reflect Texas and the entire country." SJA 176a. Indeed, in lobbying the legislature to repeal or cap the Top 10% Law, UT argued that it would offset any associated loss in minority enrollment by giving even greater consideration to race in its admissions decisions. JA 359a-360a. And, despite becoming a majority-minority university in 2010, UT continues to use race in admissions decisions to this day.

D. Proceedings Below

1. When Petitioner was denied admission to the entering class of 2008, she filed this action in the United States District Court for the Western District of Texas, challenging UT's use of race in admissions under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964. App. 3a. UT defended its use of race in undergraduate admissions as a narrowly tailored means of pursuing greater diversity, which it deemed essential to its mission as Texas's flagship institute of higher education. App. 144a-147a.

UT argued it had not attained a "critical mass" of "underrepresented" minorities because its percentage of African-American and Hispanic freshmen was below the percentage of African-Americans and Hispanics in the Texas population and because a significant number of its small classes did not have two or more African Americans, Hispanics, and Asian Americans. App. 155a-157a. UT further argued that its use of race was "narrowly tailored" because it had integrated racial classifications into an individualized, holistic admissions process and planned to reconsider its need for racial preferences every five years. App. 161a-167a.

On cross-motions for summary judgment on liability, filed after the case had been bifurcated into liability and remedy phases, JA 32a, the district court found that the admissions system conformed to *Grutter* and granted summary judgment to UT. The district court held that UT's pursuit of demographically proportional African-American and Hispanic enrollment rates was within *Grutter*'s concept of "critical mass" and endorsed UT's reliance on "classroom diversity" statistics. App. 155a-157a. The district court also found UT's admissions system narrowly tailored as properly holistic and subject to periodic review. App. 158a-159a, 167a. The district court concluded that Petitioner could not prevail "as long as *Grutter* remains good law." App. 169a.

2. The Fifth Circuit affirmed. In an opinion written by Judge Higginbotham, it acknowledged that UT's admissions system discriminates between applicants on the basis of race and thus should be subject to strict-scrutiny review. App. 35a. However, the court employed a novel, relaxed standard of judicial review because UT's "educational judgment in developing diversity policies is due deference":

> Rather than second-guess the merits of the University's decision, a task we are ill-equipped to perform, we instead scrutinize

> the University's decision-making process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the University acted in good faith, a presumption Appellants are free to rebut.

App. 35a-36a.

The Fifth Circuit held that its deferential "good faith" standard applied comprehensively, including to the questions of "whether the university has attained critical mass of a racial group" and "whether race-conscious efforts are necessary" to do so. App. 37a. It also concluded that "the narrow tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment." *Id.* Acknowledging that this Court's application of strict scrutiny has been "more restrictive" in cases involving racial preferences in state employment and contracting, the Fifth Circuit determined that such cases have "little purchase" in the context of university admissions decisions. App. 38a-40a.

Applying its deferential "good faith" standard, the Fifth Circuit found that "the efforts of [UT] have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion." App. 34a. It thus concluded that UT's decision to "reintroduce race as a factor in admissions was made in good faith." App. 47a. Consideration of state demographics to decide whether UT had reached "critical mass" was constitutional, the court reasoned, because "attention to the community it serves"—not just to the university experience—is "consonant with the educational goals outlined in *Grutter*."

App. 48a. In the court's view, "[a]lthough a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account." App. 51a. Thus, the court found it proper to measure critical mass by looking to the racial composition of "the surrounding community." App. 50a.

The Fifth Circuit further deferred to "UT's considered, good faith conclusion that the University still has not reached a critical mass." App. 66a. It rejected UT's argument that the state-mandated Top 10% Law is "entirely irrelevant" to the analysis of critical mass, finding that UT could not simply "ignore a part of the [admissions] program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texas freshman." App. 55a. Thus, the court focused on whether it was constitutional for UT to "overlay" its system of racial preferences on "the Top Ten Percent Law" given the law's "substantial effect on aggregate minority enrollment at the University." App. 62a.[6]

Conceding that "UT's claim that it has not yet achieved critical mass is less convincing when viewed against the backdrop of the Top Ten Percent Law," the Fifth Circuit nonetheless held that Petitioner had not rebutted UT's "good faith conclusion" that it lacked a critical mass of African-American and Hispanic students. App. 67a. The court pointed to Hispanic enrollment numbers, which it found "low ... considering the vast increases in the Hispanic population of Texas," and the classroom diversity study, which showed that "minority students remain[ed] clustered in certain programs"—a problem that "will only continue if additional minority representation is not achieved, as the University plans to increase its number of course offerings in future years." App. 56a, 65a-66a. Thus, it held that UT "properly concluded that race-conscious admissions measures would help" it achieve its vision of "critical mass." App. 68a.

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[6] Although Judge Higginbotham was critical of the Top 10% Law, neither Judge King nor Judge Garza joined that aspect of his opinon. Judge King explained that "[n]o party challenged ... the validity or the wisdom of the Top Ten Percent Law." App. 72a.

Finally, the Fifth Circuit rejected the argument that, under *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), UT's use of race was not justified because the existing race-neutral admissions system worked about as well in achieving student-body diversity as the post-*Grutter* race-based admissions program. App. 69a. The court found that "*Parents Involved* does not support the cost-benefit analysis that Appellants seek to invoke" because that decision turned on the "'extreme approach'" used by the school districts in that case. *Id.* (quoting *Parents Involved*, 551 U.S. at 735). The court further reasoned that *Parents Involved* "did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small." *Id.*

3. Judge Garza specially concurred, characterizing the panel's decision as "a faithful, if unfortunate, application of" *Grutter's* erroneous "digression in the course of constitutional law." App. 72a. Judge Garza saw *Grutter* as "abandon[ing] [strict scrutiny] and substitut[ing] in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades." App. 109a. He warned that the court's "decision ratifies the University's

reliance on race at the departmental and classroom levels, and will, in practice, allow for race-based preferences in seeming perpetuity," awaiting a time that "educators can certif[y] that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom." App. 87a. Judge Garza could not "accept that the Fourteenth Amendment permits this level of granularity to justify dividing students along racial lines." *Id.*

Judge Garza was particularly troubled by the fact that UT's decision to classify every applicant by race "has had an infinitesimal impact on critical mass in the student body as a whole." App. 107a. From an applicant pool totaling 29,501 students in 2008, he estimated that the number of enrolled underrepresented minority students ultimately admitted because of race could amount to no more than 1% of the freshman class, or about 55 students. App. 101a, 105a. Judge Garza therefore concluded that UT's use of race has been "completely ineffectual in accomplishing its claimed compelling interest" in filling its classrooms with minority students. App. 106a. Judge Garza could not "find that [UT]'s use of race is narrowly tailored where the University's highly suspect use of race provides no discernible educational impact," but concluded that, post-*Grutter*, "narrow tailoring in the university admissions context is not about balancing constitutional costs and benefits any longer," but is solely about "good faith." App. 108a. He added that, "[l]ike the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles." App. 114a.

4. The Fifth Circuit, by a vote of 9 to 7, denied rehearing en banc. App. 173a. Writing for five of the dissenting judges, Chief Judge Jones lamented that the panel had "extend[ed] *Grutter* in three ways" and, in so doing, "abdicate[d] judicial review of a race-conscious admissions program for undergraduate [UT] students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." App. 174a. In her view, the decision "in effect gives a green light to all public higher institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires." App. 175a.

Chief Judge Jones criticized the panel for deferring to UT both on the necessity of using race as a factor in admissions and on whether UT's use of race was narrowly tailored. As she explained, "*Grutter* does not countenance 'deference' to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications." App. 178a. She found it objectionable that the "panel's 'serious, good-faith consideration' standard distorts narrow tailoring into a rote exercise in judicial deference" and that "*Grutter* nowhere countenances this radical dilution of the narrow tailoring standard." App. 180a.

Chief Judge Jones also found that only "wholesale deference" to UT could result in a conclusion that the admissions system is narrowly tailored as it led to the admission of "no more than a couple hundred out of more than six thousand new students." App. 180a-181a. "Contrary to the panel's exercise of deference, the

Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment." App. 182a (citing *Parents Involved*, 551 U.S. at 734-35). Here, the "additional diversity contribution of the University's race-conscious admissions program is tiny, and far from 'indispensible.'" *Id.* She thus disagreed with the panel's decision "to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." *Id.*

Last, Chief Judge Jones rejected classroom diversity as a constitutional justification for racial preferences. App. 182a-184a. "The panel opinion opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be 'underrepresented.' It offers no stopping point for racial preferences despite the logical absurdity of touting 'diversity' as relevant to every subject taught" at UT and it "offers no ground for serious judicial review of a terminus of the racial preference policy." App. 183a. She found that UT's classroom-diversity rationale is "without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs." App. 184a.

SUMMARY OF ARGUMENT

If any state action should respect racial equality, it is university admission. Selecting those who will benefit from the limited places available at universities has enormous consequences for the future of American students and the perceived fairness of government action. Strict scrutiny thus remains the rule, not the exception, when universities use race as a factor in admissions decisions. Strict scrutiny requires that UT demonstrate both that its use of race in admissions decisions is "necessary to further a compelling government interest" and that "the means chosen to accomplish the government's asserted purpose" are "specifically and narrowly framed to accomplish that purpose." *Grutter*, 539 U.S. at 327, 333. Because UT cannot bear that heavy burden, its use of race in denying admission to Petitioner was unconstitutional.

Neither of UT's justifications for restoring race to its admissions system is a constitutionally compelling state interest. UT's acknowledged goal of using race in admissions to mirror the demographics of Texas is nothing more than "racial balancing, which is patently unconstitutional." *Id.* at 330. UT's goal is not racial diversity to enhance the educational dialogue and exchange of ideas by keeping minority students from feeling "isolated or like spokespersons for their race." *Id.* at 319. Instead, it is purely representational. It is only by using Texas's racial demographics as the benchmark for diversity that UT could consider Hispanics underrepresented and Asian Americans overrepresented when "the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT." App. 154a. UT simply is not pursuing the educationally-based diversity interest that *Grutter* deemed to be compelling.

UT's asserted interest in classroom diversity also is not a compelling interest. The proper base for measuring "critical mass" is the "student body," not the classroom. *Grutter*, 539 U.S. at 325. As noted above, the point of *Grutter* was to permit universities to create a "critical mass" of minority students on the campus to foster exchange of ideas and experiences. But *Grutter* nowhere suggests that every classroom must have a "critical mass" of minority students. Endorsing the classroom as the new benchmark for critical mass would promote the use of race in perpetuity. The Court should not acknowledge an interest that would justify racial engineering at every stage of the university experience "until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom." App. 87a (Garza, J.)

Because UT is not using racial classifications to pursue a compelling state interest, that should be the end of the matter. In any event, UT has not provided a "strong basis in evidence," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 276, 277 (1986), that its use of race is "necessary" to enroll any "critical mass" of minority students, *Grutter*, 539 U.S. at 327. UT has not even attempted to articulate an educational concept of critical mass. Even if it had, UT could not have set forth a strong factual basis that the university was not already enrolling that critical mass of minority students. As UT's own public statements show, largely because of the Top 10% Law, UT was one of the most diverse public universities in the nation prior to its 2004 restoration of race into its admissions system. UT should not be permitted to employ "gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." App. 182a (Jones, C.J.).

But even assuming UT was pursuing a compelling interest and had produced strong evidence that it was necessary to use race in admissions to meet that interest, neither of which is the case, its system of racial preferences still is not narrowly tailored. Foremost, the "minimal effect" of UT's admission plan is antithetical to narrow tailoring. *Parents Involved*, 551 U.S. at 733. UT "was able to obtain approximately 96% of the African-American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means." App. 107a (Garza, J.). The limited results of UT's racial preferences shows that race-neutral "means would be effective" and thus "casts doubt on the necessity of using racial classifications." *Parents Involved*, 551 U.S. at 733-34. UT has subjected tens of thousands of applicants to "disparate treatment based solely on the color of their skin," *id.* at 734, even though it "has had an infinitesimal impact on critical mass in the student body as a whole," App. 107a (Garza, J.), and even though existing race-neutral measures were working "about as well," *Wygant*, 476 U.S. at 280 n.6.

UT's use of race in admissions also lacks narrow tailoring in several other respects. Among them, UT's admissions system could never achieve "classroom diversity" through constitutional means. UT has set the bar for classroom diversity so high that it considers data showing that 63% of its classes with 10 to 24 students included 2 or more Hispanic students to be insufficient evidence of critical mass in the classroom. App. 22a. The only way UT could even approach the level of classroom diversity it desires would be to institute a fixed curriculum, make each student's race a dominant criterion in the selection of a major, or make race so dominant an admissions factor that there would be no way for every small classroom not to include several minority students. UT has shown no interest in the first option and the second two are plainly unconstitutional. App. 87a (Garza, J.); App. 183a (Jones, C.J.). Accordingly, no "means" available to UT could be narrowly tailored to the "end" of classroom diversity. UT likewise could never pursue a demographic representational goal through constitutional means because such a goal would necessarily involve different targets for each minority group and thus degenerate into multiple minority-group quotas.

In addition, even assuming that UT were pursuing the type of educational interest endorsed in *Grutter*, UT's classification of Hispanics as an "underrepresented minority" shows that UT's use of race is more expansive than necessary to meet any legitimate "critical mass" goal. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989). Given the high rates of Hispanic enrollment at UT and its noted success in graduating Hispanic students, it cannot reasonably be concluded, and UT could not establish, that Hispanic students are isolated on its campus, unable to offer their perspectives, or mere "spokespersons for their race." *Grutter*, 539 U.S. at 319.

The Fifth Circuit avoided these massive constitutional problems by substituting a good-faith, process-oriented review standard for the strict scrutiny constitutionally required when racial preferences foist unequal treatment on non-preferred applicants. Whether or not UT acted in "good faith," it must bear the burden of demonstrating that its use of race is necessary to further a compelling interest and that its means of pursuing that interest were narrowly tailored. Neither *Grutter* nor any other decision condones unlimited deference to university administrators. *Grutter* affords universities a measure of deference in claiming an unsatisfied educational interest in student-body diversity. But *Grutter* explicitly excluded racial balancing from that interest and afforded no deference on whether racial preference is necessary to further a diversity goal or on the means by which diversity is pursued. Under *Grutter*, UT may be entitled to deference on its "decision that it has a compelling interest in achieving racial and other student diversity. But that is about as far as deference should go." App. 178a (Jones, C.J.).

Indeed, even if UT were entitled to more deference than *Grutter* suggests, the Fifth Circuit erred by "distort[ing] narrow tailoring into a rote exercise in judicial deference." App. 180a (Jones, C.J.). If anything is clear, an individual suffering discrimination should not shoulder the heavy burden of proving that the government's use of race is *not* narrowly tailored. "[T]he government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests." *Johnson v. California*, 543 U.S. 499, 505 (2005). Once deference applies to narrow tailoring, strict scrutiny becomes "total deference to University administrators," App. 178a (Jones, C.J.), so long as they have articulated a rational basis for the use of race. There is no authority supporting deference to UT's subjective judgment that its use of race in admissions is narrowly tailored.

If the Fifth Circuit's reading of *Grutter* is permissible, however, that decision should be clarified or reconsidered to restore the integrity of the Fourteenth Amendment's guarantee of equal protection. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231-35 (1995). The strict scrutiny label is meaningless if its "review ... is nothing short of perfunctory [and] accepts [a university's] assurances that its admissions process meets with constitutional requirements." *Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting). In fact, "[i]f strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the

Court lacks authority to approve the use of race even in [a] modest, limited way." *Id.* at 387 (Kennedy, J., dissenting). Accordingly, if the choice is between affirming the Fifth Circuit or correcting *Grutter* to the extent that decision effectively abandons strict scrutiny, the Constitution requires the latter.

ARGUMENT

I. UT's Use Of Race In Admissions Decisions Violates The Equal Protection Clause.

In applying for undergraduate admission to UT, Petitioner was handicapped by her race in derogation of the "central mandate" of equal protection: "racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Regardless of the race of those "burdened or benefited by a particular classification," any government classification based on race is subject to "the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224. To survive strict-scrutiny review, a racial classification must be "'necessary to further a compelling governmental interest'" and must be "narrowly tailored to that end." *Johnson*, 543 U.S. at 514 (quoting *Grutter*, 539 U.S. at 539). For the reasons set forth below, UT's use of race in admissions fails strict scrutiny.

A. UT's Use Of Race In Admissions Decisions Is Subject To Strict Scrutiny.

It is indisputable that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227; *Parents Involved*, 551

U.S. at 741; *Johnson*, 543 U.S. at 505; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Grutter*, 539 U.S. at 326. Strict scrutiny requires a "detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed," as race is "a group classification long recognized as in most circumstances irrelevant and therefore prohibited." *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in judgment) ("[A]ny racial preference must face the most rigorous scrutiny by the courts."). Strict scrutiny imposes a heavy burden on any government using the "highly suspect tool" of race, *Grutter*, 539 U.S. at 326, and judicial "scrutiny" of racial classifications is "no less strict" in the educational setting, *id.* at 328; *see also Parents Involved*, 551 U.S. at 741-42; *Gratz*, 539 U.S. at 270; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-91 (1978) (Powell, J.).

Strict scrutiny requires a "detailed examination, both as to ends and as to means." *Adarand*, 515 U.S. at 236. First, the end must be compelling—not merely legitimate or important—because racial classifications are "inherently suspect." *Bakke*, 438 U.S. at 291 (Powell, J.). Second, the state must have a "strong basis in evidence" that a racial classification is "necessary" to further the compelling end because "the mere recitation of a benign or legitimate purpose" is not "an automatic shield which protects against any inquiry" into the necessity of race-based action. *Croson*, 488 U.S. at 495, 500 (citations and quotations omitted). Last, "the means chosen" must "fit" the unmet compelling interest "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.* at 493 (citations and quotations omitted); *see also Grutter*, 539

U.S. at 342 ("[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."). Strict scrutiny "forbids the use even of narrowly drawn racial classifications except as a last resort." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment).

B. UT's Use Of Race In Admissions Decisions Fails Strict Scrutiny.

1. UT's asserted interest in using race in admissions decisions is not compelling.

Although "government may treat people differently because of their race only for the most compelling reasons," *Adarand*, 515 U.S. at 227, this Court has held that universities have "a compelling interest in obtaining the educational benefits that flow from a diverse student body," *Grutter*, 539 U.S. at 343. *Grutter* thus permits race to be used as a factor in admissions decisions to obtain a "critical mass" of otherwise underrepresented minority students for educational reasons. *Id* at 333. As the Court explained, "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id.* at 330. Accordingly, a university's "interest is not simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Id.* at 330. *Grutter* instead endorses an inward-facing concept of diversity focused on enhancing the university experience—not an outward-facing concept of diversity focused on achieving a level of minority enrollment that is in proportion to the general population.

Neither of UT's asserted interests falls within the educational interest in student-body diversity endorsed in *Grutter*. UT first asserts a need to use race in admissions to bring UT's student-body demographics in line with the racial demographics of the state. App. 47a-51a. In UT's view, "significant differences between the racial and ethnic makeup of [its] undergraduate population and the state's population prevent the University from fully achieving its mission." App. 23a. But UT has produced "no evidence that the level of racial diversity necessary to achieve the asserted educational benefits [of diversity] happens to coincide with the racial demographics" of Texas. *Parents Involved*, 551 U.S. at 727. "This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under ... existing precedent." *Id.* at 729.

UT thus has not shown that it is seeking increased racial diversity in order to enhance the educational value of campus exchanges by keeping minority students from feeling "isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. Instead, UT's goal is "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Id.* at 329. That UT's targets are demographic rather than purely arbitrary does not save its decision to classify each applicant by race—it confirms the decision's unconstitutionality. UT's demographic proportionality objective is nothing more than "outright racial balancing," which this Court has held "patently unconstitutional." *Id.* at 330. "[P]roportional representation" can never be a constitutional "rationale for programs of preferential treatment." *Id.* at 343.

UT's differing treatment of Asian Americans and other minorities based on each group's proportion of Texas's population illustrates why demographic balancing is constitutionally illegitimate. *See Parents Involved*, 551 U.S. at 731 ("The validity of our concern that racial balancing has no logical stopping point is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics."). As noted above, UT gives no admissions preference to Asian Americans even though "the gross number of Hispanic students attending UT "exceeds the gross number of Asian-American students attending UT." App. 154a. This differing treatment of racial minorities based solely on demographics provides clear evidence that UT's conception of critical mass is not tethered to the "educational benefits of a diverse student body." *Grutter*, 539 U.S. at 333. UT has not (and indeed cannot) offer any coherent explanation for why fewer Asian Americans than Hispanics are needed to achieve the educational benefits of diversity.[7]

The Fifth Circuit attempted to salvage UT's reliance on demographics by suggesting that it merely represented "measured attention to the community [UT] serves" in order to "send[] a message" to that community "that people of all stripes can succeed at UT" and graduate as part of "an infrastructure of leaders in an increasingly pluralistic society." App. 48a, 50a, 51a. But this Court has always rejected the use of race to advance the general welfare of society. *Croson*, 488 U.S. at 499-50; *Wygant*, 476 U.S. at 276; *Bakke*, 438 U.S. at 288-89 (Powell, J.). A generalized societal interest has "no logical stopping point" and is far "too amorphous a basis for imposing a racially classified remedy." *Wygant*, 476 U.S. at 276; *see also Croson*, 488 U.S. at 499-50.

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[7] Recognizing representational diversity as a compelling state interest might allow universities in racially homogenous states to employ race to the detriment of qualified minority applicants in order to maintain a student body that mirrors the state population. Indeed, that is precisely the problem facing Asian-American students in Texas, as they are "over-represented" demographically but highly qualified academically.

Aside from demographic proportionality, the only other interest UT asserts is the need for greater classroom diversity. App. 23a. "Although the aggregate number of underrepresented minorities may be large," UT argues that it must use race in admissions because its student-body diversity is not "translating into adequate diversity in the classroom." App. 68a. But ensuring diversity in every small classroom goes far beyond the interest endorsed as compelling in *Grutter*.

This Court could not have been clearer that critical mass should be measured against the enrolled "student body" and not the number of minority students in each individual class. The Court framed the "question" in *Grutter* as whether it should "recognize, in the context of higher education, a compelling state interest in student body diversity." *Grutter*, 539 U.S. at 328; *see also id.* at 380 (Rehnquist, C.J., dissenting) (explaining that "'critical mass' relates to the size of the student body"). Indeed, the majority repeatedly referenced "student body" diversity as the relevant interest throughout its opinion. *See id.* at 318, 325, 328, 329, 343.

Under *Grutter*, one educational benefit possibly attributable to student-body diversity may be additional participation of underrepresented minority students "in the classroom." *Id.* at 318. But each asserted consequence of overall student-body diversity is not itself a compelling interest or a legal benchmark for critical mass. *Grutter* instead recognized that the overall comfort of a racially diverse campus should encourage increased minority participation in all educational settings—whether large or small, curricular or extra-curricular—because minority students will "not feel isolated" on campus or like "spokespersons for their race." *Id.* at 318-19. *Grutter* did not even suggest—let alone hold—that a university has a compelling interest in using race in admissions until every small class has some minimum number of minority students.

Indeed, the *Grutter* Court hesitated before even recognizing student-body diversity as a compelling government interest because of the "serious problems of justice connected with the idea of preference itself." *Id.* at 341 (citation and quotations omitted); *see also id.* at 388 (Kennedy, J., dissenting) ("Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."). Given these concerns, it is untenable to read the decision to allow UT administrators to go several steps further and employ racial classifications not only at the admissions stage but also in major and course selection. The Court should resist UT's effort to break constitutional ground and create an unprecedented classroom-diversity interest. Classroom diversity has no foundation in this Court's decisions and could never be implemented in a narrowly tailored way. *See infra* at 43-44.

2. UT cannot establish a strong basis in evidence that its use of race is necessary to further a compelling interest in student-body diversity.

a. Requiring UT to establish a strong basis in evidence is essential to strict-scrutiny review in the educational setting.

UT also must demonstrate that its use of race in admissions is "necessary to further" an unmet compelling government interest. *Adarand*, 515 U.S. at 237. This demonstration of necessity requires a "strong basis in evidence." *Wygant*, 476 U.S. at 277; *Croson*, 488 U.S. at 500; *Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting) ("Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, *when supported by empirical evidence.*") (emphasis added).[8] UT thus needed a strong factual basis that the student body did not already include the "meaningful number" of minority students needed to meet an educational goal in student-body diversity before restoring race into its admissions system. *Grutter*, 539 U.S. at 318.

The Fifth Circuit refused to hold UT to a strong-basis-in-evidence obligation. App. 38a-42a. In the court's view, "[t]he high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration." App. 40a. The court added that "*Wygant* and *Croson* both involved explicit quotas; in *Ricci*, the Court was concerned that the city's use of race threatened to devolve into a *de facto* quota." *Id.*

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[8] The Court also has applied the strong-basis-in-evidence standard to resolve equal-protection challenges to aspects of Title VII, *see Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 2675-81 (2009), and the Voting Rights Act, *see, e.g.*, *Bush v. Vera*, 517 U.S. 952, 977-82 (1996); *Shaw v. Hunt*, 517 U.S. 899, 908-15 (1996); *Shaw v. Reno*, 509 U.S. 630, 656-58 (1993).

The Fifth Circuit's cursory attempt to distinguish this Court's precedent is fatally flawed. In the educational setting, the Court has expressly relied on decisions such as *Wygant*, *Croson*, and *Adarand* for its analytical framework. *See, e.g.*, *Grutter*, 539 U.S. at 326-34; *Parents Involved*, 551 U.S. at 729-32; *Gratz*, 539 U.S. at 270. Although the particular attributes of any race-based program may bear on whether it is narrowly tailored, *compare Grutter*, 539 U.S. at 334-43, *with Gratz*, 539 U.S. at 270-75, they do not bear on the question whether it is "necessary" to invoke racial preferences in the first place. Ignoring these bedrock equal-protection decisions "fails to apply the avowed continuity in the principle of the Court's decisions." App. 180a (Jones, C.J.). In the context of university admissions, as in other settings, the government must prove that race-based measures are necessary before they can be used.

This case illustrates why the "strong basis in evidence" standard is essential to strict-scrutiny review. The Fifth Circuit accepted on faith UT's assertion that pervasive racial admissions preferences were needed on a campus that has already reached award-winning levels of diversity. Yet to meet strict scrutiny, a university must "define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510. Without precision in identifying the critical problem that the race-based measure will address, there will be "no logical stopping point" for the disfavored use of race. *Id.* at 498 (quoting *Wygant*, 476 U.S. at 275). In other words, if UT may sustain a race-based preference through its own opinion of necessity, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Id.* at 504. "[C]lassifications based on race are potentially so harmful to the entire body politic" that "the reasons for any such classification [must] be clearly identified and unquestionably legitimate." *Id.* at 505 (citations and quotations omitted). Subjective assessments of need, like those advanced by UT and accepted by the Fifth Circuit, are not enough.

Finally, the strong basis in evidence standard "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Id.* at 510. If government cannot marshal a strong evidentiary basis for disparate treatment of its citizens because of their race, there is a very real "danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics." *Id.* Strict scrutiny "smoke[s] out" just such "illegitimate uses of race." *Id.* at 493. In other words, demanding a strong factual basis before allowing race-based governmental action ensures that "[s]trict scrutiny remains … strict." *Bush v. Vera*, 517 U.S. 952, 978 (1996).

b. UT cannot meet the strong basis in evidence standard.

For several reasons, UT cannot come close to meeting its evidentiary burden of proving that racial classifications were needed to meet an educational interest in student body diversity. Foremost, UT announced its intention to reintroduce race into admissions before it gathered any factual evidence. In fact, UT announced its decision on the very same day that this Court issued *Grutter*. *See supra* at 5. For this reason alone, UT has failed to provide a strong evidentiary foundation for its conclusion that minority enrollment fell short of "critical mass."

Even if the Court were to allow UT to rely on its later-conducted study, however, the university still "has made no effort to define a percentage of its student body that must be filled by underrepresented minorities in order to achieve critical mass." App. 148a; JA 265a. UT never even purported to study the level of minority enrollment needed to enhance campus dialogue, interracial understanding, graduation rate, or any other educational benchmark for critical mass. And, although it promised periodic review, any such review could only measure minority admission levels against demographics and classroom diversity levels. Without an educationally based target for "critical mass," UT has left its use of race unbounded—it can neither tailor its means to fit a compelling end, nor accumulate evidence to support the necessity of using race in admission decisions to reach that end, nor meaningfully measure its progress in any periodic review it might conduct.

Moreover, even if UT had shown an interest in pursuing educationally-based "critical mass," it still lacked a strong basis in evidence that using race in admissions was necessary to meet that goal. In *Grutter*, the Court found that it was necessary for the University of Michigan Law School ("UMLS") to use race in admissions to boost minority enrollment from 4% to 14%. 539 U.S. at 320. By contrast, the record here establishes that UT's pre-*Grutter* admissions system was generating substantial and growing levels of Hispanic and African-American enrollment. In 2004, the last year in which UT used that system, African-American (4.5%) and Hispanic (16.9%) students were 21.4% of the incoming freshman class. App. 20a. By the time Petitioner applied, their enrollment levels were even higher, thus eliminating any possible need to continue using race during her admissions cycle. The year prior, the combined percentage of Hispanic and African-American enrollees had risen to 25.5%, with racial preferences having only a negligible effect on this figure. *See infra* at 38-42. Including Asian-American minority students, UT's minority enrollment was well over 40% before Petitioner applied to UT. *See supra* at 11.

With the Top 10% Law in operation then, UT was one of the most diverse public universities in the nation both when it restored race to its admissions system in 2004 and later used race to deny Petitioner admission in 2008. Neither *Grutter* nor any of this Court's other decisions authorizes "gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." App. 182a (Jones, C.J.).[9]

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[9] Importantly, unlike in *Grutter*, Petitioners are not attempting to force a percentage plan upon Respondents. *See* 539 U.S. at 340. Here, the Texas legislature had already made the policy choice to adopt the Top 10% Law. Thus, "[i]n evaluating the constitutionality of an admissions program, [a court] cannot ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texas freshman." App. 55a.

UT's own public statements suggest that UT knew that it had already achieved educational critical mass as early as 2000 and certainly no later than 2003. In 2000, while proclaiming the success of the Top 10% Law, UT reported that its race-neutral program had restored minority enrollment levels "to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies." JA 343a. UT also announced that its program was enrolling minority students that performed better than ever before, and applauded the Top 10% Law for "helping to create a more representative student body and enroll students who perform well academically." *Id.* In 2003, UT proudly announced that it had "effectively compensated for the loss of affirmative action." JA 346a. UT thus had every reason to avoid identifying, or attempting to support with evidence, some educationally related point or even a general range within which it would conclude that it had enrolled a "critical mass" of minority students.

At bottom, UT's use of race in admissions is flawed in all the ways that the strong–basis–in–evidence standard is designed to root out as hallmarks of an unconstitutional program. UT asks this Court to take it at its word that it will cease using race in admissions at some unspecified time in the future when it achieves some unspecified critical mass. JA 265a. That explanation falls far short of the precision needed to assure that the use of race has a logical stopping point. Accepting these assurances in the absence of an evidentiary foundation is all the more problematic given, as UT publicly acknowledged, that its preexisting race-neutral system was enrolling a large group of minority students. In the absence of any evidentiary basis for UT's decision to restore race to its admissions system, let alone a strong one, there is no way for the Court to dispel the concern that the decision to racially classify every applicant for admission is "the product of unthinking stereotypes or a form of racial politics." *Croson*, 488 U.S. at 510.

3. UT's use of race in admissions decisions is not narrowly tailored.

To survive strict scrutiny, UT's use of race in admissions also must be narrowly tailored. *See Grutter*, 539 U.S. at 333 ("Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still constrained in how it may pursue that end.") (citation and quotations omitted). Strict scrutiny requires that "the means chosen to accomplish the [government's] asserted purpose ... be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal quotation marks and citation omitted).

UT attempts to short-circuit the narrow tailoring requirement by arguing that race is only a "factor of a factor of a factor of a factor" in admissions decisions for a limited group of non-10 Top 10% Law in-state applicants. App. 159a-160a. In UT's view, so long as consideration of an applicant's race is a small part of a larger so-called holistic review process, its use of race in admissions is narrowly tailored. *See id.* As noted above, UT's narrow tailoring justification is fatally flawed *ab initio* as it is not "tailored" to meet any legitimate compelling educational interest. *See supra* at 26-30.

As explained below, even leaving aside the absence of any constitutionally valid interest to which UT's use of race could be tailored, it is not narrowly tailored for additional reasons. Given the success of UT's prior race-neutral admissions system in increasing minority enrollment, primarily through the Top 10% Law, and the minimal contribution racial preferences make to student body diversity, there can be no question that "a nonracial approach ... could promote the substantial interest about as well and at tolerable administrative expense." *Wygant*, 476 U.S. at 280 n.6. Additionally, even if increased classroom diversity or demographic representation were a sufficient basis for using race, neither could possibly be implemented in a narrowly tailored way. Finally, UT's treatment of Hispanics as "underrepresented" renders its use of race overinclusive because the high level of Hispanic enrollment at UT demonstrate that Hispanic students are not underrepresented on campus in any educational sense.

a. That UT's use of race is generating only minimal additional minority enrollment demonstrates that race-neutral means would have worked about as well.

Among other things, narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. And where racial classifications have only a "minimal impact" in pursuing a compelling interest, it "casts doubt on the necessity of using racial classifications" in the first instance and demonstrates that race-neutral alternatives would have worked about as well. *Parents Involved*, 551 U.S. at 734; *see also id.* at 790 (Kennedy, J., concurring).

That is precisely the case here. UT is unable to identify any students who were "ultimately offered admission due to their race who would not have otherwise been offered admission." App. 33a. Its admissions statistics confirm that its decision to classify each of the tens of thousands of applicants by race has "had an infinitesimal impact on critical mass in the student body as a whole." App. 107a (Garza, J.). This "infinitesimal impact" demonstrates that the continued use of UT's pre-2005 race-neutral admissions system would have worked "about as well." *Wygant*, 476 U.S. at 280 n.6.

In 2008, for example, after classifying 29,501 applicants by race, UT enrolled 216 African-American and Hispanic students through use of the race-affected AI/PAI analysis. App. 101a-103a. Even assuming that race was a decisive factor for each student admitted outside the operation of the Top 10% Law, UT's use of race still could only have added, at most, 58 African-American and 158 Hispanic students to an in-state class of 6,322. On a campus as large as UT's, with significant student-body diversity already in place, it strains credulity to conclude that the addition of students representing "0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman class" made a constitutionally meaningful impact on student body diversity. App. 104a (Garza, J.).

However, the applicant's race was not decisive for many of the 216 "underrepresented" minority students. Some of the students were admitted based solely on their high AI scores, and others would have been admitted irrespective of race. App. 103a-104a. As a comparison, in 2004, when race was not a factor in admissions, 15.2% of non-Top 10% Texas enrollees were African American or Hispanic; in 2008, 17.9% of all enrollees were African American or Hispanic. SJA 157a. It stands to reason that at least the same percentage of "underrepresented" minority students would have been admitted in 2008 as were admitted in 2004 on a race-neutral basis. If so, race could only have determined the admission of the 2.7% difference between the two years—or 33 additional students. Classifying every applicant by race in order to add only 33 students, representing 0.5% of an enrolled in-state class of 6,322, where the class already has a nearly 40% minority enrollment rate, is the type of gratuitous racial preference that narrow tailoring forbids.

"[T]he necessity of using racial classifications" is doubtful when racial classifications have a "minimal impact ... on school enrollment." *Parents Involved*, 551 U.S. at 734. Small gains suggest that UT "could have achieved [its] stated ends through [nonracial] means." *Id.* at 790 (Kennedy, J., concurring). That is not speculation in this instance. As explained above, UT's prior race-neutral plan, including the reliably high level of minority enrollment produced by the Top 10% Law, already has, in fact, resulted in an "ever-increasing number of minorities gaining admission" to UT. App. 2a (Jones, C.J.).

Narrow tailoring clearly prevents UT from using the "extreme measure" of racial classifications to obtain trivial gains in minority enrollment, especially in light of the meaningful impact of existing race-neutral measures on UT's student-body diversity. *Parents Involved*, 551 U.S. at 728. Of course, it is not that "greater use of race would be preferable." *Id.* at 734. Rather, narrow tailoring recognizes that racial preferences, which "are by their very nature odious to a free people," *id.* at 746 (quoting *Adarand*, 505 U.S. at 214), cannot be deployed unless their benefits far outweigh their heavy cost, *id.* at 735. In

Parents Involved, therefore, the Court squarely rejected the use of race where, as here, it operated in "subtle and indirect ways" and benefited only a "small number" of students. *Id.* at 733-34. Racial preferences at UMLS, in contrast, were "indispensable in more than tripling minority representation at the law school—from 4 to 14.5 percent." *Id.* at 734-35 (citing *Grutter*, 539 U.S. at 320).

Thus, contrary to the Fifth Circuit's conclusion, the constitutionally significant difference between the use of race in *Grutter* and *Parents Involved* was not the ages of students affected or the types of "racial categories" employed. App. 69a-70a. The critical difference was the necessity and effectiveness of the program. Unlike in *Grutter*, where the Court concluded that the benefits of achieving "critical mass" warranted the heavy cost of using racial classifications, the Court concluded in *Parents Involved* that a minimal increase in diversity simply could not "justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis." 551 U.S. at 745.

Thus, contrary to the Fifth Circuit's assertion, App. 69a-70a, a reviewing court cannot myopically credit "small gains" in minority enrollment without comparing those alleged benefits to the "undeniable" costs that the use of race imposes at all levels of education. *Parents Involved*, 551 U.S. at 745. As this Court has repeatedly recognized, "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Id.* at 746 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). Racial classifications "carry a danger of stigmatic harm" and may "promote notions of racial inferiority." *Croson*, 488 U.S. at 493. Because a racial preference "inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race," they can inflict the most harm on their "supposed beneficiaries." *Adarand*, 515 U.S. at 229 (citations omitted).

Here, UT's use of race in admissions "exacts a cost disproportionate to its benefit." App. 105a (Garza, J.). UT has not attempted to quantify any tangible benefit from its pervasive racial classifications and, even if it had, it would be minimal at best. UT thus has failed to establish any benefit from its use of racial classifications that could justify reliance on this "highly suspect tool." *Grutter*, 539 U.S. at 326. In order to enroll a few additional "underrepresented" minority students each year, UT makes the educational future of all its students depend, in part, on "irrelevant factors [such] as a human being's race," *Croson*, 488 U.S. at 495, and places an unwarranted badge of inferiority on the thousands of Hispanic and African-American applicants who are admitted to UT each year based on merit and achievement. In sum, UT cannot satisfy its "burden of proving [its] marginal changes ... outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin." *Parents Involved*, 551 U.S. at 734.[10]

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[10] Even were UT able to demonstrate a compelling educational interest in increasing the number of African-American and Hispanic enrollments by a few dozen students in 2008, UT failed to consider readily available alternatives to reach that goal. *See Grutter*, 539 U.S. at 339. First, of the 2,800 African-American and Hispanic students admitted under the Top 10% Law, 1,331 of them chose not to enroll at UT. By intensifying its

b. UT's claimed interest in classroom diversity could never be implemented in a narrowly tailored way.

Even if UT has a compelling interest in classroom diversity, which it does not, *see supra* at 29-30, UT has no plan to achieve it within the constraints imposed by the narrow tailoring requirement. UT's definition of classroom diversity—a classroom with at least two African-American, two Hispanic and two Asian American students—is virtually guaranteed never to be satisfied. Attainment is literally impossible in classes of five and UT disclaims satisfaction in the 63% of classes with two or more Hispanic students. *See* App. 22a. Moreover, the results of UT's study indicate that "classroom diversity" is more lacking for Asian Americans than for Hispanics. *Id.* But UT's use of race in admissions discriminates against Asian Americans and, if anything, exacerbates the classroom diversity problem. *See supra* at 28. Such a system is not narrowly tailored to resolve any alleged classroom diversity deficiency. Realistically, UT has created a classroom diversity metric that will function as an endless justification for using racial preference in admissions.

For the same reason, UT's pursuit of classroom diversity lacks a meaningful termination point. "[R]eliance on race at the departmental and classroom levels ... will,

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outreach to this already-admitted group, UT would have easily matched the effect of its use of race even if it increased its yield rate among this group by only 1 or 2%. Moreover, allowing the Top 10% Law to achieve its full potential, *see supra* at 8 n.3, would increase minority enrollment as much or more than the use of racial classifications in admissions decisions.

in practice, allow for race-based preferences in seeming perpetuity." App. 87a (Garza, J.). As Chief Judge Jones queried, "Will the University accept this 'goal' as carte blanche to add minorities until a 'critical mass' chooses nuclear physics as a major?" App. 183a. "If this is so, a university's asserted interest in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom." App. 87a. (Garza, J.). Given these concerns, the Court should not break new ground and recognize a compelling government interest in classroom diversity. *See supra* at 29-30. Nor should it find that classroom diversity levels are an appropriate measuring stick for a university's attainment of "critical mass."

As UT's experience demonstrates, a university can have a sizable minority enrollment but, due to factors outside the control of the admissions office, still have many individual classes with fewer minority students than it desires. But if UT seriously attempted to produce classroom diversity, it would need to either (1) institute a fixed curriculum to ensure that each classroom mirrored the racial makeup of the overall class, (2) require some students to enroll (or prevent others from enrolling) in specific schools or majors, or (3) make race so dominant in admissions decisions that it floods the system with enough minority students to solve the problem. UT has not expressed any interest in the first option and the other two are patently unconstitutional. Accordingly, there are no "means" available to UT that can be narrowly tailored to the "end" of classroom diversity.

c. UT's claimed interest in demographic representation could never be implemented in a narrowly tailored way.

Even if UT has a compelling interest in proportional a representation based on Texas demographics, which it does not, *see supra* at 27-29, such a goal could not possibly be implemented in a narrowly tailored way. Pursuing a representational interest would necessarily involve setting different enrollment targets for each minority group (presumably commensurate with their respective pro rata shares of the state population) and thus inevitably lead to discrimination between and among the various minority groups, including those minority groups already receiving an admissions preference. Indeed, even the process of creating each minority "group" category and then determining which one a particular applicant belongs to for purposes of granting an admission preference to some minorities but not others is itself problematic. App. 175a (Jones, C.J.) ("Texas today is increasingly diverse in ways that transcend the crude White/Black/Hispanic calculus that is the measure of the University's race conscious admissions program.").

In any event, among the problems with pitting one minority group against another is that "preferring black to Hispanic applicants, for instance, does nothing to further the interest" in student-body diversity. *Grutter*, 539 U.S. at 375 (Thomas, J., concurring in part and dissenting in part). By focusing on "underrepresented minority students" as a group, 539 U.S. at 316, 318, 319, 320, 335, 336, 338, 341, and defining critical mass in terms of "underrepresented minorities," *id.* at 333, the Court was ensuring that a university would not be allowed to discriminate in admissions between "similarly situated" ethnic or racial groups, *id.* at 374-75 (Thomas, J., concurring in part and dissenting in part). ("[T]he Law School maintains that it does not ... discriminat[e] among the groups the Law School prefers.")

This is precisely the situation that exists here. There are slightly more Hispanic students than Asian-American students enrolled at UT, SJA 156a, yet UT discriminates between the two by using race in admissions decisions to benefit the former but not the latter, App. 154a. Because this discrimination between minority groups is the necessary result of pursuing a representational goal, such a goal never could be implemented in a narrowly tailored manner.

d. UT's use of race is not narrowly tailored because it is overinclusive.

Even assuming that UT is pursuing the type of interest endorsed in *Grutter*, UT's classification of Hispanics as an "underrepresented minority" and thus an intended beneficiary of racial preference renders its admissions system overinclusive. *See, e.g., Croson*, 488 U.S. at 506 (citing *Wygant*, 476 U.S. at 284 n.13). It thus runs afoul of the narrow-tailoring requirement, the very purpose of which "is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter*, 539 U.S. at 333.

It is quite a stretch to argue that Hispanic students at UT are underrepresented or feel "isolated or like spokespersons for their race," *id.* at 319, when UT has been recognized as one of the nation's "top producers of undergraduates for Hispanics" by *Diverse Issues in Higher Education* magazine, JA 320a, and one of the nation's "Best Schools for Hispanics" by *Hispanic Business Magazine*, JA 325a. Given the educational success of its Hispanic students, UT's use of race clearly is purely representational and thus over-inclusive.

II. The Fifth Circuit's Comprehensive Deference To UT Under A Novel "Good Faith" Standard Cannot Be Sustained.

Because searching judicial review of UT's racial preferences under traditional strict scrutiny would have doomed them, the Fifth Circuit was only able to uphold UT's admissions system by replacing such review with a novel good faith, process-oriented review standard, which it termed "*Grutter*'s 'serious, good faith consideration' standard." App. 41a. This effective abandonment of strict scrutiny should be rejected. Once it is, every one of the reasons that the Fifth Circuit gave for sustaining UT's admissions program dissipates.

Grutter reiterated—no fewer than eleven times—that strict scrutiny remains the governing standard in higher education. *See* 539 U.S. at 326-28, 334. The Court's subsequent decisions likewise confirm that strict scrutiny remains the rule "in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies." *Johnson*, 543 U.S. at 505 (citing *Grutter*, 539 U.S. at 326). In *Parents Involved*, this

Court found it "well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." 551 U.S. at 720. No decision of this Court before or since suggests that any more deferential standard applies here.

To reach a contrary conclusion, the Fifth Circuit ripped the phrase "serious, good faith consideration" out of its *Grutter* context. Strict scrutiny includes an inquiry into UT's "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 735 (quoting *Grutter*, 539 U.S. at 339). But it does so only in the context of the narrow-tailoring prong of the strict scrutiny analysis; that is, UT cannot establish that its use of race in admissions decisions is narrowly tailored simply by engaging in "a rote exercise in dismissing race-neutral alternatives." App. 180a (Jones, C.J.). For all other aspects of the strict scrutiny test, UT's "good faith" is plainly insufficient. "More than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification system." *Adarand*, 515 U.S. at 226. Were it otherwise, "[t]he mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially ... insulate any racial classification from judicial scrutiny." *Croson*, 488 U.S. at 490; *see, e.g.*, *Parents Involved*, 551 U.S. at 743.

The Fifth Circuit's application of its newly minted deferential standard shows how far it departed from strict scrutiny. First, the court characterized its role as one of merely "scrutiniz[ing] the University's decisionmaking process." App. 36a. Simple process-oriented review is entirely incompatible with *Grutter*'s reaffirmation of strict scrutiny and its reliance on *Croson* to emphasize the importance of a "'searching judicial inquiry into the justification for such race-based measures.'" 539 U.S. at 326 (quoting *Croson*, 488 U.S. at 493). *Croson* makes clear that the entire point of strict scrutiny is to "'smoke out' illegitimate uses of race by assuring that the [governmental] body is pursuing a goal important enough to warrant use of a highly suspect tool." 488 U.S. at 493. The only way to accomplish this task is through "an examination of the factual basis for [the racial classification at issue] and the nexus between its scope and that factual basis." *Id.* at 494-95. Endorsing the Fifth Circuit's process-oriented review would thus defeat the fundamental purpose of strict scrutiny and allow evidence of good intentions and rote recitals of diversity goals to trump the close scrutiny "as to ends and as to means" that the Constitution requires. *See Adarand*, 515 U.S. at 236.

Second, the court deferred to UT administrators at every step of its "strict scrutiny" analysis. It found that "due deference" validated UT's conclusions that racial diversity is "'essential to its educational mission,'" App. 34a-35a (quoting *Grutter*, 539 U.S. at 328), that the levels of minority enrollment arising from UT's pre-existing race-neutral admission program were insufficient to meet its legitimate diversity goals, App. 66a, and that UT's use of racial preferences was narrowly-tailored to pursue that interest, App. 71a. But neither *Grutter* nor any other decision condones such unlimited deference.

In *Grutter*, this Court deferred to the "academic decision[]" that student body diversity "is essential to [a university's] educational mission." 539 U.S. at 328. It did not suggest—let alone endorse—that courts should also defer to a university's assertions that racial classifications are necessary to further that compelling government interest and narrowly tailored to that end. Instead, "scrutiny of the interest asserted by [UMLS] [was] no less strict for taking into account complex education judgments in an area that lies primarily within the expertise of the university." *Id.* Additionally, the Court scrutinized "the means chosen to accomplish the [government's] asserted purpose" to ascertain whether they were "specifically and narrowly framed to accomplish that purpose." *Id.* at 333. Under *Grutter*, UT is entitled to deference on an educational "decision that it has a compelling interest in achieving racial and other student diversity. But that is about as far as deference should go." App. 178a.

Third, the Fifth Circuit's deference to UT was so sweeping that it entirely inverted the strict scrutiny standard and placed the burden on Petitioner to prove that that UT's actions were *not* taken in good faith. App. 36a ("We presume the University acted in good faith, a presumption Appellants are free to rebut."). This is the antithesis of strict scrutiny. It is "the government"—not Ms. Fisher—that "has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests." *Johnson*, 543 U.S. at 505 (quotation omitted).

Fourth, the Fifth Circuit refused to take "'relevant [factual] differences' into account." *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 228). Instead, the court concluded that because "[t]he admissions procedures that UT adopted [were] modeled after the plan approved by the Supreme Court in *Grutter*, [they] are narrowly tailored[.]" App. 71a. It thereby ignored the "important factual distinction[s] between this case and *Grutter*," App. 180a-181a, contrary to the instruction of *Grutter* itself. The "fundamental purpose" of strict scrutiny is "to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race *in that particular context*." *Grutter*, 539 U.S. at 328 (emphasis added).

Fifth, and perhaps most troubling, the Fifth Circuit deferred to UT's subjective assertion that its use of race was narrowly tailored. The court refused to "second-guess the merits of the University's decision" that race-neutral measures were an insufficient alternative to its restoration of racial classifications in admissions decisions. App. 36a. Rather than restrict UT's ability to broadly use race as an admissions factor, the court conducted the "narrow-tailoring inquiry ... with a degree of deference to the University's constitutionally protected, presumably expert academic judgment." App. 37a. Under the court's standard, provided a "university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system," its system will always be narrowly tailored. App. 41a.

Even if UT were entitled to greater deference on the compelling government interest side of the strict-scrutiny analysis than any of this Court's decisions have suggested, it certainly is not entitled to deference as to whether its pursuit is narrowly tailored. Narrow tailoring reviewed through a deferential lens is effectively meaningless. The entire point of narrow tailoring is to ensure that benign motives do not replace absolute necessity as the touchstone for the permissible use of race. Narrow tailoring ensures that racial classifications are used only as "a last resort to achieve a compelling interest," *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring); *see also Croson*, 488 U.S. at 519 (Kennedy, J., concurring). Thus, "[f]ar from diluting narrow tailoring in order to defer to university administrators," *Grutter*'s discussion of narrow tailoring "was meant to challenge the university." App. 177a (Jones, C.J.).

The Fifth Circuit's deferential review effectively transformed strict scrutiny into rational basis review—"the lowest level of permissible equal protection scrutiny." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982); *see Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (holding that rational basis review "is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."). Indeed, rational basis review "is not a difficult standard for a State to meet when it is attempting to act sensibly and in good faith." *Logan*, 455 U.S. at 439.

This Court has rejected deferential rational-basis review when it comes to racial classifications. *Adarand*, 515 U.S. at 227. It should not change course now. *Croson*, 488 U.S. at 519 (Kennedy, J., concurring); *Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring). Judging "the ultimate validity of any particular [racial classification] ... is the job of the court applying strict scrutiny." *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 230). Thus, UT's use of race in admission decisions cannot be sustained by deference or presumed good faith.

III. *Grutter* Should Be Clarified Or Overruled To The Extent It Can Be Read To Permit The Fifth Circuit's Effective Abandonment Of Strict Scrutiny.

The history of this case illustrates the difficulty inherent in *Grutter*. The District Court interpreted *Grutter* as a mechanistic formula for racial preference—a claimed "holistic" review coupled with avoidance of express quota or point systems suffices to satisfy strict scrutiny. App. 158a-162a. The Fifth Circuit thought *Grutter* preserved the form of strict scrutiny but replaced its substance with deference to the academy at every stage of the judicial inquiry. App. 36a-37a. In contrast, the five Judges joining in Chief Judge Jones' dissent from rehearing en banc agreed with Petitioner that, apart from deference on an educational diversity goal, rigorous strict scrutiny was required and fatal to UT's use of racial classifications in admissions. App. 176a-184a.

The potential for these interpretive difficulties was noticed by the dissenting Justices in *Grutter*. *See, e.g.*, 539 U.S. at 380 (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 388 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal."). As Judge Garza noted, "[w]henever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed." App. 72a. The Court should expressly clarify or overrule *Grutter* to the extent needed to bring clarity to the law and restore the integrity of strict scrutiny review in the higher educational setting. *See, e.g.*, *Adarand*, 515

U.S. at 231-35 (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)).

By corrupting the "unitary formulation" of strict-scrutiny review, the Court "undermines both the test and its own controlling precedents." *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). It undermines that judicial test to suggest that strict scrutiny allows lower courts to "abdicate judicial review of a race-conscious admissions program for undergraduate students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." App. 174a (Jones, C.J.). It would undermine precedent to abandon "this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years," *Adarand*, 515 U.S. at 231-35, which affirmed "the absolute necessity of strict scrutiny when the State uses race as an operative category," *Grutter*, 549 U.S. at 388 (Kennedy, J., dissenting). Strict scrutiny cannot serve its important purpose if "review that is nothing short of perfunctory [and] accepts [a university's] ... assurances that its admissions process meets with constitutional requirements." *Id.* at 388-89.

"Constant and rigorous judicial review forces" university officials, furthermore, "to undertake their responsibilities as state employees in the most sensitive of areas with utmost fidelity to the Constitution." *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). In other words, "[b]ecause even University administrators can lose sight of the constitutional forest for the academic trees, it is the duty of the courts to scrutinize closely their 'benign' use of race in admissions." App. 176a (Jones, C.J.). For example, universities can be "'breathtakingly cynical' in deciding who [will] qualify as a member of underrepresented minorities." *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (citation omitted). UT's overt discrimination against Asian-American applicants here reinforces the point. *See supra* at 28. "It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decision-making. Prospective students, the courts, and the public can demand that [universities] prove their process is fair and constitutional in every phase of implementation." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

Moreover, failing to restore the integrity of strict-scrutiny review either by clarifying or overturning *Grutter* would leave in place a regime that has "proved to be unworkable in practice." *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965). An opinion that produces the amount of discord and confusion merely as to the applicable standard of review shown here exposes "litigants and courts alike [to] the perpetuation of an unworkable rule." *Id.*[11]

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[11] *Grutter* has not created reliance interests that would warrant its retention. *See Adarand*, 515 U.S. at 233-34. Racial preferences, by their nature, do not produce weighty reliance interests. No university was required to employ racial preferences following *Grutter*. "[A]ny State ... is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program." *Bakke*, 438 U.S. at 379 (Brennan, J.). Indeed, the Texas legislature has already made a contingency plan in the event that Petitioner prevails in this challenge. *See supra* at 8 n.3. Moreover, the limited racial preferences authorized by *Grutter* are by definition temporary, given that the decision itself announces that their termination is certain. *See Grutter*, 539 U.S. at 342.

Retention of an unworkable rule would not only harm courts and litigants. Another "unhappy consequence" would be "to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539, U.S. at 394 (Kennedy, J., dissenting). "Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives." *Id.* Indeed, despite the substantial number of minorities being admitted to UT under its prior race-neutral system, the university announced it would return to a race-based admissions system on the very day *Grutter* was decided. *See supra* at 5. As this case illustrates, then, when "universities are given the latitude to administer programs that are tantamount to quotas," they will discard race-neutral "programs ... more effective in bringing about harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter*, 539 U.S. at 394-95.

In the end, "[i]f strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks *authority* to approve the use of race even in [a] modest, limited way." *Id.* at 387 (Kennedy, J., dissenting) (emphasis added). "The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review." *Id.* at 395. And "as between the principle and its later misapplications, the principle must prevail." *Adarand*, 515 U.S. at 235. Thus, the Court should, as Chief Judge Jones suggested, clarify that *Grutter* imposes rigorous strict-scrutiny review, or, as Judge Garza suggested, overrule *Grutter* to the extent it abandons this essential aspect of equal-protection doctrine. In either case, the watered-down version of judicial scrutiny that allowed the Fifth Circuit to invoke *Grutter* to uphold UT's blatantly unconstitutional restoration of race as a factor in admissions decisions must be corrected.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

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In the
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Petitioner asked the Court to decide the following question:

> "Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions."

Pet. i.

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INTRODUCTION

After considering largely the same objections raised by petitioner and her amici here, this Court strongly embraced Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and refused to prohibit the consideration of race as a factor in admissions at the Nation's universities and graduate schools. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *see id.* at 387 (Kennedy, J., dissenting). And although the Court has made clear that any consideration of race in this context must be limited, it has been understood for decades that "a university admissions program may take account of race as one, non-predominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary." *Id.* at 387 (Kennedy, J., dissenting) (citing *Bakke*, 438 U.S. at 289-91, 315-18 (Powell, J.)); *see id.* at 322-23. The University of Texas at Austin (UT)'s highly individualized consideration of race for applicants not admitted under the State's top 10% law satisfies that demand, and meets strict scrutiny under any conception of that test not designed simply to bar the consideration of race altogether.

That conclusion follows *a fortiori* from existing precedent. UT's admissions plan was modeled on the type of plan upheld in *Grutter* and commended by Justice Powell in *Bakke*. Moreover, UT's plan lacks the features criticized in *Grutter* by Justice Kennedy—who agreed with the majority that *Bakke* is the "correct rule." *Id.* at 387 (dissenting). Justice Kennedy concluded that Michigan Law School's admissions plan used race "to achieve numerical goals indistinguishable from quotas." *Id.* at 389. Here, it is undisputed that UT has not set any "target" or "goal" for minority admissions. JA 131a. Justice Kennedy stressed that Michigan's "admissions officers consulted ... daily reports which indicated the composition of the incoming class along racial lines." *Grutter*, 539 U.S. at 391 (dissenting). Here, it is undeniable that no such monitoring occurs. JA 398a. And Justice Kennedy believed that race was "a predominant factor" under Michigan's plan. *Grutter*, 539 U.S. at 393 (dissenting). Here, petitioner argues (at 20) that UT's consideration of race is too "minimal" to be constitutional. That paradoxical contention not only overlooks the indisputably meaningful impact that UT's plan has on diversity, *infra* at 36-38, it turns on its head Justice Powell's conception of the appropriately nuanced and modest consideration of race in this special context.

Because petitioner cannot dispute that UT's consideration of race is both highly individualized and modest, she is forced to take positions directly at odds with the record and existing precedent. Her headline claim that UT is engaged in "racial balancing" (Pet. Br. 6-7, 19, 27-28, 45-46) is refuted by her own concession that UT has *not* set any "target" for minority admissions. JA 131a. Her argument that the State's top 10% law bars UT from considering race in its holistic review of applicants not eligible under that law is foreclosed by *Grutter*'s holding that percentage plans are not a complete, workable alternative to the individualized consideration of race in full-file review. 539 U.S. at 340. And her argument that, in 2004, UT had already achieved all the diversity that the Constitution allowed is based on "a limited notion of diversity" (*Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007)) rejected by this Court—one that crudely lumps together distinct racial groups and ignores the importance of diversity among individuals *within* racial groups.

In the end, petitioner really is just asking this Court to move the goal posts on higher education in America—and overrule its precedent going back 35 years to *Bakke*. Pet. Br. 53-57. *Stare decisis* alone counsels decisively against doing so. Petitioner has provided no persuasive justification for the Court to reexamine, much less overrule, its precedent, just nine years after this Court decided *Grutter* and eliminated any doubt about the controlling force of Justice Powell's opinion in *Bakke*. And overruling *Grutter* and *Bakke* (or effectively gutting them by adopting petitioner's conception of strict scrutiny) would jeopardize the Nation's paramount interest in educating its future leaders in an environment that best prepares them for the society and workforce they will encounter. Moreover, the question that petitioner herself asked this Court to decide is the constitutionality of UT's policy under *existing* precedent, including *Grutter*. *See* Pet. i; Pet. Br. i. Because the court of appeals correctly answered that question, the judgment below should be affirmed.

STATEMENT OF THE CASE

A. UT And Its Mission

UT was founded in 1883 pursuant to a constitutional mandate to create "a University of the first class." Tex. Const. art. VII, § 10. For nearly 130 years, UT has served as the flagship public university for Texas. Not all of that history has been noble. During the first 70-plus years of its existence, UT was racially segregated by law. The first African-

American was not admitted until 1950, following the Court's landmark decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), holding that Heman Sweatt could not be excluded from the UT law school on account of his race. The vestiges of *de jure* segregation lasted for decades thereafter. UT is painfully aware of that history, and the lingering perception that "[UT] is largely closed to nonwhite applicants and does not provide a welcoming supportive environment to underrepresented minority students." SJA 14a.[1]

Over time, UT has grown into one of the largest—and finest—state universities in the United States. UT now occupies a 350-acre campus in downtown Austin—the State capital—with 17 different colleges and schools, more than 50,000 students, and 24,000 faculty and staff. In 2009, UT had the fifth largest enrollment of any university in the country. *Campuses with the Largest Enrollments, Fall 2009*, Chronicle of Higher Education, Aug. 26, 2011, at 33. UT is also proud to have a robust Reserve Officers Training Corps (ROTC) program, which has trained officers of the Nation's armed forces for more than 60 years.

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[1] Until 1969, the Texas Constitution required "separate schools ... for the white and colored children." Tex. Const. art. VII, § 7 (repealed 1969). For decades after *Sweatt* and *Brown v. Board of Education*, 347 U.S. 483 (1954), discrimination persisted at Texas's public schools—including at UT—against African-Americans as well as Hispanics. *See Texas v. Hopwood*, 518 U.S. 1033 (1996) (No. 95-1773), U.S. Br. 3; *see Hopwood v. Texas*, 861 F. Supp. 551, 555-57, 572-73 (W.D. Tex. 1994) (discussing "Texas' long history of discrimination against blacks and Mexican Americans in public education," including at UT), *rev'd on other grounds and remanded by* 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). The breadth and effects of such discrimination are discussed by the amici Sweatt family members.

UT's mission—as embodied in the "Compact with Texans" required by state law—is to provide "superior and comprehensive educational opportunities" and to "contribute to the advancement of society." Its core values include: "*Leadership*"; "*Individual Opportunity*—Many options, diverse people and ideas, one University"; and "*Responsibility*—To serve as a catalyst for positive change in Texas and beyond."[2] A critical component of that mission is the responsibility to train the future leaders of Texas and, indeed, the Nation. JA 203a, 357a, 365a, 366a, 428a; SJA 23a. UT's graduates include four-star generals, top leaders in federal and state government, Fortune 500 CEOs, astronauts, Pulitzer Prize winning authors, renowned physicians, and Heisman Trophy winners. Just as important, UT's graduates go on to become doctors, engineers, teachers, business persons, lawyers, and community leaders across Texas and the country.

Consistent with its mission, UT is a highly selective institution. JA 364a. In 2008, for example, UT received some 30,000 applications—the vast majority from Texans—for 6,715 places in the entering class. *Id.* For UT, as for any comparable school, the process of selecting its student body represents a critical means of advancing its mission. Each year, UT strives to assemble a class that is exceptionally talented and well-prepared for UT's rigorous academic environment. It is also a "'major priority'" that each class be well-rounded and diverse. JA 309a, 364a-65a, 428a, 431a. UT has a "broad vision of diversity," which looks to a wide variety of individual characteristics—including "an applicant's culture; language; family;

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[2] UT, *Compact with Texans*, http://www.utexas.edu/about-ut/compact-with-texans (last visited Aug. 6, 2012).

educational, geographic, and socioeconomic background; work, volunteer, or internship experiences; leadership experiences"; special artistic or other talents, as well as race and ethnicity. JA 364a-365a, 374a. UT has set—and seeks to meet—"a 'high standard for diversity.'" JA 365a.

A diverse student body is "indispensable" (JA 309a) to UT's mission to educate and train the future leaders of Texas and America. JA 203a, 357a, 365a, 366a, 428a; SJA 23a. UT has learned through experience that diversity has invaluable educational benefits. These benefits include, but are not limited to, promoting cross-racial understanding; breaking down racial, ethnic, and geographic stereotypes; and creating an environment where students do not feel like spokespersons for their race. JA 365a-66a, 428a-29a. Diversity improves academic outcomes and better prepares students to become the next generation of leaders in an increasingly diverse society. JA 366a.

B. Efforts To Promote Diversity At UT

Appreciating the vital importance of a diverse student body to its educational mission, both UT and the State of Texas have taken important steps over the past decades to promote diversity at UT.

a. Before 1996, UT selected students using an Academic Index (AI) and race. The AI is based on an applicant's high school class rank, standardized test scores, and high school curriculum. App. 15a. Separate admissions committees reviewed minority and nonminority applicants, and "race was considered directly and was often a controlling factor in admission." App. 16a & n.46. The Fall 1996 freshman class—the last class selected with this methodology—included 266 African-American students (4.1% of the overall class) and 932 Hispanic students (14.5%). JA 108a. That represented some progress in addressing racial isolation, but it by no means indicated that UT had achieved the full educational benefits of diversity.

b. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit held unconstitutional the University of Texas School of Law's consideration of race in admissions. In response, UT revised its admissions policy and excluded the consideration of race. The new policy adopted a Personal Achievement Index (PAI) to be used with the AI, which included a "holistic review of an applicant's leadership qualities; extracurricular activities; awards/honors; work experience; service to school or community; and special circumstances." JA 112a. "[S]pecial circumstances" included factors such as the "socio-economic status of a family," "language spoken at home," and "socio-economic status of school attended" (but not an applicant's race). JA 112-13a.

UT also devoted substantial efforts to developing race-neutral initiatives that it hoped would increase enrollment of underrepresented minorities. For example, UT increased its annual recruitment budget and established three new regional admissions centers to increase UT's visibility and contact with prospective students, parents, and high school administrators in geographic markets with historically few UT students. JA 400a-01a. UT also created several scholarship programs aimed at recruiting highly qualified students of all races from lower socioeconomic backgrounds, and students who would be the first in their family to attend college. JA 399a-400a; *see* JA 274a-76a.

Despite these efforts, UT experienced an immediate and serious decline in enrollment among underrepresented minorities. Compared to 1995, for example, African-American enrollment in 1997 had dropped almost 40% (from 309 to 190 entering students) and Hispanic enrollment had dropped by 5% (from 935 to 892 entering students). App. 19a.

c. The Texas Legislature responded to *Hopwood* by enacting the top 10% law (House Bill 588), which guarantees admission to UT to any graduate of a Texas high school who is ranked in the top 10% of his or her high school class, beginning with the 1998 admissions cycle. Tex. Educ. Code § 51.803; JA 368a-69a. An acknowledged purpose of the law was to increase minority admissions given the loss of race-conscious admissions. *See* App. 20a; JA 120a; House Research Organization Daily Floor Report: HB 588 at 4-5 (Apr. 15, 1997). The top 10% law helps minority admissions, but at significant cost to educational objectives.

The top 10% law "hurts academic selectivity" by basing the admissions decision solely on class rank, without regard to other standard markers of academic achievement and potential. App. 57a n.149. Basing the admissions decision on "just a single criteria" has also undermined UT's efforts to achieve diversity in the broad sense. JA 359a. And the racial diversity that the law does add is mostly a product of the fact that Texas public high schools remain highly segregated in regions of the State—*e.g.*, with overwhelmingly Hispanic student bodies in the Rio Grande Valley, and overwhelmingly African-American student bodies in urban areas such as Dallas and Houston. That limits the diversity that can be achieved *within* racial groups and creates "damaging incentives." App. 58a.

The portion of the class admitted pursuant to the top 10% law has ranged from roughly 60 to 80%. SJA 170a. To fill the remaining seats in its freshman class, UT used the full-file review process developed after *Hopwood*—which considered numerous individual characteristics (but not race). The odds of admission for a qualified African-American or Hispanic applicant from the second decile of their high school class declined after the top 10% law took effect, whereas the odds for a similarly situated Caucasian applicant increased. App. 20a; *see* App. 59a.

C. UT's 2004 Proposal To Consider Race

In June 2003, this Court decided *Grutter v. Bollinger*, effectively overruling *Hopwood*. Like many schools, UT re-examined its admissions policies in light of *Grutter* and its educational mission. JA 395.[3]

a. In August 2003, the Board of Regents of The University of Texas System authorized UT to reconsider its admissions policies. SJA 1a. Over the next year, UT reviewed admissions data, surveyed students, and held discussions with administrators, faculty, constitutional law experts, and others on student body diversity at UT and the possibility of considering race in full-file review of applicants not eligible under the top 10% law. JA 431a. Officials focused on UT's "overall goal of having a student body that is meritorious and diverse in a variety of educationally relevant ways." *Id.*

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[3] Petitioner notes (at 5, 34) that UT's president stated on the day *Grutter* was issued that UT "will modify its admissions procedures to comply with [*Grutter*]." App. 356a. Of course, this statement was informed by many years of experience with the top 10% law. But the more fundamental point is that only the Board of Regents could authorize UT even to consider such a change, and UT did not propose to modify its policy until after it had completed a year-long inquiry. JA 395a-97a.

The picture that emerged was alarming. Even with the top 10% law and UT's race-neutral diversity initiatives, African-American and Hispanic enrollment at best remained stagnant compared to the pre-*Hopwood* period. JA 122a. In Fall 2002, only 3.4% of the freshman class was African-American and 14.3% was Hispanic, below 1996 levels. JA 127a; SJA 25a. The numbers were 4.5% and 16.9%, respectively, in 2004. JA 127a. And underrepresentation actually worsened during this period for Hispanics, given the explosive growth of Hispanics in the State. SJA 43a.

School officials also considered diversity in classrooms at UT as "one window" into the effectiveness of UT's efforts to foster a diverse campus environment. JA 266a. It found that nearly 90% of undergraduate classes of the most common size at UT—sections with 10-24 students—enrolled zero or one African-American student in 2002, and nearly 40% of those classes enrolled zero or one Hispanic student. Defs.' Summ. J. Reply Br. 7 n.2, ECF No. 102; SJA 140a. The numbers were scarcely better for classes enrolling 25-49 students—over 70% had zero or one African-American enrolled. *Id.* Classes of this size are not only predominant at UT; they are most likely to involve the kind of discussion or exchanges where the educational benefits of diversity are realized.

In addition, UT sought feedback from the students themselves. Interviews with students "on their impressions of diversity on campus," including "in the classroom," further confirmed that diversity was wanting at UT. App. 22a; JA 267-68a, 432a.

b. In June 2004, UT proposed to alter its admissions policy to allow for the consideration of race in the context of the holistic review already conducted for students not admitted under the top 10% law. JA 397a; SJA 23a-32a (2004 Proposal). The 2004 Proposal embraced the diversity interest that this Court found compelling in *Grutter* in all its dimensions (SJA 1a-4a), and observed that "[a] comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." SJA 23a. "This type of academic environment," the Proposal explained, "is a goal of [UT] and admission decisions must take into account this goal." *Id.*

The 2004 Proposal concluded that UT "did not have a critical mass of minority students sufficient to provide an optimal educational experience in 1996," and that that had not changed after seven years of good-faith efforts to achieve racial diversity through facially race-neutral means such as holistic admissions (not considering race), the State's top 10% law, scholarships, and aggressive recruiting efforts. SJA 23a-24a. The 2004 Proposal explained that "[c]ritical mass" simply means "an adequate representation of minority students to assure educational benefits deriving from diversity," including an environment in which students "learn that there is not 'one' minority or majority view." SJA 25a; *see* JA 264a-66a.

The 2004 Proposal stressed that the consideration of race in the process of full-file review would be individualized, SJA 26a-29a; that an applicant's race would be only one of many factors considered during the process and would not be assigned any independent weight, SJA 29a; that "[n]o specific goal will be established in terms of the numbers of students with specific characteristics who are admitted," *id.*;

and called for periodic review of the need for race-conscious admissions, SJA 32a. In August 2004, the University of Texas System (as authorized by the Board of Regents) approved UT's proposal, and it took effect for the Fall 2005 entering class. JA 432a-33a.[4]

D. UT's Holistic Review Process

UT's applicant pool is divided into applicants who are eligible for automatic admission under the top 10% law, and applicants who are not. Although most admits fall into the former category, the admission of students not eligible for the top 10% law is a critical means of pursuing UT's educational mission and an important counterpart to the top 10% law. A Texas applicant may be ineligible for the top 10% law because she was in the bottom 90% of her class (like petitioner), or because her school does not rank students (as is true of some of the best private high schools in Texas).

After the files of the non-top-10% applicants are scored, they are plotted on a matrix corresponding to the school or major for which admission is sought, with the AI score on one axis and PAI score on the other. Each cell on the matrix contains all applicants with a particular AI/PAI combination. JA 392a. After considering the number of students in each cell and the available spaces for a particular major or school, admissions officers draw a stair-step line on the matrix, dividing the cells of applicants who will be admitted from those that will be denied. JA 386a-87a.

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[4] Consistent with the 2004 Proposal, UT has reviewed its admissions policy on an annual basis. App. 24a; JA 435a. UT has not finalized its five-year review (SJA 32a), however, because any conclusions that may be drawn from the available data must be based on a careful review of the decision in this case.

For each cell, admission is an all-or-nothing proposition: all the applicants within a cell are either admitted or denied. PAI scores are fixed long before this step in the process occurs, and nameless applicants clustered within each cell are not identified by race. So, as petitioner has acknowledged, admissions officers cannot—and do not—consider the racial demographics of the cell (or the race of any applicant within it) when they draw the stair-step line dividing cells. JA 387a-89a, 411a-12a; Summ. J. Hr'g Tr. 20, ECF No. 118 (petitioner's counsel: "[T]hey use a matrix where you don't know who's who. Because once they've made a score, you become a number. So they're not doing what Michigan was doing in *Grutter*.").

An applicant's PAI score is based on two essays and a Personal Achievement Score (PAS). JA 374a. Essays are reviewed by specially trained readers, and are scored on a race-blind basis from 1 to 6. JA 374a-76a. The PAS score ranges from 1 to 6 as well, and is based on holistic consideration of six equally-weighted factors: leadership potential, extracurricular activities, honors and awards, work experience, community service, and special circumstances. JA 379a. The "special circumstances" factor is broken down into seven attributes, including socioeconomic considerations, and—as of 2005—an applicant's race. JA 380a. Race is one of seven components of a single factor in the PAS score, which comprises one third of the PAI, which is one of two numerical values (PAI and AI) that places a student on the admissions grid, from which students are admitted race-blind in groups. In other words, race is "a factor of a factor of a factor of a factor" in UT's holistic review. App. 159a.

No automatic advantage or value is assigned to race or any other PAS factor. JA 379a-81a. Each applicant is considered as a whole person, and race is considered "in conjunction with an applicant's demonstrated sense of cultural awareness," not in isolation. JA 397a, 130a. "Race is contextual, just like every other part of the applicant's file," JA 169a, and "[t]he consideration of race helps [UT] examine the student in 'their totality,'" JA 129a. Adding race to the mix in whole-file review "increases the chance" that underrepresented minorities will be admitted. App. 434a. But because of the contextualized way in which race is considered, it is undisputed (JA 130a) that consideration of race may benefit *any* applicant (even non-minorities)—just as race ultimately "may have no impact whatsoever" for any given applicant (even an underrepresented minority). JA 381a, 397a-98a; *see* JA 207a-09a, 285a, 434a; App. 29a, 46a.[5]

Consistent with the holistic and modest way in which race is considered, it is impossible to tell whether an applicant's race was a tipping factor for any given admit. JA 294a. But it is undisputed that "race is a meaningful factor and can make the difference in the evaluation of a student's application." App. 163a n.14; *see* JA 130a. Moreover, although petitioner claims that the consideration of race in holistic admissions has had an "'infinitesimal'" (at 10) impact on diversity at UT, the record shows otherwise. Of the 728 African-Americans offered admission to the 2008 class, 146—or 20%—were admitted through full-file review. SJA 158a. That figure was 15% for Hispanic students admitted. *Id.; see infra* at 36-38.

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[5] For that reason, petitioner's repeated claim (at 7, 28, 46) that Asian-Americans are "discriminat[ed] against" (at 55) by UT's admissions policy is incorrect, and contradicted even by her own proposed statement of facts (JA 128a-31a). *Infra* at 44-46.

Petitioner notes (at 9) that race is listed on the front page of the application. But to be clear, the only place where race is considered in the admissions process is in the calculation of the PAS score as described above. Race plays no role in the calculation of AI. And petitioner has conceded that race has "no influence" in scoring essays, or in deciding whether to admit or deny a cell. Summ. J. Hr'g Tr. 8, 20.

E. Petitioner's Application For Admission

Petitioner, a Texas resident, applied for admission to UT's Fall 2008 freshman class in Business Administration or Liberal Arts, with a combined SAT score of 1180 out of 1600 and a cumulative 3.59 GPA. JA 40a-41a. Because petitioner was not in the top 10% of her high school class, her application was considered pursuant to the holistic review process described above. JA 40a. Petitioner scored an AI of 3.1, JA 415a, and received a PAI score of less than 6 (the actual score is contained in a sealed brief, ECF No. 52). The summary judgment record is uncontradicted that—due to the stiff competition in 2008 and petitioner's relatively low AI score—petitioner would not have been admitted to the Fall 2008 freshman class even if she had received "a 'perfect' PAI score of 6." JA 416a.

Petitioner also was denied admission to the summer program, which offered provisional admission to some applicants who were denied admission to the fall class, subject to completing certain academic requirements over the summer. JA 413a-14a. (UT discontinued this program in 2009.) Although one African-American and four Hispanic applicants with lower combined AI/PAI scores than petitioner's were offered admission to the summer program, so were 42 Caucasian applicants with combined AI/PAI scores identical to or lower than petitioner's. In addition, 168 African-American and Hispanic applicants in this pool who had combined AI/PAI scores identical to or *higher* than petitioner's were *denied* admission to the summer program.[6]

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[6] These figures are drawn from UT's admissions data and are provided in response to petitioner's unsupported assertion (at 2) that her "academic credentials exceeded those of many admitted minority applicants." Petitioner presented a subset of this data (admitted minority students) to the district court as Plaintiffs' Exhibits 26 and 27 at the preliminary injunction hearing (the court later returned the exhibits). *See* W.D. Tex. Record Transmittal Letter (July 27, 2012), ECF No. 136. UT summarized additional data in a sealed letter brief after the hearing. ECF No. 52; JA 20a (discussing data and explaining that petitioner had not requested data regarding the applicants "who were *not* admitted to UT"). In denying a preliminary injunction, the district court stated (without citation) that 64 minority applicants with lower AI scores than petitioner were *admitted* to Liberal Arts. *Fisher v. Texas*, 556 F. Supp. 2d 603, 607 & n.2 (W.D. Tex. 2008). That statement is not binding at the merits stage. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Although the district court did not specify whether it was referring to admissions to the fall class or the summer program, that figure can only encompass admits to the summer program. As explained in the unrebutted summary judgment record, with her AI score, petitioner could not "have gained admission through the fall review process," even with a "perfect" PAI score. JA 415a-16a. Petitioner has submitted no contrary evidence (and UT is aware of none). That leaves the now-defunct summer program. The district court's statement that minority applicants with lower AI scores than petitioner were admitted does not establish that race was a factor in petitioner's denial from the summer program, because (as noted above) many more minority applicants (168) with identical or *higher* AI/PAI scores were *denied* admission to the summer program. It is thus hard to see how petitioner could establish any cognizable injury for her § 1983 damages claim—the only claim

UT did offer petitioner admission to the Coordinated Admissions Program, which allows Texas residents to gain admission to UT for their sophomore year by completing 30 credits at a participating UT System campus and maintaining a 3.2 GPA. JA 414a. Petitioner declined that offer and enrolled at Louisiana State University, from which she graduated in May.

F. Procedural History

Petitioner and another applicant—"no longer involved in this case," Pet. Br. ii—filed suit in the Western District of Texas against UT and various University officials under 42 U.S.C. § 1983, alleging, *inter alia*, that UT's 2008 full-file admissions procedures violate the Equal Protection Clause. JA 38a. They sued only on their own behalf (not on behalf of any class of applicants) and sought a declaratory judgment and injunctive relief barring UT's consideration of race and requiring UT to reconsider their own applications in a race-blind process. JA 39a. They also sought a "refund of [their] application fees and all associated expenses incurred ... in connection with applying to UT." *Id.*; *see* App. 3a-4a.

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still alive in this case—or, for that matter, standing to maintain that claim. *See Texas v. Lesage*, 528 U.S. 18, 19, 21 (1999) (per curiam); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). (Petitioner's claims for injunctive relief dropped out of the case at least once she graduated from a different university in May 2012, making this issue pertinent now.) And that is just one apparent vehicle—if not jurisdictional—defect with this case. *See* Br. in Opp. 6-22; *see also* Adam D. Chandler, *How (Not) To Bring an Affirmative-Action Challenge*, 122 Yale L. J. Online (forthcoming Sept. 2012), *available at* http://ssrn.com/abstract_id=2122956 (discussing vehicle defects stemming from, among other things, the unusual manner in which this case was framed).

The district court denied petitioner's request for a preliminary injunction. The parties filed cross-motions for summary judgment and supporting statements of fact (JA 103a-51a, 363a-403a). Applying strict scrutiny (App. 139a), the court granted judgment to UT, holding that UT has a compelling interest in attaining a diverse student body and the educational benefits flowing from such diversity, and that UT's individualized and holistic review process is narrowly tailored to further that interest. App. 168-69a.

The Fifth Circuit affirmed. Like the district court, the court of appeals found that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*." App. 5a. And the court likewise took it as "a given" that UT's policy "is subject to strict scrutiny with its requirement of narrow tailoring." App. 35a. While acknowledging that *Bakke* and *Grutter* call for some deference to a university's "educational judgment," the court emphasized that "the scrutiny triggered by racial classification 'is no less strict for taking into account' the special circumstances of higher education." App. 34a, 36a. Applying strict scrutiny, the court upheld UT's admissions policy. App. 71a.

Judge Garza concurred. He recognized that the court's opinion was "faithful" to *Grutter*, but argued that *Grutter* was wrongly decided. App. 72a-73a.

SUMMARY OF ARGUMENT

UT's individualized consideration of race in holistic admissions did not subject petitioner to unequal treatment in violation of the Fourteenth Amendment.

I. Racial classifications are subject to strict scrutiny, including in the higher education context. But ever since Justice Powell's opinion in *Bakke*, this

Court has recognized that universities have a compelling interest in promoting student body diversity, and that a university may consider the race of applicants in an individualized and modest manner—such that race is just one of many characteristics that form the mosaic presented by an applicant's file.

UT's holistic admissions policy exemplifies the type of plan this Court has allowed: race is only one modest factor among many others weighed; it is considered only in an individualized and contextual way that "examine[s] the student in 'their totality,'" JA 129a; and admissions officers do not know an applicant's race when they decide which "cells" to admit in UT's process. At the same time, UT's policy *lacks* the features that Justice Kennedy found disqualifying in *Grutter*: it is undisputed that UT has not established any race-based target; race is not assigned any automatic value; and the racial or ethnic composition of admits is not monitored during the admissions cycle.

II. Petitioner's arguments that she was nevertheless subjected to unequal treatment in violation of the Fourteenth Amendment are refuted by both the record and existing precedent.

A. Petitioner's main argument is that UT's objective is not diversity, but outright "racial balancing." But the record establishes that UT has not set a "goal, target, or other quantitative objective" for minority admissions, as petitioner herself has admitted. JA 131a. UT considered demographics in determining whether minorities were *under-represented* at UT in the first place. But underrepresentation at a flagship state university like UT is naturally assessed by some attention to statewide numbers, and there is no constitutional requirement that such a university must blind itself to obvious evidence that particular minority groups are systematically faring poorly in admissions. Moreover, the record establishes that UT does not use its admissions process to work backwards toward any demographic target—or, indeed, any target at all.

B. Petitioner also errs in arguing that the State's top 10% law categorically forecloses UT from taking race into account for applicants not subject to that law. In *Grutter*, this Court flatly rejected the contention that percentage plans are a complete, workable alternative to race-conscious holistic review. That makes perfect sense. Percentage plans not only bar consideration of important academic benchmarks beyond class rank, but prevent consideration of the many different factors—including race—that create a richly diverse student body, including diversity *within* different racial groups of individuals. Accepting petitioner's argument also would have the perverse effect of discouraging universities from experimenting with percentage plans—for fear that they would then forfeit the ability to consider race in holistic review.

C. Petitioner's counter-intuitive claim that UT's consideration of race is too *modest* to be constitutional cannot be sustained. The fact that race has only a modest and nuanced role in admissions decisions is not a constitutional problem—it is the hallmark of the type of plan this Court has held out as constitutional since *Bakke*. And in any event, the limited consideration of race in holistic review unquestionably has had a meaningful impact at UT. Petitioner completely overlooks the diversity *within* racial groups that UT's holistic plan fosters. And in 2008 alone, a full 20% of all

African-American admits and 15% of all Hispanic admits secured admission through holistic review.

D. Petitioner's effort to recast UT's broad interest in diversity also fails. The record overwhelmingly establishes that UT's objective was the educational benefits of a richly diverse student body—the very interest held compelling in *Bakke* and *Grutter*. The notion that, by 2004, UT had already achieved all the diversity it was allowed to seek not only paints a dim view of the student body diversity that this Court has recognized as vital to training the Nation's future leaders, but is refuted by the record in this case. Indeed, in 2003—despite years of aggressive race-neutral efforts—diversity remained at best stagnant at 1996 levels, despite a large increase in the Hispanic applicant pool. There was also stark racial isolation in classrooms—a critical environment where the educational benefits of diversity are realized, or lost.

E. Finally, petitioner's attack on the Fifth Circuit's opinion is misguided. The Fifth Circuit made clear that strict scrutiny applied—and in a manner that was "'no less strict for taking into account' the special circumstances of higher education." App. 36a. The Fifth Circuit also recognized that certain educational judgments fall within the zone of academic freedom long recognized "as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312. But respecting such judgments on subsidiary issues is not incompatible with strict scrutiny. And the Fifth Circuit's careful and extended analysis of petitioner's contentions as to both the compelling-interest and narrow-tailoring prongs belie her claim that the Fifth Circuit abdicated its responsibility to scrutinize UT's plan. In any event, this Court reviews judgments, not statements in opinions. And UT's plan passes strict scrutiny on the record before this Court.

III. The Court should decline petitioner's far-reaching request to reopen and overrule *Bakke* and *Grutter*. That request is outside the scope of the question presented, which asks the Court to review UT's policy under *existing* precedent, including *Grutter*. In any event, petitioner has failed to identify any special justification for taking the extraordinary step of overruling *Grutter*, just nine years after this Court decided *Grutter* and unequivocally answered any doubt about the validity of Justice Powell's opinion in *Bakke*. Abruptly reversing course here would upset legitimate expectations in the rule of law—not to mention the profoundly important societal interests in ensuring that the future leaders of America are trained in a campus environment in which they are exposed to the full educational benefits of diversity.

ARGUMENT

It is undisputed that UT's consideration of race in its holistic admissions process triggers strict scrutiny, and that "[s]trict scrutiny requires that UT demonstrate both that its use of race in admissions decisions is 'necessary to further a compelling government interest' and that 'the means chosen to accomplish the government's asserted purpose' are 'specifically and narrowly framed to accomplish that purpose.'" Pet. Br. 18-19 (quoting *Grutter*, 539 U.S. at 327, 333); *see Bakke*, 438 U.S. at 290-91 (Powell, J.). But while that inquiry is undeniably rigorous, the fact that strict scrutiny applies to UT's policy does not mean that UT's policy is in fact unconstitutional.

This Court applies strict scrutiny "to '"smoke out" illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" *Johnson v. California*, 543 U.S. 499, 506 (2005). But here UT was pursuing the broad interest in diversity that petitioner herself recognizes is compelling (JA 74a; *see* Part II.D, *infra*) and it is common ground (JA 131a) that UT has not established "a quota system," *Bakke*, 438 U.S. at 318 (Powell, J.). It also cannot be disputed that UT's admissions policy "treats each applicant as an individual in the admissions process" and considers race only in a modest, individualized, and nuanced way. *Id.*; *see* Part I, *infra*. Especially given those incontestable features of UT's plan, it is not surprising that UT's admissions policy satisfies strict scrutiny.

I. UT'S ADMISSIONS POLICY IS A MODEL OF THE TYPE OF INDIVIDUALIZED AND HOLISTIC PLAN THAT THIS COURT HAS APPROVED SINCE *BAKKE*

1. For 35 years, this Court has upheld the "competitive consideration of race and ethnic origin" in higher education admissions as one factor in a "properly devised admissions program" designed to further the compelling state interest in assembling a diverse student body—the kind of diversity that encompasses a "broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 320, 315; *Grutter*, 539 U.S. at 325 (quoting *Bakke*). As Justice Powell emphasized in *Bakke*, and this Court reaffirmed in *Grutter*, "nothing less than the '"nation's future depends upon leaders trained through wide exposure" to ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313 (Powell, J.)).

In *Bakke*, this Court invalidated an admissions policy adopted by the Medical School of the University of California at Davis that set aside 16 out of 100 places in the class exclusively for racial minorities. But the Court also reversed the California Supreme Court's injunction against "any consideration to race," 438 U.S. at 379, holding that the "competitive consideration of race and ethnic origin" in a "properly devised admissions program" would pass strict scrutiny. *Id.* at 320. Justice Powell offered the narrowest rationale for that holding. His controlling opinion approved Harvard College's race-conscious admissions policy, which Justice Powell appended to his opinion as an example of a "properly devised" and "constitutional" plan. *Id.*

Justice Powell explained that, under the Harvard plan, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317. Because such a policy "treats each applicant as an individual"—"without the factor of race being decisive"—one "who loses out on the last available seat" would know it was because her "combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant." *Id.* at 318, 316. Even though race might tip the balance, this individualized consideration ensured that each applicant was considered "fairly and competitively" and "would have no basis to complain of unequal treatment." *Id.* at 318.

Nine years ago, in *Grutter v. Bollinger*, this Court reaffirmed Justice Powell's landmark opinion and upheld Michigan Law School's race-conscious admissions policy. After recognizing that universities for decades "have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies," the Court reaffirmed "Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." 539 U.S. at 323, 325. In addition, the Court held that the law school's policy was narrowly tailored because it subjected each applicant to an individualized review process, in which race was only a possible plus factor. *Id.* at 334.

Justice Kennedy, in dissent, agreed with the majority that Justice Powell's opinion in *Bakke* provided "the correct rule for resolving th[e] case." *Id.* at 387. But he concluded that race was used as "an automatic factor in most instances" under the law school's policy and that the law school had in fact established "numerical goals indistinguishable from quotas." *Id.* at 389. Justice Kennedy emphasized evidence that "admissions officers consulted ... daily reports which indicated the composition of the incoming class along racial lines," and concluded that there was no "individual review save for race itself" at the end stage of the admissions process. *Id.* at 391-92.

2. UT's consideration of race in its holistic admissions process bears all of the hallmarks of the individualized—and constitutional—consideration of race that Justice Powell commended in his opinion in *Bakke* without the particular features that Justice Kennedy found impermissible in *Grutter*.

As explained, under UT's policy race is but one of many factors that may be considered, including geographic diversity, socioeconomic diversity, cultural diversity, and so on. JA 313a; *see* JA 310a. No numerical value is assigned to an applicant's race or any other factor considered in determining a PAS score. And any applicant—of any race—can benefit from UT's contextualized consideration of race. *Supra* at 14. Race is just one factor that UT considers to "examine the student in 'their totality,' 'everything that they represent, everything that they've done, everything that they can possibly bring to the table.'" JA 129a. The consideration of race along with other factors "may benefit some students, may not benefit other students, but it's not based on their race, it's based on the entire context of their file." JA 209a. Race, that is, is not a predominant factor—it "is a factor of a factor of a factor of a factor." App. 159a.

UT's admissions process also ensures that race is considered only in an individualized and holistic fashion. Race is considered only in the full-file process of assigning a PAI score; at that stage, "'whole file' readers are not making admissions decisions ..., but are simply assigning a PAI score." JA 407a-08a. PAI scores are fixed long before admissions officers draw a line on the AI/PAI matrix identifying which "cells" will be admitted. *Supra* at 13. At that point, as petitioner herself has conceded, applicants are not identified by race within the cells on matrices. So admissions officers cannot—and do not—consider the race of any applicant in making the all-important decision where to draw the "'stair-step' decision line" that determines which cells will be admitted. JA 387a-89a, 411a-12a.[7]

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[7] Petitioner asserts (at 8) that "race is a factor in admission, placement, or both for every in-state undergraduate applicant." That is incorrect. Race is not considered in admitting students to UT under the top 10% law (which fills most of the class). Within UT, some programs are in such high demand that most (or all) of their slots could be filled with top 10% admits alone. But even these "impacted" programs accept 75% of their students based on

The constitutionality of UT's individualized consideration of race follows *a fortiori* from this Court's precedents, because it suffers from none of the flaws identified by Justice Powell in *Bakke* or that caused Justice Kennedy to conclude that the admissions plan in *Grutter* operated as a quota. It is undisputed that UT does not have a quota or target for any racial group. JA 131a. It is undisputed that race is neither an "automatic" nor predominant factor (to the contrary, petitioner argues (at 38-42) that it is too "minimal"). And the record establishes that "[n]o admissions officer ... monitors the racial or ethnic composition of the group of admitted students at any time during the admissions process in order to determine whether an applicant will be admitted." JA 398a; *see* JA 131a, 387a-89a, 415a; App. 32a-33a, 45a.

Like the Harvard plan approved by Justice Powell, UT's admissions policy "treats each applicant as an individual in the admissions process," and does not "foreclose[] [petitioner] from all consideration" for any seats "simply because [s]he was not the right color or had the wrong surname." *Bakke*, 438 U.S. at 318. Standing on its own, UT's modest consideration of race in the non-percentage applicant pool is constitutional

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class rank or AI alone (where race is irrelevant); their remaining slots are filled using the AI/PAI matrix process described above. JA 383a. Accordingly, depending on the program selected as the first choice, some top 10% admits in 2008 also received a full-file read (and a PAI score) to determine whether they would get their first- or second-choice program. That policy furthers UT's interests in academic selectivity and ensuring that its students enjoy the educational benefits of student body diversity. In any event, petitioner challenges only the denial of her admission to UT under holistic review. JA 38a. She has no basis to complain about UT's placement of students admitted under the top 10% law.

under this Court's existing precedent, as the court of appeals and district court held. Because petitioner's qualifications and circumstances were "weighed fairly and competitively" on a holistic and individualized basis, she has "no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.*

II. PETITIONER'S ARGUMENTS THAT UT'S ADMISSIONS POLICY NEVERTHELESS IS UNCONSTITUTIONAL LACK MERIT

Unable to challenge the individualized nature of UT's consideration of race, petitioner is forced to wage a challenge at odds with existing precedent and the record developed in this case. That effort fails.

A. Petitioner's Central "Racial Balancing" Charge Is Unfounded

The centerpiece of petitioner's brief is her claim that UT is engaged in "racial balancing." Petitioner repeatedly asserts—mostly without citation to the record—that UT's objective is to "mirror the demographics of Texas," and thus is "purely representational." Pet. Br. 19; *see id.* at 6-7, 22, 26-29, 45-46. Petitioner even argues that "mirror[ing] the demographics of Texas" is "UT's *acknowledged* goal." *Id.* at 19 (emphasis added). That is not only incorrect, it is fatally contradicted by petitioner's own concession.

The cases in which the Court has found racial balancing or the like have involved a policy that set a racial quota or target tied to demographics. *See, e.g.*, *Parents Involved*, 551 U.S. at 729; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986); *Bakke*, 438 U.S. at 307 (Powell, J.). In *Parents Involved*, the plurality explained that "working backward to achieve a particular type of racial balance ... is a fatal flaw under our existing precedent." 551 U.S. at 729. It then contrasted the plan invalidated in *Parents Involved*, which established a "defined range set solely by reference to ... demographics," and the plan upheld in *Grutter*, which (the *Grutter* Court held) "did not count back from its applicant pool to arrive at the 'meaningful number' it regarded as necessary to diversify its student body." *Id.*

The record here forecloses any finding of racial balancing. Indeed, petitioner herself conceded in a proposed statement of fact that UT has *not* established a "goal, target, or other quantitative objective" for admitting minorities. JA 131a. That should end the matter. Although petitioner now argues (at 27) that UT *has* established racial "targets," petitioner—like all litigants—is bound by her own concessions. *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2983 (2010); *id.* at 2999 (Kennedy, J., concurring).

Moreover, petitioner's concession is unassailable. The record establishes that admissions officers do *not* monitor the racial composition of the class or work backwards to get to any target at any point in the process. *Supra* at 26-27. The structure of UT's admissions process makes that impossible—since race is considered only in the PAI score, and PAI scores are all determined individually, months before the actual admissions line is drawn on the (wholly race-blind) grid. *Supra* at 26. The numbers of minorities admitted under holistic review do not remotely mirror racial demographics. App. 45a. And the testimony of admissions officers confirms that UT's objective in considering race was to achieve the educational benefits of diversity. JA 264a-65a, 178a, 309a.

So how does petitioner try to justify her racial balancing charge? She points to the determination in the 2004 Proposal that there are "underrepresented" minorities at UT, based on a comparison between UT's undergraduate student body and the State's population—the primary applicant pool for UT. *See* Pet. Br. 6-7 (citing SJA 24a-25a). But that is not evidence of racial balancing. "'Some attention to numbers'" is unavoidable in determining whether a racial group is underrepresented as a general matter, and that attention in deciding whether to consider race at all in admissions by no means "transform[s] a flexible admissions system into a rigid quota." *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323); *cf. Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) (it is "permissible" for a school to consider its "racial makeup" and "adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.") (citing *Grutter*).

There are some 26 references to underrepresented minorities in *Grutter*, and the concept of underrepresentation as gauged by state population has been used by this Court in other areas, such as in determining racial disparities in grand jury selection. *E.g., Castaneda v. Partida*, 430 U.S. 482, 494-95 & n.13 (1977). State population likewise is a logical data point in determining underrepresentation at a flagship state university—like UT—that draws the vast majority of its admits each year (about 90%) from the State it was created to serve. A university's identification of underrepresented minorities thus does not disqualify a plan under *Grutter* and *Bakke*. *See* Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1813-14 (2004).

UT considered such statewide data only in determining whether any race-conscious admissions policy could be warranted at all under this Court's precedent. SJA 1a. The point of considering such data was not to ensure that the university reaches some representational target; it was to assess whether minority groups are underrepresented at the university because, among other things, they are systematically faring poorly in the admissions process. Of course, a university cannot look to racial demographics—and then work backward in its admissions process to meet a target tied to such demographics. But as discussed, the record establishes that UT has not done so—and, indeed, has not established any "target" at all. JA 131a.

B. The Top 10% Law Does Not Foreclose The Individualized Consideration Of Race In UT's Holistic Review Process

Petitioner argues (at 37-38) that the top 10% law is a "'workable race-neutral alternative'" that alone forecloses UT's holistic consideration of race for non-percentage applicants. That argument is unavailing.

Applicants subject to UT's holistic admissions process are by definition not eligible for admission under the top 10% law. Petitioner has not argued that the entire undergraduate class should be mechanically selected pursuant to the top 10% law, and such a rule would impose enormous educational costs because of the shortcomings inherent in percentage plans, discussed below. Like all selective schools, UT seeks "to make the best possible use of the limited number of places in each entering class" to advance as effectively as it can its educational mission. William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly, Sept. 26, 1977, at 7, 9. So UT seeks to maximize broad diversity within the pool of holistic admits; indeed, the individualized consideration of a wide range of factors is the central purpose of whole-file review. *Supra* at 13-14. The existence of the top 10% plan does not bar UT from doing so.

Indeed, in *Grutter* this Court specifically rejected the argument that percentage plans are a complete, workable, and constitutionally required alternative to the individualized consideration of race in holistic review. 539 U.S. at 339-40. As the Court observed, "even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 340. That conclusion is particularly salient because the Court's decision specifically identified Texas's percentage plan. *Id.*

Percentage plans have serious educational tradeoffs. UT, like many of the Nation's top universities, seeks to assemble a class that is diverse in the innumerable ways—including race—that advance its mission of educating students and preparing them to be the leaders of tomorrow. UT's holistic admissions process directly advances that compelling interest. By contrast, the percentage plan—with its single-minded focus on class rank—makes such nuanced judgments impossible. It also forecloses the consideration of other academic criteria, including the quality of the applicant's high school, the nature of her course load, and her performance on standardized tests. *See* Laycock, *supra*, at 1817-19. This Court presumably would not select its own law clerks based solely on class rank—from any law school within a State or geographic area—without regard to other academic criteria or individualized factors.

In addition, although the top 10% law helps admit minorities, it does so largely as a result of well-known de facto segregation throughout much of Texas's secondary school system. *See supra* at 8; Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admission: A Comparative Analysis of Three States' Experiences* 14-15 (2003); Laycock, *supra*, at 1806-10. That segregation produces clusters of overwhelmingly majority-minority schools—largely confined to particular geographic areas of the State—that tend to produce large numbers of minority admits under the top 10% law. But that clustering also means that the top 10% law systematically hinders UT's efforts to assemble a class that is broadly diverse, and academically excellent, across the board—including *within* groups of underrepresented minorities.

Holistic review permits the consideration of diversity within racial groups. *Cf. Bakke,* 438 U.S. at 324 (quoting Harvard plan; contrasting an applicant who is the "'child of a successful black physician'" and one who "'grew up in an inner-city ghetto of semi-literate parents'"). And, in fact, admissions data show that African-American and Hispanic students admitted through holistic review are, on average, more likely than their top 10% counterparts to have attended an integrated high school; are less likely to be the first in their families to attend college; tend to have more varied socioeconomic backgrounds; and, on average, have higher SAT scores than their top-10% counterparts. *See* UT, Office of Admissions, *Student Profile: Admitted Freshman Class of 2008*, at http://www.utexas.edu/student/admissions/research/AdmittedFreshmenProfile-2008.pdf.

These students have great potential for serving as a "bridge" in promoting cross-racial understanding, as well as in breaking down racial stereotypes. *See* App. 57a n.149. The African-American or Hispanic child of successful professionals in Dallas who has strong SAT scores and has demonstrated leadership ability in extracurricular activities but falls in the second decile of his or her high school class (or attends an elite private school that does not rank) cannot be admitted under the top 10% law. Petitioner's position would forbid UT from considering such a student's race in holistic review as well, even though the admission of such a student could help dispel stereotypical assumptions (which actually may be *reinforced* by the top 10% plan) by increasing diversity within diversity.

That is not to say that a minority applicant with a less disadvantaged socioeconomic background is preferred. To the contrary, as noted, UT has made specific efforts to recruit minorities of all socioeconomic backgrounds. *Supra* at 7. The point is that just as broad diversity is essential to UT's educational mission, so is the presence of minority students with different backgrounds and perspectives. As this Court has observed, "failing to account for the differences between people of the same race" not only compromises diversity in the broad sense, it does a "disservice" to the goal of becoming "'a society that is no longer fixated on race.'" *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 434 (2006).

The Constitution permits UT to conclude that holistic review—including its modest consideration of race—for the remaining admissions decisions is a critical counterpart to the top 10% law in order to compensate for the various ways in which the single-criterion percentage plan otherwise distorts and limits the overall diversity of the class. That conclusion fits comfortably within strict scrutiny review. Race-neutral methods are not "workable" if they would have a significant "detrimental effect" on a university's mission. *Croson*, 488 U.S. at 509-10. And they are not genuine "alternative[s]" unless they would serve the university's compelling interest "'about as well'" as the race-conscious plan. *Wygant*, 476 U.S. at 280 n.6. The top 10% law comes up short on both yardsticks.

Petitioner argues (at 51-52) that UT's adoption of the policy at issue was not a "last resort." But the record overwhelmingly establishes that UT acted in good faith and only after considering many race-neutral alternatives, including recruiting, scholarships, and other measures. *Supra* at 7. As the district court put it, "[t]o argue that UT has failed to give serious, good faith consideration to race-neutral alternatives is to ignore the facts of this case." App. 164a; *see* SJA 24a. For years, UT went deep into the playbook for race-neutral alternatives in this context, and yet levels of underrepresented minorities at UT remained stagnant, at best. The Constitution did not place the self-defeating burden on UT to continue even further down that unpromising path before trying the modest race-conscious measure at issue here.

Petitioner's argument also creates perverse incentives. It would discourage universities from experimenting with percentage plans or similar alternatives—and thus would impede the ultimate goal of ending race-conscious admissions. Under petitioner's approach, the adoption of a race-neutral measure like a percentage plan for a portion of the admissions class would effectively preclude a university from engaging in race-conscious holistic review for the remaining part of the class. Experimentation is critical in this area. *See* William G. Bowen & Derek Bok, *The Shape of the River* 286 (1989). Experimentation with percentage plans should not be reduced to an all-or-nothing proposition.

C. The Modest Manner In Which Race May Impact Holistic Admissions Is A Constitutional Virtue, Not A Vice

Petitioner argues (at 38-42) that UT's consideration of race in holistic admissions is too modest to pass muster. That argument is flawed as both a doctrinal and factual matter. As a doctrinal matter, in the kind of individualized and holistic review of applicants commended in *Bakke* and *Grutter* race does not predominate but instead plays only a nuanced and limited role in the admissions process. *See* Part I, *supra*; *Grutter*, 539 U.S. at 337; *Bakke*, 438 U.S. at 318 (Powell, J.); *see also Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) (race may be "one, nonpredominant factor" in such a system). The nuanced and modest impact of race under UT's holistic review plan is thus a constitutional virtue, not a vice.

Petitioner's reliance (at 38) on *Parents Involved* is misplaced. The plan at issue there used a crude "white/non-white" classification in pursuit of a fixed target based on the racial composition (in white/non-white terms) of the district. 551 U.S. at 723. Race was not considered simply as "one factor weighed with others in reaching a decision, as in *Grutter*"—it was "*the* factor." *Id.* And the plan merely "'shuffle[d] a few handfuls of different minority students'" around to get a specified range of minority enrollment based on district-wide demographics. *Id.* at 734. In *that* context—the "extreme approach" of assigning students to different districts based on "a binary conception of race"—the Court observed that the "minimal impact" of the challenged classification was a reason to conclude that other, less burdensome means would have been just as (or more) effective. *Id.* at 735. UT's individualized consideration of race in holistic admissions is entirely different, its purposes could not be accomplished in any other way, and as discussed, in this context the goal is for race to play a modest role.

In any event, UT's nuanced consideration of race has a significant impact on advancing UT's diversity objective. It is undisputed that "the consideration of race in admissions does increase the level of minority enrollment," and the evidence shows that "race is a meaningful factor and can make a difference in the evaluation of a student's application." App. 163a n.14; JA 113a. Moreover, petitioner's efforts to trivialize the number of minority admits from the holistic pool is based on only a one-dimensional view of diversity that ignores UT's objective to assemble a student body that is broadly diverse—including within different minority groups. As discussed, that diversity itself has invaluable educational benefits. *Supra* at 34.

The raw numbers of underrepresented minorities admitted under holistic review also completely belie petitioner's claim (at 9, 39) that the consideration of race has had a "negligible"—nay, "infinitesimal"—impact on diversity at UT. Petitioner states (at 39) that UT "classif[ied] 29,501 applicants by race" (a claim that is inaccurate, *see supra* n.7) and "enrolled 216 African-American and Hispanic students" evaluated through holistic review. But looking at minority *enrollment* masks the impact of the admissions policy; UT competes with Ivy League and other top schools for many holistic admits—and does not always win that battle. The relevant benchmark therefore looks to the minorities *admitted*. And in 2008, a full 20% of all African-American admits were offered admission through full-file review, as were 15% of all Hispanic students offered admission. SJA 158a.

Petitioner also argues (at 39) that UT's consideration of race was likely "not decisive for many of the 216" African-American and Hispanic admits who ultimately enrolled. That may well be right—but only because it is precisely what you would expect to get when admissions decisions are made on an individualized basis, taking race into account only in context, and as a non-predominant factor. UT has carefully followed this Court's teachings to ensure that race is only one factor among many in a process that respects the individual dignity of each applicant. In petitioner's view, those instructions were not a road map to the safe harbor recognized by *Bakke* and *Grutter*, but a trap leading to unconstitutionality.

D. UT Had A Sufficient Basis To Conclude That Adding Race To Its Holistic Review Promoted Its Compelling Interest In Diversity

Although UT decided to add race to holistic review to advance the same broad diversity interest that this Court held compelling in *Grutter* and *Bakke*, petitioner argues that UT lacked a compelling interest to consider race in holistic admissions. Not so.

1. Petitioner first tries to recharacterize the interest pursued by UT. Pet. Br. 26-30. Her main claim (at 27) is that UT's objective was simple "racial demographics." As discussed (Part II.A, *supra*), that argument is meritless. As a fall back, petitioner argues (at 29) that UT's "only other interest" was "classroom diversity." That argument also fails. UT did consider diversity in the classroom as "*one* window" into whether its students were realizing the educational benefits of diversity. JA 226a (emphasis added). But UT's objective was far broader than the interest in "classroom diversity" attacked by petitioner.

UT has made clear that its objective is the educational benefits flowing from a richly diverse class—an interest that this Court found compelling in *Grutter* and *Bakke*. SJA 1a, 3a-4a. That includes an "academic environment" in which there is "a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." SJA 23a. An obvious way of promoting that objective is fostering diversity in the classroom—one of the most important places where ideas are exchanged. But UT's diversity interest extends beyond the classroom to the existence of "a *student body* that permits all students to experience concrete benefits from diversity." JA 428a-29a (emphasis added). The record is replete with evidence that UT pursued this broader objective—and seeks diversity "spread across the university in all the things that [it does]." JA 266a; *see, e.g.*, JA 159a, 204a-05a, 210a-11a, 264a-65a, 309a, 364a-65a, 396a, 428a.

However it is parsed, UT's broad diversity interest is unquestionably compelling under *Grutter*, 539 U.S. at 322-36, and *Bakke*, 438 U.S. at 311-15 (Powell, J.). *See Parents Involved*, 551 U.S. at 722-23. Indeed, this interest in diversity is if anything even more compelling here than in *Grutter* or *Bakke*, because it has been argued that the educational benefits of diversity are all the more salient in the undergraduate setting than the graduate school setting. *Bakke*, 438 U.S. at 313 (Powell, J.). Likewise, ensuring a diverse student body is especially important at a flagship state university like UT, which "bear[s] a special responsibility in ensuring that 'the path to leadership be visibly open to talented and qualified individuals.'" SJA 3a (quoting *Grutter*, 539 U.S. at 332).

2. Petitioner argues (at 34) that UT's interest in diversity is suspect because UT has not defined the "percentage" of minorities that will meet its objective. But reducing racial diversity to a fixed percentage itself "would amount to outright racial balancing." *Grutter*, 539 U.S. at 329-30. Moreover, this argument overlooks the whole point of diversity in this context. As Justice Powell explained, the interest that is compelling is "not an interest in simple ethnic diversity" tied to a "specified percentage of [minorities in] the student body"; rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315.

Instead of seeking any fixed percentage, UT seeks a "critical mass," which is simply a short-hand reference to the racial diversity necessary to realize the educational benefits that this Court has repeatedly acknowledged. SJA 25a. No particular percentage of the incoming class will ensure that those benefits are realized in all educational settings—just as (to follow the analogy back to its roots) no fixed amount of fissile material guarantees a nuclear chain reaction without regard to other circumstances. Differences in the size or type of schools, in their educational missions, in the communities that universities serve, in their history of racial isolation or discrimination, and so on, may all affect the level of diversity required to realize the full educational benefits of diversity. Reducing diversity to an inflexible, one-size-fits-all percentage finds no support in *Bakke* or *Grutter*, or the real world.

That does not mean that the critical-mass determination is just an abstraction. An important part of the determination is a university's own first-hand assessment of the educational benefits flowing from student body diversity at a given point in time. Although that might seem like an amorphous determination to some, trained educators make these sorts of judgments all the time in ascertaining—and calibrating—the environment in which their students are educated. Because a diverse student body is "so essential to the quality of higher education," that judgment is entitled to some deference. *Bakke*, 438 U.S. at 312-13; *see Grutter*, 539 U.S. at 328. But UT did not simply rely on an unadorned statement of educational judgment. It based its determination that UT had not yet reached a critical mass in 2004 on hard data on minority admissions, enrollment and racial isolation at UT, as well as discussions with students about their own experiences at UT. JA 267a-68a.

3. Petitioner argues that UT already had achieved all the diversity the Constitution allowed it to seek

when it adopted the admissions policy in 2005. That argument has two major structural flaws. First, in gauging diversity, petitioner repeatedly combines individuals of different races—African-Americans and Hispanics—suggesting that the relevant measure of diversity is the sum of the percentages of *both* groups. *See* Pet. Br. 35; *see id.* at 3, 4, 5. But this Court has already rejected reliance on such "a limited notion of diversity," *Parents Involved*, 551 U.S. at 723, which lumps together distinct racial groups of individuals, and ignores the diversity that exists among individuals *within* racial groups, *Perry*, 548 U.S. at 434.

Second, petitioner apparently assumes that UT had already achieved all the diversity it was allowed in 1996—the year of *Hopwood*—because she adopts 1996 as the baseline for whether UT was permitted to do more. Pet. Br. 36. But UT by no means regarded the level of racial diversity in 1996 as a fully-realized end point. UT also appreciated that, as one Texan observed in a similar vein, the fact that "race-neutral admissions policies have resulted in levels of minority attendance for incoming students that are close to and in some instances slightly surpass those under the old race-based approach" (such as quotas) does not mean that we should be "satisfied with the current numbers of minorities on Americans' college campuses." 39 Weekly Comp. Pres. Docs. 71, 72 (2003) (President Bush's remarks on the Michigan cases). To the contrary—"[m]uch more [progress] is needed." *Id.*[8]

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[8] Similarly, the fact that UT touted existing diversity in the various materials cherry-picked by petitioner—some of which post-date 2008—in no way suggests that UT had concluded that it had already fully achieved a critical mass. And petitioner overlooks the critical importance of such materials in recruiting

The record amply supports UT's judgment—following its year-long evaluation—that it had not yet achieved all the constitutionally permissible educational benefits of diversity. Indeed, in 2003, after several years of facially race-neutral efforts to promote diversity, only 3%—a startling number—of the entering class was African-American and 14% Hispanic, at or below 1996 levels. JA 121a-22a. The figures were only slightly better in 2004. JA 127a. In other words, the levels of underrepresented minorities at UT were at best stagnant compared to 1996. And in an important sense, the situation was worse for underrepresented minorities in 2004: the odds of admission for an African-American or Hispanic in the second decile of their high school class dropped under the top 10% law, whereas the odds for a similarly situated Caucasian applicant increased. App. 20a.

At the same time, there was jarring evidence of racial isolation at UT. *Supra* at 10. The classroom is an especially important environment at a massive university like UT, where students are more dispersed and the vast majority live off campus. Of course a critical mass of underrepresented minorities is not required in "every small class." Pet. Br. 30. But the fact that African-American and Hispanic students were nearly non-existent in *thousands* of classes was a red flag that UT had not yet fully realized its constitutional interest in diversity. App. 157a. If "[a] compelling interest exists in avoiding racial isolation," *Parents Involved*, 551 U.S. at 797 (Kennedy, J.,

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minority students to join a campus community still perceived as "largely closed" and "[un]welcoming" to them. SJA 14a.

concurring), then surely a university may take account of blatant racial isolation in its classrooms.[9]

4. Petitioner argues (at 7, 28) that UT's interest in diversity cannot be compelling because UT's policy purportedly favors African-Americans and Hispanic students, while (petitioner says) penalizing other groups such as Asian-Americans. That gets both the law and the facts wrong. As a legal matter, this Court's precedents call for an examination of whether a university has reached a critical mass of "underrepresented minority students." *Grutter*, 539 U.S. at 338. As the Court has explained, "[b]y virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to [a university's] mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences." *Id.*; *id.* at 333 ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."). That explains why UT focused on underrepresented minorities in gauging critical mass in 2004.

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[9] Given the backward-looking nature of petitioner's sole-remaining damages claim, the only question here is whether UT had a sufficient basis to adopt the challenged policy in 2005 or apply it in 2008. *Supra* at 17. Petitioner's numerous references to minority enrollment at UT *after* that time period are therefore irrelevant here. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012) ("[W]e adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court.") (quoting *Sweatt*, 339 U.S. at 631).

As petitioner has recognized, Asian-Americans are not an underrepresented minority at UT when considering UT's primary applicant pool—Texas. Pls.' Mot. for Partial Summ. J. Br. 16 n.3, ECF No. 94; *see* App. 45a. In 2004, Asian-Americans comprised about 3% of the population in Texas, yet accounted for 18%—six times that figure—of UT's freshman class (and grew to 19% by 2008 under the plan at issue). App. 155a n.10; SJA 156a. Meanwhile, Asian-American applicants to UT have for years gained admission at higher rates than any other group (including Caucasians). SJA 43a, 156a. For example, 61.7% of all Asian-American applicants in 2004 gained admission. SJA 43a. In other words, unlike African-Americans and Hispanics, Asian-Americans have fared dramatically better in admissions at UT than would be expected just considering their presence in the applicant pool.

As a factual matter, petitioner's argument is based on a misconception of how the policy operates. As she has conceded, UT's holistic consideration of race can benefit any applicant, minority or not. JA 130a; *see supra* at 14. That includes Asian-Americans (JA 284a)—whose enrollment actually *increased* under the policy at issue. App. 24a. At the same time, no applicant, even an underrepresented minority, is guaranteed that race will be a tipping factor in full-file review. As this Court recognized in *Grutter*, 539 U.S. at 338, underrepresented minorities are more likely to have racial experiences that may impact an admissions decision under the contextualized way that race is considered by UT. But because the contextualized consideration of race is the same for all applicants, any applicant—of any race—may benefit from the individualized consideration of race.[10]

For similar reasons, petitioner's argument (at 46-47) that UT's policy is unconstitutional on the ground that Hispanic students are "not underrepresented" at UT is not only wrong, but academic. Petitioner has acknowledged that Hispanics are underrepresented at UT compared to the State (UT's main applicant pool). Pls.' Mot. for Partial Summ. J. Br. 16 n.3. Although petitioner emphasizes that Hispanics were 16.9% of the student body in 2004, there were still thousands of classes at UT with zero or only one Hispanic student, and Hispanics were being admitted at a far lower rate than one would expect. *Supra* at 10. The flagship state university for Texas—with a special obligation to train the future leaders of Texas—was entitled to conclude that that was simply unacceptable.

In any event, although petitioner focuses on the level of Hispanics admissions, she does not contest that African-Americans were, and still are, severely underrepresented at UT. That undeniable fact provided a sufficient basis for UT to adopt its race-conscious admissions policy in 2004, under which the consideration of race could benefit any applicant.[11]

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[10] The Harvard plan, as well as all other holistic admissions plans of which UT is aware, consider the race of *all* applicants in full-file review, and not just that of underrepresented minorities. *See Grutter* Amherst Br. 10-11.

[11] Petitioner's suggestion that race-conscious admissions will never end at UT just renews the same basic end-point arguments that this Court rejected in *Grutter*. And this case is a particularly ill-suited vehicle in which to revisit those arguments, because petitioner's only remaining claim is her *backward-looking* damages claim, which turns on whether UT's policy was justified

E. Petitioner's Efforts To Recast And Impugn The Fifth Circuit's Articulation Of Strict Scrutiny Fail

Although the Fifth Circuit explicitly recognized that strict scrutiny applied (App. 35a), petitioner argues (at 47) that the court "abandon[ed]" strict scrutiny. That argument is based more on statements stripped of context than a fair reading of the opinion.

The Fifth Circuit not only took it as "a given" that "strict scrutiny with its requirement of narrow tailoring" applied, it stressed that "race summons close judicial scrutiny, necessary for the nation's slow march toward the ideal of a color-blind society." App. 34a-35a. The court also emphasized that "[n]arrow tailoring ... requires any use of racial classifications to so closely fit a compelling goal as to remove the possibility that the motive for the classification was illegitimate racial stereotype." App. 36a. And the court made clear that "the scrutiny triggered by racial classification 'is no less strict for taking into account' the special circumstances of higher education." *Id.* (quoting *Grutter*, 539 U.S. at 328). Ultimately, the court's detailed and rigorous examination of the record and the parties' arguments on both the compelling-interest and narrow-tailoring prongs in its lengthy decision refutes petitioner's claim that the court was derelict in its duty to apply strict scrutiny.

Petitioner's main complaint (at 48-49) is the way in which the Fifth Circuit characterized the deference

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in 2005 or 2008. In any event, the proper application of strict scrutiny will ensure that any use of race in admissions lasts no longer than warranted. And one of the lessons of the explosive growth in Asian-American admissions in higher education in recent years is that racial barriers can be overcome.

due to a university's educational judgments, and its willingness to presume "good faith" on part of UT in pursuing educational objectives—"absent 'a showing to the contrary.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 318-19 (Powell, J.)). But in stating that it owed "a degree of deference to [UT]'s constitutionally protected, presumably expert academic judgment" (App. 37a), the Fifth Circuit did not abandon strict scrutiny. It simply recognized—as Justice Powell did in *Bakke*, 438 U.S. at 312-13, and the Court did in *Grutter*, 539 U.S. at 329-30—that subsidiary facts in the strict scrutiny analysis may involve judgments within the ambit of the academic freedom that has long been recognized "as a special concern of the First Amendment." 438 U.S. at 312; *see Parents Involved*, 551 U.S. at 792 ("First Amendment interests give universities particular latitude in defining diversity.") (Kennedy, J., concurring); *Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting) (it is appropriate to give "deference to a university's definition of its educational objective"). This Court itself has deferred to analogous factual determinations in conducting strict scrutiny in other contexts, where courts likewise lack institutional competence to make the determinations. *See, e.g., Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010).

Of course, such deference still has its limits. A university does not get deference on the ultimate question whether the means through which it pursues its compelling interest are narrowly tailored. *Grutter*, 539 U.S. at 334-35; *see id.* at 388 (Kennedy, J., dissenting) (university is not entitled to "deference to the implementation of [its diversity] goal"). But the Fifth Circuit did not defer to UT's belief that its policy was *narrowly tailored.* Nor did it defer to UT on whether its policy served as a disguised quota, ensured individual consideration, or relied upon race as a predominant factor in admissions. To the contrary, the court rigorously tested the policy in light of petitioner's narrow-tailoring objections. App. 43a-70a.

Petitioner also argues (at 31-34) that the Fifth Circuit erred in not extending the "strong basis in evidence" standard to this case. Here again, however, the Fifth Circuit simply followed existing precedent. Although the petitioner in *Grutter* similarly argued that a "strong basis in evidence" was required (*Grutter* Pet. Br. 24), not even the *Grutter* dissenters advanced that view. And neither *Parents Involved*, nor *Grutter*, nor *Gratz* holds that this standard applies when the interest asserted is a university's compelling interest in the educational benefits of diversity—which this Court has long recognized *is* a compelling interest that all public universities possess, so long as it is genuinely tied to their educational mission and is not a disguised quota (which, as discussed, is undisputed here).

Moreover, as the Fifth Circuit explained, the employment and government contracting cases on which petitioner relies in advocating this standard are readily distinguishable. App. 38a-42a. The only compelling interest that the Court has held could justify the consideration of race in those contexts is the "backward-looking" (App. 40a) interest in remedying past wrongs. In such cases, the Court has explained, "the necessary factual predicate is prior discrimination," so there must be "a factual determination" for the conclusion that "remedial action was necessary." *Wygant,* 476 U.S. at 277-78 & n.5 (Powell, J.). By contrast, the compelling interest recognized by *Bakke* and *Grutter* in the higher education admissions process is the "forward-looking" interest that universities have in "obtain[ing] the educational benefits of diversity." App. 41a.

In any event, the evidence discussed establishes that UT had a "strong basis" for concluding that race-conscious admissions were necessary in 2005 to further UT's compelling interest in a diverse student body. Indeed, whereas the "strong basis in evidence" standard has been used to smoke out whether an employer has adopted a "*de facto* quota system," App. 39a, it is conceded that UT has not established any quota. A contrary conclusion would subject the Nation's finest universities and graduate schools to endless litigation over the use of race-conscious admissions policies. As a practical matter, that would be tantamount to forbidding the consideration of race in holistic admissions. But this Court has twice refused to do that. And it should reject petitioner's request to overhaul the strict scrutiny inquiry in order to achieve the same practical result here.

Strict scrutiny can be strict without being "fatal in fact." *Johnson*, 543 U.S. at 514. There is no basis to hold the Nation's universities to any higher standard in seeking to advance educational objectives that this Court itself has held are compelling.

III. THERE IS NO BASIS TO RECONSIDER OR OVERRULE EXISTING PRECEDENT

Given the obvious tension between her arguments and this Court's existing precedent, it is not surprising that petitioner ultimately finds it expedient to ask (at 53) this Court to "overrule[]" that existing precedent. That request underscores that petitioner's objective is not so much the *application* of existing precedent as the dismantling of it. She has provided no basis for the Court to take that extraordinary step.

For starters, petitioner has not even properly presented that question. Her own question presented explicitly assumes *the validity of* existing precedent, asking "[w]hether this Court's decisions ..., including *Grutter* ..., permit the University of Texas at Austin's use of race in undergraduate admissions decisions." Pet. i. The question whether a decision of this Court should be overruled is quite different from (and therefore not fairly included within) the question whether a policy is lawful "under" (Pet. Br. i)—*i.e.*, according to—such precedent. *See* Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). A single sentence tacked onto the end of the petition for certiorari (at 35) states that, if the decision below is correct, *Grutter* should be overruled "to restore the integrity of the Fourteenth Amendment's guarantee of equal protection." But neither that platitude nor the back-of-the-envelope discussion of *stare decisis* at the tail-end of petitioner's merits brief properly presents the far-reaching question whether *Grutter* and *Bakke* should be overruled. *Cf. Randall v. Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring).

In any event, even when the Court would not "agree with [a decision]'s reasoning and its resulting rule" were it "addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling" the decision at a later point. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). After all, "[t]he doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained." *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., joined by Kennedy, J., concurring) (quoting *The Federalist No. 78*, at 471 (Clinton Rossiter ed., 1961)).

Although petitioner and her amici obviously believe that *Grutter* and *Bakke* are *wrong*, they have not identified any "'special justification'" (*id.*) for overruling those decisions. In *Grutter*, this Court reaffirmed Justice Powell's opinion in *Bakke*. And in the nine years since *Grutter*, this Court has never questioned *Grutter*'s core holding. To the contrary—it has relied on *Grutter* without questioning it. *Parents Involved*, 551 U.S. at 722-23. *Bakke*—as solidified by *Grutter*—has become a "long-established precedent … integrated into the fabric of the law." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233 (1995); *see also, e.g.*, *Grutter* Amherst Br. 28-29. Indeed, petitioner herself does "not challenge" a central component of *Bakke* and *Grutter*: the Court's holding that universities have a compelling interest "in promoting 'student body diversity.'" JA 74a.

Nor have the standards established in *Bakke* and *Grutter* proven to be unworkable. That is underscored by this Court's own reliance on those cases (*see Parents Involved*, 551 U.S. at 722-23), three decades of implementation of this Court's decisions by the Department of Education (*see Grutter* Resp. Br. 18-19), and the fact that *Grutter* has not produced any conflict of authority in the lower courts.

Moreover, overruling *Grutter* and *Bakke* would upset profoundly important societal interests. As the Court recognized in *Grutter*, both public and private universities across the country have been modeling their admissions policies "on Justice Powell's [opinion in *Bakke*]" for decades. 539 U.S. at 323. The student body diversity fostered by these programs has translated into invaluable educational benefits for millions of Americans and had a vital impact on training the Nation's future leaders in all fields, including the military. The selection and education of America's future leaders in our increasingly diverse society are too important for this Court to eliminate the constitutional framework that has been used by universities for decades in pursuing that compelling objective on the basis of the skimpy, four-page argument (at 53-56) that petitioner makes here.

And, of course, the Court's "legitimacy requires, above all, that [it] adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds." *Bush v. Vera*, 517 U.S. 952, 985 (1996). It would be an abrupt—and destabilizing—step for the Court to overrule *Grutter* just nine years after this Court reconsidered and reaffirmed Justice Powell's opinion in *Bakke*. It would be all the more disruptive given that *Grutter* captured the attention of the Nation when it was decided by this Court; nothing has changed since *Grutter* (other than the composition of this Court); this case will not be considered by the full Court (because of Justice Kagan's recusal); and this case concededly does not even present the central concern (the risk of disguised quotas) that critics of the consideration of race in the higher education context have attacked.

* * * * *

UT well appreciates that the appropriate consideration of race in higher education admissions defies an easy answer. Certainly all aspire for a colorblind society in which race does not matter—and need not be considered to ensure a diverse proving ground for the Nation's future leaders. But in Texas, as in America, "our highest aspirations are yet unfulfilled." *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring). And it remains "a fact of life in contemporary America that the perspectives of individuals are often affected by their race as by other aspects of their background." Bowen, *supra*, at 9. The Constitution did not bar UT from taking account of that fact—and considering race along with the many other characteristics applicants possess in the individualized and modest manner in which its holistic admissions policy operated in 2008, in order to seek the full educational benefits of a diverse student body.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY
BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents and their *amici* focus on defending racial diversity in higher education as a compelling government interest and on insisting that race-neutral percentage plans like the Texas Top 10% law not be constitutionally mandated alternatives to "full file" admissions. Br. for Respondents at 23-28, 31-36 (Aug. 6, 2012) ("Resp."); Br. for United States as *Amicus Curiae* at 8-17 (Aug. 13, 2012) ("U.S."). Respondents tilt at self-created windmills. Petitioner has not contested the holding of *Grutter v. Bollinger*, 539 U.S. 306 (2003), that pursuing racial diversity for educational purposes is constitutional when necessary to secure "critical mass" and narrowly tailored to that end. Nor does Petitioner seek to impose a percentage system on all universities. Petitioner's reliance on the substantial diversity produced by the Top 10% law simply recognizes that, given the Texas legislature's decision to enact it, a reviewing court cannot ignore the law's consequences when evaluating whether UT's reintroduction of racial preferences was in fact necessary and narrowly tailored to achieve the interest that *Grutter* found compelling.

Respondents' misdirected arguments cannot obscure their concessions on the matters actually at issue. Respondents have effectively abandoned any reliance on the pervasive deference that the Fifth Circuit accorded UT's use of racial preferences and have expressly abandoned "classroom diversity" as a compelling interest. Respondents instead reemphasize their interest in achieving demographic proportionality and suggest a newly minted interest in elitism dressed up as "intra-racial" diversity. But neither interest is compelling.

And Respondents cannot explain why UT's use of racial preferences is constitutionally necessary or how UT's admissions system is narrowly tailored to achieving any legitimate interest in student body diversity.

Engaging in doublespeak, Respondents contend that race is only a "factor of a factor of a factor of a factor" in the scoring of applications yet seek to credit it for *every* non-Top 10% minority admission. They argue that African-American and Hispanic (but not Asian-American) students remain underrepresented based on state population data but deny that UT is pursuing proportional representation because their system is ineffectual in achieving it. They disclaim an interest in classroom diversity but point to its purported absence as a constitutional basis for using racial preferences. They concede that UT publicly touted the diversity achieved by its prior race-neutral system but (notwithstanding its creation of one of the most racially diverse universities in the Nation) ask the Court to disregard those statements as recruiting puffery. They assure the Court that UT had a factual basis for reintroducing racial preferences but warn that judicial testing of that evidence would sound the death knell for academic freedom. Finally, they critique UT's race-neutral system because it failed to shape a student body representative of Texas yet argue that its centerpiece (the Top 10% law) is problematic because it inadequately favors minorities from affluent backgrounds.

This case is not about Respondents' dissatisfaction with the kind of minorities that UT enrolls because of the Top 10% law. That complaint—which has no connection to racial isolation in the student body—should be directed to the people of Texas and their elected representatives—not the Court. Nor is this case about the benefits of diversity for society as a whole, businesses, the military, or the civil service. This case is instead about whether UT has proven that its reintroduction of racial preferences was necessary to meet a compelling interest and is narrowly tailored to that end. Only then could the injury that Abigail Fisher suffered when applying to UT be constitutionally tolerable. "It is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting). Racial preferences thus "may be considered legitimate only if they are a last resort to achieve a compelling interest." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring). UT's many proffered justifications for reintroducing racial preferences and using them to handicap Ms. Fisher in the admissions process do not remotely meet this standard.

A. Respondents failed to demonstrate the necessity of UT's use of racial preferences to achieve student body diversity.

1. Respondents agree that UT's "consideration of race" in reviewing Petitioner's application for admission "triggers strict scrutiny." Resp. 22.[1] As a result, they

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[1] Despite conceding—as they must—that Petitioner suffered a constitutional injury, *see Grutter*, 539 U.S. at 327, Respondents incorrectly suggest there is a standing problem based on their contention that she would not have been admitted to UT. Resp. 16-17 n.6. But the "question of [Petitioner]'s admission *vel non* is merely one of relief," not standing. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978). And because the district court bifurcated the case, the issue of relief will be litigated in the first instance on remand. Reply Br. at 2 (Dec. 20, 2011). In any

acknowledge that UT must "demonstrate both that its use of race in admissions decisions is necessary to further a compelling government interest and that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose." Resp. 22; *see also* Br. for Petitioner at 24 (May 21, 2012) ("Br.").

Although Respondents suggest the Fifth Circuit fairly applied this standard, they should know better. Respondents in fact refuse to defend the Fifth Circuit's novel "good faith" standard, conceding that "[a] university does not get deference on the ultimate question whether the means through which it pursues its compelling interest are narrowly tailored." Resp. 48. Respondents nevertheless try to rehabilitate the Fifth Circuit by arguing that it "did not defer to UT's belief that its policy was narrowly tailored." *Id.* 48-49. Respondents risk their own credibility in so arguing, as the Fifth Circuit clearly held that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably

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event, Respondents' argument contradicts their representation to the district court that UT could not evaluate whether Petitioner would have been admitted without rerunning its entire admissions process. Opp. to Mot. for Prelim. Injunction, ***Fisher v. UT***, No. 08-263, at 12 (W.D. Tex. May 5, 2008) (Doc. 42). Respondents also cannot reconcile the argument with their claim that race was decisive for every minority admitted outside the Top 10% law. *See infra* at 17-18. Finally, any other "vehicle" problems were addressed at the certiorari stage and need not be repeated other than to note that Respondents have abandoned their mootness argument. They now concede that a damages claim is "still alive in this case." Resp. 17 n.6.

expert academic judgment." App. 37a. Respondents even defended the Fifth Circuit on this score in opposition to certiorari. *See* Br. in Opp. at 30 (Dec. 7, 2011). Now, in retreat from all-out deference, Respondents can say only that "this Court reviews judgments, not statements in opinions." Resp. 21-22.

Respondents also resist having to prove necessity under the "strong basis in evidence" standard. Resp. 49-50. They argue that *Grutter* did not invoke this standard. *Id.* 49. But the issue was not contested in *Grutter.* There, "the consideration of race was viewed as indispensible in more than tripling minority representation at the law school—from 4 to 14.5." *Parents Involved*, 551 U.S. at 734-35. Respondents also contend that the strong-basis-in-evidence standard has been applied only in cases involving remedial preferences. Resp. 49-50. But that is a baseless distinction, Br. of Cato Institute as *Amicus Curiae* at 5-24 (May 29, 2012), and is incompatible with "the avowed continuity in principle of the Court's decisions," App. 180a (Jones, C.J.). This requested distinction would wrongly grant the state broader license to use racial classifications in promoting diversity than in remedying proven discrimination. *Parents Involved*, 551 U.S. at 793-96 (Kennedy, J., concurring).

Respondents contend that the "strong basis in evidence" standard is too difficult to meet and would subject universities to increased judicial oversight. Resp. 50. But that is its purpose. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring) ("[A]ny racial preference must face the most rigorous scrutiny by the courts."); *see also Bakke*, 438 U.S. at 299 (Powell, J.); App. 176a (Jones, C.J.). Despite giving lip service to the need for strict scrutiny, Respondents ultimately seek to reclaim the good-faith review of necessity that the Fifth Circuit condoned—just without defending the words "good faith." The Court should not allow UT to use racial preferences without both proving a need to do so and identifying a termination point. *See supra* at 3-4. The strong-basis-in-evidence standard ensures that racial classifications are employed only as "a last resort." *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring).[2]

2. UT has no evidentiary basis—let alone a strong one—establishing that the minority enrollment achieved by the Top 10% law and race-neutral AI/PAI evaluation generated insufficient student body diversity. Br. 34-37. Although Respondents proclaim adherence to *Bakke* and *Grutter*, they fail to apply their teaching by establishing a legitimate "critical mass" target. Instead, they accuse Petitioner of seeking to impose "an inflexible, one-size-fits-all" critical mass target on all universities. Resp. 41. Even if the "critical mass" target required by *Grutter* may

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[2] Respondents also argue that universities are entitled to deference on "subsidiary" factual questions that "involve [academic] judgments." Resp. 48. That may be true as to UT's "educational judgment that ... diversity is essential to its educational mission." *Grutter*, 539 U.S. at 328; Br. 26. But the demonstration of necessity is not a "subsidiary" factual issue; it is a legal question that lies at the heart of the strict-scrutiny inquiry. No decision—certainly not *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010)—is to the contrary. Resp. 48. The vast differences between the issues here and in *Holder* are too numerous to comprehensively detail. But Respondents' mistaken belief that UT's admissions process is entitled to the same deference as the Executive's management of national security and foreign affairs is revealing.

differ contextually, it still must be determined in order to safeguard the rights of *all* applicants and permit judicial review of the need for and means by which diversity is pursued. Critical mass may differ from school to school. But, as in physics, it is always ascertainable. UT never even attempts to establish how much "fissile material" is needed to sustain a "nuclear chain reaction" on its own campus. *Id.*

Respondents also argue that developing a numerical target for critical mass would be racial balancing. Resp. 40. But establishing objective guideposts—so race will be used only when necessary—is not racial balancing so long as the enrollment goal is based on the educational benefits of diversity and not a desire to reserve a "certain fixed number or proportion of opportunities ... exclusively for certain minority groups." *Grutter*, 539 U.S. at 335; *Bakke*, 428 U.S. at 323 (Powell, J.) ("[T]here is some relationship between numbers and achieving the benefits to be derived from a diverse student body[.]"). UT's failure to identify even a range of minority enrollment that would constitute "critical mass" precludes it from constitutionally justifying racial preferences.

UT likely declined to establish objective guideposts because, as its own data and public statements show, its race-neutral system satisfied any legitimate critical-mass goal. Br. 35-36. Respondents sidestep this data by arguing that Petitioner wrongly "lumps together" distinct minority groups. Resp. 42. But it is the Court that adopted "underrepresented" minorities in the aggregate as the relevant category, *Grutter*, 539 U.S. at 336; *id.* at 375 & n.12 (Thomas, J., concurring in part and dissenting in part); *Parents Involved*, 551 U.S. at 733-74, given the constitutional problems arising from micro-managing critical mass for all minority groups, *see infra* at 16-17. Respondents also discount UT's many public statements touting the success of its race-neutral system as a recruiting ploy. Resp. 42 n.8. But UT cannot so easily abandon its public statements, which are verified by its own "hard data." *Id.* 41.

Respondents would rather attack the wisdom of the Top 10% law, *id.* 31-36, than confront the fact that UT has "approve[d] gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic," App. 182a (Jones, C.J.). But "context matters" in evaluating whether racial preferences are necessary to enroll "meaningful numbers" of minority students. *Grutter*, 539 U.S. at 327, 318. Try as it might, UT cannot "ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texan freshman." App. 55a. Because the Top 10% law (in conjunction with the other aspects of UT's "full file" race-neutral admissions system) enrolled a critical mass of underrepresented minorities, UT had no constitutionally legitimate need to reintroduce racial preferences to further increase minority enrollment.

3. In the courts below, Respondents gave only two reasons for why there was insufficient minority enrollment at UT: the lack of so-called "classroom diversity" and the misalignment of its student body with the demographics of Texas. Br. 27-30. Respondents now have abandoned classroom diversity as a compelling interest and agree that critical mass must be measured against the enrolled freshman class. Resp. 25, 39. Respondents thus continue

to lean heavily on their asserted demographic interest to justify UT's use of racial preferences. *Id.* 30-31, 45-46.

Indeed, Respondents view this demographic interest as inoculating some of UT's most troubling practices. *See, e.g.*, Resp. 45 (deeming Asian Americans overrepresented because they "comprised about 3% of the population of Texas ... yet accounted for 18% ... of UT's freshman class"); *id.* 46 (stating that while Hispanics were "16.9% of the student body in 2004" they were "underrepresented at UT compared to the State"). The parties agree, then, that UT reintroduced racial preferences "based on a comparison between UT's undergraduate student body and the State's population—the primary applicant pool for UT." *Id.* 30. But "student body diversity" is an educational interest—not a representational one. A lack of proportional representation thus could never justify racial preferences. It is constitutionally forbidden racial balancing—not a compelling state interest. Br. 27-29.

Respondents counter that, under *Grutter*, paying "[s]ome attention to numbers" is not racial balancing. Resp. 30. But UT paid attention to the wrong numbers. *See infra* at 10-11. UT never determined the number of minority students needed to avoid racial isolation and unlock the educational benefits of diversity. If it had, there would be no reason to treat Asian Americans and Hispanics unequally, as they are enrolled in similar numbers. UT instead seeks only to secure a demographically proportionate number of seats in the freshman class for African Americans and Hispanics. This is patently unconstitutional. Because critical mass turns on the number of minorities required in the student body to meet *bona fide* educational goals, *Parents Involved*, 551 U.S. at 727; *Grutter*, 539 U.S. at 343, it must be measured against the number of minorities on the university campus—not outside of it.[3]

Respondents also claim that state demographics are a "logical data point" because UT is a "flagship state university" and has a "special duty to train the future leaders" of Texas. Resp. 30, 46. But UT uses state demographics as far more than a "data point." A purported lack of diversity as measured against the Texas population was how UT determined that racial preferences "could be warranted at all under this Court's precedent." *Id.* 31. And the "flagship" and "future leaders" arguments are just repackaged versions of the societal welfare and role model interests this Court has always rejected. Br. 29; *Podberesky v. Kirwan*, 38 F.3d 147, 159 (4th Cir. 1994). At bottom, UT is no more entitled to discriminate on the basis of race to make its student body look more like Texas than the University of Idaho would be to make its student body look as homogeneous as Idaho.

UT claims that its reliance on state demographics finds support in precedent but points only to one grand jury selection case. Resp. 30 (citing *Castaneda v. Partida*,

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[3] Respondents seek to treat Petitioner's statement that UT had not established a fixed critical-mass target as a concession. Resp. 29. That statement referred to UT's failure to set an educationally based critical-mass goal, *see supra* at 6-7, and did not excuse UT's use of demographics as the sole baseline for evaluating diversity, *see supra* at 8-9. Both lower courts understood the difference. App. 44a-51a; App. 148a-156a. Although UT has failed to identify a "specific number or percentage of minority student enrollment that must be achieved in order to create a 'critical mass,'" App. 156a, it has tied its interest in diversity to racial demographics.

430 U.S. 482 (1977)). But because the Fifth Amendment has a "fair cross-section of the community" requirement, Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 15.4(d), at 702-03 (3d ed. 1992), statistical deviation from the composition of the local population could signal race-based exclusion. This cross-section jury selection principle cannot carry over to the educational setting, *see Parents Involved*, 551 U.S. at 726-27 (plurality opinion), especially when it would "lead to different treatment based on a classification that tells each student he or she is to be defined by race," *id.* at 789 (Kennedy, J., concurring).

Respondents also argue that underrepresentation can be divorced from the critical-mass inquiry. Resp. 30-31. But the two concepts are inseparable. Under *Grutter*, whether a school has obtained critical mass must be based on the number of underrepresented minorities in its student body. 539 U.S. at 328-30. UT's claimed reliance on "statewide data only ... to assess whether minority groups are underrepresented at the university" does not save its admissions system. Resp. 31. It conclusively establishes that UT was not pursuing the critical-mass interest that *Grutter* deemed compelling. UT instead was working from state demographics to determine whether it had achieved critical mass on its campus. *Parents Involved*, 551 U.S. at 729.

Last, Respondents suggest the "structure" of its "admissions process makes [it] impossible" to work backwards to obtain demographic parity because "race is considered ... months before the actual admissions line is drawn on the (wholly race-blind) grid." Resp. 29. But UT admits that race "can make a difference" in individual admissions decisions. App. 33a. And for good reason. UT acknowledges that it: (1) uses race to adjust the scores of applicants before they are plotted on the grids that determine admission; and (2) decides which minority groups are to be the express beneficiaries of racial preferences based on state demographics. Resp. 12-13. State demographics thus determine who can benefit from race-enhanced PAI scores and thereby play a direct role in placing the applicant on the "grid" dividing "applicants who will be admitted from those that will be denied." *Id.* 12. That the process is insufficient to achieve UT's demographic goal may make it pointless, but not "wholly race-blind" or constitutional. *See infra* at 19-20.

4. Finally, Respondents assert a novel compelling state interest in "diversity within racial groups." Resp. 33. The argument was not pressed or passed on below and thus need not be considered. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). But, even were the Court inclined to consider it, the argument is meritless.

In Respondents' view, minority students admitted under the Top 10% law are not as "broadly diverse" or "academically excellent" as those admitted through the AI/PAI process. Resp. 33. Thus, UT sees racial preferences as a way to enroll more minority students who matriculate from "an integrated high school," are not the "first in their families to attend college," and are from more affluent "socioeconomic backgrounds" because, unlike minority students admitted under the Top 10% law, they "dispel stereotypical assumptions" instead of "reinforc[ing]" them. *Id.* 33-34. UT asserts that it does not prefer affluent minority students to those who secured admission by excelling despite life's disadvantages. But

Respondents' stated preference for the "African American or Hispanic child of successful professionals in Dallas" makes things clear. *Id.* 34. Apparently, Respondents do not believe that UT's race-neutral system failed to enroll a critical mass of minority students—they believe it failed to enroll enough of its preferred kind of minorities. *Id.* 35.

The argument is without constitutional foundation. There is no compelling interest in securing a critical mass of minority students from privileged backgrounds. Once UT enrolls a critical mass of underrepresented minority students, it is no longer necessary to discriminate among applicants on the basis of race. UT may wish to enroll a kind of minority student different from the disadvantaged students to whom the door of opportunity is opened at UT by the Top 10% law. But that is a matter left to the people of Texas and their elected representatives. *See supra* at 2-3. It is not a constitutional reason for ignoring the presence of underprivileged minorities in justifying racial preferences.

UT's pursuit of "intra-racial diversity" also conflicts with its adherence to demographic proportionality as a compelling state interest. UT claims that it needs to increase minority enrollment beyond the substantial level achieved under the race-neutral system so that it can teach its students "to lead a multicultural workforce and to communicate policy to a diverse electorate." SJA 24a. But UT has failed to demonstrate how favoring the enrollment of minority students from privileged backgrounds over minority students from less fortunate circumstances advances that interest. And UT's newly minted argument is all the more troubling given UT's conclusion that Top 10% "minority students earned higher grade point averages" and had "higher retention rates" than minority students admitted under the pre-*Hopwood* system, thus enabling UT "to diversify enrollment ... with talented students who succeed." JA 343a. But UT apparently wants to enroll minority students outside the Top 10% law *because* of their privileged background—not in spite of it. Whatever the reason, UT's preference for elite minorities has nothing to do with the interest this Court found compelling in *Grutter* and thus could never justify discrimination against other applicants.

In any event, UT's "full file" review includes consideration of the "[s]ocio-economic status of family" and the "[s]ocio-economic status of school attended." JA 430a. But that does not solve UT's purported "intra-racial diversity" problem. Race-neutral factors accommodating educational handicaps exacerbate it and, importantly, do not support preferring the hypothetical "African American or Hispanic child of successful professionals in Dallas" to Abigail Fisher. Both come from integrated schools, would not be the first in their family to attend college, come from similar communities, and (despite Respondents' cynical description of Petitioner as being in the "bottom 90% of her class," Resp. 12, and the hypothetical Dallas student as being in the "second decile of his or her high school class," *id.* 34) have indistinguishable academic credentials. The argument is revealing. UT claims an interest in allowing "students to better understand persons of different races" from "the greatest possible variety of backgrounds," *Grutter*, 539 U.S. at 330, but does not mean it. UT wants students from the same background as Abigail Fisher. It just wants them to be of a different race.

B. Respondents failed to demonstrate that UT's use of racial preferences in admissions is narrowly tailored.

1. Respondents incorrectly argue that the process-oriented question of "holistic" review and the avoidance of express quotas and fixed preferential scoring are the sole determinants of narrow tailoring. Resp. 19, 23, 25-28. The narrow-tailoring inquiry is far broader. Because "context matters," the Court must "carefully examine" UT's use of race to ensure a precise "fit" between a legitimate diversity interest and the means chosen to achieve it. *Grutter*, 539 U.S. at 327. The narrow tailoring inquiry ensures that: the use of racial preferences is materially advancing the compelling interest; a non-racial approach would not work as well; the racial classification is not over-inclusive; and the university is implementing racial preferences in an individualized way. Br. 37-38. UT's use of a "full file" review process does not meet any of these criteria no matter how holistic its admissions machinery may or may not be.

2. While Respondents have abandoned any effort to defend "classroom diversity" as a compelling state interest, *supra* at 8, they still argue that the lack of classroom diversity is a "red flag" indicating that UT's use of race is narrowly tailored, Resp. 43. Respondents cannot invoke an interest that UT has not even tried to advance, cannot constitutionally further, Br. 43-44; U.S. 25 ("[C]lassroom representation ... would likely be unattainable."), and that UT agrees is not compelling, to justify racial preferences as narrowly tailored. UT's use of race must be narrowly tailored to achieve *a compelling state interest*.

Respondents also concede that UT's pursuit of demographic proportionality is not narrowly tailored. In Respondents' own words, "[t]he numbers of minorities admitted under holistic review do not remotely mirror racial demographics." Resp. 29. Respondents appear to view this as evidence that UT is not pursuing demographic proportionality. Yet all it really demonstrates is that UT is pursuing that illegitimate goal ineffectually. Indeed, the rapid increase in Texas's minority population guarantees that it would take decades of massive preference for UT to align the student body to state demographics, making narrow tailoring nearly impossible. *See Grutter*, 539 U.S. at 342-43. Worse still, the admitted inadequacy of UT's admissions system in achieving demographic parity shows that UT's reintroduction of racial preferences was tailored only to public posturing.

Given Respondents' objection to so-called "lump[ing] together" of racial groups, *supra* at 7-8, UT could effectively pursue demographic proportionality only by making race a determinative criterion for admission, using different enrollment targets for different racial groups, and continuing to provide racial preferences to some minorities and not others. This process necessarily would condone discrimination between and among minority groups—a practice this Court has rejected. *See Grutter*, 539 U.S. at 375 (Thomas, J., concurring in part and dissenting in part). UT also would need to more finely tune its system and abandon the "crude White/Black/ Hispanic calculus that is the measure of the University's race conscious admissions program." App. 175a (Jones, C.J.). For example, "[t]he catch-all category of Asian Americans includes individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population." Br. of the Asian American Legal Foundation and the Judicial Education Project as *Amici Curiae* at 27-31 (May 29, 2012). Surely not all of these ethnic groups are demographically overrepresented at UT. Yet UT "lumps" them "together" and denies preference to all Asian Americans. That imprecise approach is not even remotely tailored to UT's asserted demographic interest.

3. In reality, UT's racial preferences are making miniscule progress toward any diversity goal—compelling or otherwise—given the negligible effect their reintroduction had on minority enrollment. Br. 38-42 (citing *Parents Involved*, 551 U.S. at 733-35, 745-46, 790). Respondents seek to evade *Parents Involved*, claiming the "modest impact" of racial preference on UT's student body diversity is "a virtue, not a vice" and that UT has avoided using a "crude white/non-white classification." Resp. 36-37. As explained above, however, UT's racial classifications are only slightly less crude. Moreover, the Court's concern in *Parents Involved* was more fundamental. There is something odious about labeling tens of thousands of applicants by race without significant benefit. To be constitutionally justified, the results must "outweigh the cost of subjecting" all of these "students to disparate treatment based solely on the color of their skin." *Parents Involved*, 551 U.S. at 734. The negligible results attributable to UT's racial preferences themselves indicate that UT "could have achieved [its] stated ends through [race-neutral] means." *Id.* at 790 (Kennedy, J., concurring).

Respondents also dispute that UT's use of race had minimal effect on student body diversity. After devoting pages to praising UT's "modest" use of race, Respondents argue that it was actually decisive for *every* non-Top 10% minority student enrolled at UT. Resp. 20-21, 38. The contention is not only at odds with Respondents' "factor of a factor of a factor of a factor" theme, but it cannot be squared with UT's own admissions data. Br. 39-40; App. 101a-107a (Garza, J.); *see also* App. 33a (noting that UT could not identify any students "ultimately offered admission due to their race who would not have otherwise been offered admission"). The record demonstrates that race likely was decisive for, at most, 33 African-American and Hispanic students combined. Br. 9-10.[4] This "infinitesimal impact," App. 107a (Garza, J.), confirms that "a nonracial approach ... could promote the substantial interest about as well and at a tolerable administrative expense," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 276, 280 n.6 (1986).[5]

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[4] Even on Respondents' unsupported and counterfactual assumption, racial preference still only accounted for an increase of 216 students or slightly over 3% of the incoming freshman class, which is an insufficient demonstration of necessity. *See Parents Involved*, 551 U.S. at 734 (finding that the impact of race on an estimated 3% of school assignments undermined "the necessity of using racial classifications").

[5] Respondents also ask the Court to judge UT's success based on admitted rather than enrolled minority students. Resp. 38. But UT cannot meet its compelling interest in student body diversity by admitting—without enrolling—qualified minority applicants. Indeed, if it only increased by 1 or 2% its enrollment yield of African-American and Hispanic students admitted under the Top 10% law, UT would have equaled the minimal impact of racial preferences on student body diversity. Br. 42-43 n.10. Allowing the Top 10% law to achieve its full effect would have an even more dramatic effect on UT's minority enrollment. *Id.* 8 n.3; *see* Br. for Current and Former Federal Civil Rights Officials

4. Respondents unpersuasively argue that their racial preference for Hispanic students is not overinclusive. Resp. 46-47. But all they offer is that Hispanics—unlike Asian Americans—are demographically underrepresented in the student body and in small classrooms, *id.*, and that argument fails for reasons addressed above, *see supra* at 8-12. Respondents never explain why Hispanics—but not Asian Americans—still feel like "spokespersons for their race," *Grutter*, 539 U.S. at 319, given their comparable enrollment numbers, *supra* at 9, and the fact that UT has received accolades as one of the Nation's "top producers of undergraduates for Hispanics," JA 320a; Br. 47. UT cannot rationalize its differential treatment of these similarly situated minority groups. Although Respondents deflect by pointing to their less robust African-American enrollment, *see* Resp. 46, UT's admissions preferences are not so limited, and the issue on appeal is not whether UT could go back to the drawing board and devise a plan meeting constitutional requirements, *see Croson*, 488 U.S. at 506.

5. Finally, regardless of whether UT's "full file" review is "holistic," it is unequivocally not "designed to consider each applicant as an individual" in the admissions process. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). UT does not consider "each characteristic of a particular applicant" when determining whether applicant "A" or "B" has the "background, experiences, and characteristics" that would best round out the class. *Gratz v. Bollinger*, 539 U.S.

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as *Amici Curiae* at 8-21 (May 29, 2012) (discussing other race-neutral alternatives available to universities). In any event, looking at admissions numbers would not help UT's cause given that a higher percentage of minority students were admitted through full-file review under UT's race-neutral system than under the 2008 system. SJA 158a (cited at Br. 38).

244, 271-74 (2003). UT's matrix system bases admissions decisions on two-dimensional point scores and thus does not permit contextualized comparison of individual applicants. Resp. 13. UT officials grant preference to underrepresented minorities as a "special circumstance[]" in the initial scoring process, reduce all applicants to a numerical score, graph them on a matrix, and then draw "a stair step line dividing cells" in order to determine admission. *Id.* UT thus does not use an admissions "system where individual assessment is safeguarded through the entire process." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting). UT considers only impersonal scores at the point of admission. Resp. 13, 15, 19, 26.[6]

Nor has UT completed the periodic five-year review that it promised, *see* SJA 32a, and that this Court found essential to keeping racial preferences "limited in time," *Grutter*, 539 U.S. at 342. Three years late, Respondents dodge by claiming that UT has not "finalized its five-year review" because its conclusions "must be based on a careful review of the decision in this case." Resp.

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[6] Respondents cannot sustain this point system by pointing to the "volume of applications and the presentation of applicant information [that] make it impractical ... to use the admissions system upheld by the Court ... in *Grutter*." *Gratz*, 539 U.S. at 275. "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." *Id.* Nor can Respondents defend UT's system by speciously arguing that race can benefit non-minority applicants. Resp. 46 n.10. Using racial classifications to increase the enrollment of African-American and Hispanic students necessarily limits enrollment of non-minority applicants.

12 n.4. But the outcome of this case cannot change the empirical results of UT's system of racial preferences. If anything, the converse is more likely to be true. UT has not "finalized" its five-year review because it has established a demographic goal that would justify the endless imposition of racial preference. UT was required to conduct this five-year review to ensure that its use of race is "'a temporary matter, a measure taken in the service of the goal of equality itself.'" *Grutter*, 539 U.S. at 342 (quoting *Croson*, 488 U.S. at 510). Empty promises are not an acceptable substitute.

C. *Stare decisis* does not require affirmance.

1. Contrary to Respondents' assertion, Resp. 50-51, the choice between clarifying or overruling *Grutter* to the extent it justifies UT's reintroduction of racial preferences is before the Court. As the lengthy opinions of Chief Judge Jones and Judge Garza demonstrate, App. 72a-114a, App. 174a-184a, Petitioner has not made it an "afterthought" or failed to discuss *stare decisis*, *see Randall v. Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring). In short, this issue was preserved below, is included within the question presented, and has been adequately briefed.

2. Respondents also are wrong on the merits of the *stare decisis* inquiry. Resp. 51-53. As an initial matter, the Court need not overrule *Grutter* to resolve this case in Petitioner's favor. Br. 22-23. Even Respondents agree that *Grutter* should be clarified to the extent it can be read to afford UT pervasive deference on the admissions system's ultimate constitutionality. Resp. 47-48. And *stare decisis* is not an impediment. The issue here is not whether *Grutter*'s recognition of a diversity interest was

an erroneous departure from this Court's precedent. The issue is how to avoid reading *Grutter*'s language discussing strict scrutiny as incompatible with "equal protection jurisprudence[] established in a line of cases stretching back over 50 years." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 232 (1995). All options for precluding that misreading are properly before the Court. Br. 53-57. Decisions like *Wygant*, *Croson*, *Adarand*, *Gratz*, and *Parents Involved* are as entitled to as much *stare decisis* weight as *Grutter*.

3. Finally, Respondents' suggestion that *Grutter* should not be clarified or overturned because it involves a "sensitive political" issue is telling. Resp. 53. Universities should not be allowed to use racial preferences "as a bargaining chip in the political process." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). As Respondents' brief makes clear, rigorous judicial review is thus essential to address the concern that UT's hasty decision to reintroduce racial preferences despite its substantial minority enrollment was not "a form of racial politics." *Croson*, 488 U.S. at 510. Indeed, absent strict scrutiny the Court cannot "demand that [universities] prove their process is fair and constitutional in every phase of implementation." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). *Grutter* should be clarified or overruled to ensure that the courts continue performing this indispensible function.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the University of Texas at Austin's use of race as one of several diversity considerations in a holistic analysis of individual applicants violates the Equal Protection Clause of the Fourteenth Amendment.

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In the Supreme Court of the United States

No. 11-345

ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The United States has significant responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of institutions of higher learning, see 42 U.S.C. 2000c-6, and for the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color or national origin by recipients of federal funds, including institutions of higher education. Numerous federal agencies—including the Departments of Defense, Justice, Education, Commerce, Labor, Homeland Security, and Health and Human Services, among others—have concluded that well-qualified and diverse graduates are crucial to the fulfillment of their missions. The United States thus has a strong interest in the development of the law regarding the consideration of race and ethnicity in admissions in higher education.

STATEMENT

1. The University of Texas at Austin (the University) is the flagship institution of Texas's public university system. Pet. App. 119a. The University is a selective institution, and its admissions policy reflects two decades of evolution and experimentation.

a. Until 1996, the University admitted undergraduates by considering each applicant's Academic Index (AI)—a projection of freshman academic performance—and race. Pet. App. 120a; S.J.A. 41a. In 1996, the Fifth Circuit invalidated that policy. *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

In 1997, the University began using a Personal Achievement Index (PAI) to supplement the AI. The PAI is a numerical score based on a "holistic review of applications," including essays, leadership, extracurricular activities, work experience, socioeconomic status, language spoken at home, and other similar characteristics. Pet. App. 121a; S.J.A. 41a.

Beginning with the entering class of 1998, the University implemented House Bill 588, Tex. Educ. Code Ann. § 51.803 (West 1997), also known as the Top Ten Percent law (Top Ten plan). J.A. 259a. The Top Ten plan grants public-university admission to Texas high school graduates who are in the top ten percent of their class. Pet. App. 123a. After admitting applicants through the Top Ten plan, the University filled the remainder of its entering class using its AI/PAI analysis.

b. In 2004, following this Court's approval of the University of Michigan Law School's consideration of race in individual admissions decisions, see *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), the University concluded that considering race in some individual admissions decisions was necessary to achieve the educational benefits of diversity. Pet. App. 125a-126a; S.J.A. 1a, 23a-24a.

The University explained that its educational mission includes "produc[ing] graduates who are capable of fulfilling the future leadership needs of Texas" and who are "able to lead a multicultural workforce and to communicate policy to a diverse electorate." S.J.A. 24a. The University concluded that African Americans and Hispanics were currently underrepresented in its student body, which resulted in a marked lack of diversity in the classroom. S.J.A. 24a-26a. As a result, "the University [was] less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society." S.J.A. 25a. In addition, "significant differences between the racial and ethnic makeup" of the student body and the State's population meant that "students at the University [were] currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow." S.J.A. 24a-25a.

c. The University first used its current admissions policy, which permits officers to consider individual applicants' race as one factor among many, in the selection of the 2005 entering class. J.A. 432a-433a. After admitting applicants through the Top Ten plan, the University evaluates remaining applicants based on their AI and PAI scores. In calculating the PAI score, in order to "establish[] a contextual background for the student's achievements," officials may consider an applicant's race in addition to the factors adopted in 1997. S.J.A. 29a;

J.A. 208a-209a, 432a-434a. Race is not considered in isolation or given independent weight. S.J.A. 29a. To ensure consistent PAI scoring, admissions officers undergo rigorous training. J.A. 117a-118a; S.J.A. 28a; Bremen Dep. 27-28.

Once the AI and PAI scores are calculated, they are plotted on a matrix representing the school or major to which the applicants seek admission. Each cell contains all applicants with a particular AI/PAI combination. Admissions officers establish a cut-off that divides the matrix along a stair-step line. Applicants whose scores place them in cells above the cut-off line are admitted. J.A. 411a-412a; see J.A. 420a.

2. Petitioner, a white applicant denied admission to the University in 2008, brought this action, alleging that the University discriminated against her on the basis of race in violation of the Fourteenth Amendment and 42 U.S.C. 1981, 1983, and 2000d *et seq.* Pet. App. 117a-118a.

The district court granted summary judgment to respondents. Pet. App. 115a-171a.

3. The court of appeals affirmed. Pet. App. 1a-114a. The court held that the University "has a compelling interest in obtaining the educational benefits of diversity" and that its policy satisfies the constitutional standards set forth in *Grutter*. *Id.* at 3a, 33a; *Grutter*, 539 U.S. at 328-343. The court rejected petitioner's argument that the University sought to attain minority representation proportional to that of the Texas population, reasoning that respondents' "methods and efforts belie the charge." *Id.* at 45a. The court also rejected petitioner's contentions that the University had attained sufficient diversity without considering race through the Top Ten plan, *id.* at 62a-68a; and that the University's

consideration of race was not narrowly tailored because it resulted in only small increases in minority enrollment, *id.* at 69a-70a.

Judges King and Garza specially concurred. Pet. App. 72a; *id.* at 72a-114a.

4. The court of appeals denied rehearing en banc. Pet. App. 172a-174a. Seven judges would have granted the petition. Chief Judge Jones, joined by four judges, authored a dissenting opinion, in which she argued that the panel had failed to apply strict scrutiny. *Id.* at 174a-184a.

SUMMARY OF ARGUMENT

I. In *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), this Court held that a university may conclude that the educational benefits of diversity, including racial and ethnic diversity, are essential to its educational mission, and that a university can therefore have a compelling interest in assembling a diverse student body. Diverse student enrollment not only "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races"; it also prepares all students to succeed in, and eventually lead, "an increasingly diverse workforce and society." *Id.* at 330, 333 (brackets in original; citations and internal quotation marks omitted).

The educational benefits of diversity identified in *Grutter* are of critical importance to the United States. Careers in a range of fields that are vital to the national interest—such as the military officer corps, science, law, medicine, finance, education, and other professions (for which a university degree is a prerequisite)—must be open to all segments of American society, regardless of race and ethnicity. That is not simply a matter of civic responsibility; it is a pressing necessity in an era of intense competition in the global economy and ever-evolving worldwide national-security threats. The government, moreover, has a vital interest in drawing its personnel—many of whom will eventually become its civilian and military leaders—from a well-qualified and diverse pool of university and service-academy graduates of all backgrounds who possess the understanding of diversity that is necessary to govern and defend the United States. In particular, the Department of Defense (DoD) has concluded that a highly qualified and broadly diverse officer corps is essential to military readiness. Officer training programs run by DoD and the Department of Homeland Security (DHS)—including service academies and Reserve Officer Training Corps (ROTC) programs located at civilian institutions such as the University—therefore must produce a racially and ethnically diverse range of graduates who are prepared to lead a multiracial force.

This Court has held that a university may institute a narrowly tailored policy that considers race as part of a holistic, individualized admissions process, when doing so is necessary to achieve the educational benefits of diversity. *Grutter*, 539 U.S. at 333. Race should, however, be considered in individualized admissions decisions only when other means are insufficient to achieve the benefits of diversity. *Id.* at 340. "[S]earching judicial review" is thus an essential safeguard that ensures that race is used in admissions only when necessary to further a compelling interest in educational diversity and when narrowly tailored to achieve the university's goals. *Id.* at 395 (Kennedy, J., dissenting).

II. The admissions program instituted by the University is constitutional under *Grutter*. A core component of the University's educational mission, as Texas's flagship public university, is to train students to become the next generation of Texas leaders by exposing them to the many diverse perspectives and cross-racial interactions that they will encounter in civic life. The University therefore determined that the educational benefits of diversity are essential to its mission, that its student body was insufficiently diverse to attain those benefits, and that it was necessary to consider race in individual admissions decisions in order to achieve the University's compelling interest. Those conclusions are amply supported by the record.

To attain its educational objectives, the University relied on *Grutter* in instituting a holistic analysis that permits consideration of an applicant's race as one factor among many. See *Grutter*, 539 U.S. at 327-337; *id.* at 393 (Kennedy, J., dissenting). Race is considered not on its own, but as a piece of information that provides valuable context in understanding an applicant's achievements and his likely contributions to the University. See *ibid.* That individualized consideration is designed to work in conjunction with the Top Ten plan to enable the University to construct a class that is diverse in all ways valued by the institution. It not only enables the University to seek a "critical mass of students from traditionally underrepresented backgrounds," S.J.A. 25a, but also ensures that the University fills the limited number of non-Top Ten admissions slots with students who are diverse in all respects valued by the University. This contextual, limited consideration of race is narrowly tailored to achieve the University's compelling interest, and it should be upheld.

ARGUMENT

I. THE UNITED STATES HAS A CRITICAL INTEREST IN ENSURING THAT EDUCATIONAL INSTITUTIONS ARE ABLE TO PROVIDE THE EDUCATIONAL BENEFITS OF DIVERSITY

A. The Court Has Recognized That Institutions Of Higher Education Have A Compelling Interest In Attaining A Diverse Student Body

1. In *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003), this Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter* reaffirmed the reasoning of Justice Powell's opinion announcing the judgment of the Court in *Regents* v. *Bakke*, 438 U.S. 265, 311-315 (1978), which served as "the touchstone for constitutional analysis of race-conscious admissions policies" and the model for the admissions programs of "[p]ublic and private universities across the Nation." 539 U.S. at 323. Justice Powell had approved a university's consideration of race to further a compelling interest in a student body that is diverse in all respects valued by the institution, reasoning that the "[N]ation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 311-312, 313 (internal quotation marks omitted).

Drawing on Justice Powell's reasoning, *Grutter* held that a university may conclude that "diversity is essential to its educational mission." 539 U.S. at 328-330; accord *id.* at 387-388 (Kennedy, J., dissenting). *Grutter* explained that racially and ethnically diverse student enrollment "promotes 'cross-racial understanding,' helps break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" *Id.* at 330 (citation omitted); see *Bakke*, 438 U.S. at 312. Student-body diversity also "better prepares students for an increasingly diverse workforce and society," *Grutter*, 539 U.S. at 330, while ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity," *id.* at 332 (internal quotation marks and citation omitted).

Grutter therefore held that a university may seek to assemble a class that contains sufficient numbers of underrepresented minorities to attain the "educational benefits [of] diversity." 539 U.S. at 330. A university may "consider race or ethnicity * * * flexibly as a 'plus' factor in the context of individualized consideration" of each applicant, *id.* at 334, when doing so is necessary to attain the educational benefits of diversity and the program is narrowly tailored, *id.* at 333.

2. The University relied on *Grutter*'s guidance in analyzing its educational mission and interest in diversity and in tailoring its admissions policy. S.J.A. 24a, 26a-32a. Many other post-secondary institutions throughout the country have done the same. The Departments of Education and Justice have issued guidance designed to assist post-secondary educational institutions in determining whether considering race is necessary to achieve their educational missions and in tailoring any consideration of race to meet the standards delineated in *Grutter*. See generally U.S. Dep'ts of Education and Justice, *Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (2011)*.

B. The United States Military And Federal Agencies Have Recognized The Importance Of The Educational Benefits Of Diversity

The *Grutter* Court recognized that the educational benefits of diversity "are not theoretical but real." 539 U.S. at 330. The United States' experience confirms that conclusion. The armed services and numerous federal agencies have concluded that well-qualified and diverse graduates are crucial to the fulfillment of their missions. The Nation's interests in a range of areas—including military readiness, national security, public health, federal law enforcement, global competitiveness, and education—will be more readily achieved if the pathways to professional success are visibly open to all segments of American society. The government endeavors to recruit well-qualified graduates who are diverse and prepared to succeed in a diverse society, and it benefits directly when selective universities ensure that their student bodies are diverse so that all students receive the educational benefits of diversity.

1. The United States armed services have a strong interest in a well-qualified and diverse officer corps, and the educational benefits of diversity are critical to serving that interest

a. The armed services have long recognized that building and maintaining a military force that is both highly qualified and broadly diverse—including in its racial and ethnic composition—is a "strategic imperative, critical to mission readiness and accomplishment, and a leadership requirement." DoD, *Diversity and Inclusion Strategic Plan—2012 to 2017*, at 3 (2012) (*Strategic Plan*). As both the enlisted ranks of the military and the population of the Nation have become increasingly diverse, military leaders have concluded that an officer corps that is markedly less diverse than the enlisted ranks, and that is unattuned to the diverse perspectives of those they must lead, can undermine the military's combat readiness. Fostering a pipeline of well-prepared and diverse officer candidates is therefore an urgent military priority.

That military policy judgment reflects the lessons of actual battlefield experience during the Vietnam War, when the disparity between the overwhelmingly white officer corps and the highly diverse enlisted ranks "threatened the integrity and performance" of the military. Military Leadership Diversity Comm'n, *Final Report, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military* xvi (Mar. 15, 2011) (*MLDC Report*). Officers often failed to perceive racial tensions among enlisted personnel that threatened combat readiness. Bernard C. Nalty, *Strength for the Fight: A History of Black Americans in the Military* 303-317 (Free Press 1986). The absence of diversity in the officer corps also undermined the military's very legitimacy by fueling "popular perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders." *MLDC Report* 15.

Against this background, military leaders have concluded that a diverse officer corps is essential to the military's operational readiness. An officer corps that reflects the diversity of the enlisted ranks improves performance by "facilitat[ing] greater confidence" in leadership and assuring enlisted personnel that advancement is possible "regardless of * * * background." *MLDC Report* xvi, 14-15, 44. In addition, as then-Secretary of Defense Robert M. Gates observed, there is a risk over time of developing a corps of military leaders who "politically, culturally, and geographically have less and less in common with the people they have sworn to defend." *Lecture at Duke University: All-Volunteer Force* (Sept. 29, 2010). Countering that risk by fostering diversity of all kinds "engender[s] trust among the population" and helps ensure democratic legitimacy. *MLDC Report* 44. And maintaining a diverse leadership corps ensures that the military contains the "cultural and racial identities that allow us to create lasting relationships to better understand our partner forces." Gidget Fuentes, *SEALs Reach Out to Increase Diversity*, NavyTimes, Apr. 30, 2012; *MLDC Report* 17. Diversity is "absolutely a combat multiplier, especially in the environments that we see coming at us and that we are dealing with today." *MLDC Report* 16 (quoting General George Casey, Jr., former Chief of Staff of the Army).

The military thus has a powerful interest in developing an officer corps that is prepared to lead a diverse force and whose makeup is not divorced from those of the enlisted ranks and the general population. *Strategic Plan* 3-4; Adm. Michael G. Mullen, Chairman, Joint Chiefs of Staff, *The National Military Strategy of the United States of America*, at 16-17 (Feb. 8, 2011). Despite progress toward that objective, minorities remain "underrepresented among the Armed Forces' top leadership, compared with the servicemembers they lead." *MLDC Report* xiii.

b. To meet these concerns, creating a diverse pipeline of officer candidates is an urgent military priority. *Strategic Plan* 3-4, 7. Because the military does not hire line officers laterally, as a corporation might, *MLDC Report* xvi, the military's top leadership in future decades will be drawn from those who join the military today. The educational practices of the military's primary officer-training programs—the service academies and ROTC programs—will therefore shape the next generation of military leaders.

The services have concluded that fostering student-body diversity is vital to the service academies' and ROTC programs' ability to provide a rigorous education for all students and prepare cadets for leadership roles. For instance, the United States Air Force Academy (USAFA) has concluded that the highest quality military education comes from "exposing [cadets] to a broad range of ideas and experiences in both a formal classroom setting and in informal interactions with individuals whose background and experience offer dissimilar information." Lt. Gen. Michael C. Gould, USAFA Superintendent, *USAFA Diversity Plan* 1 (June 2009). The USAFA's leadership training program is "best realized when the cadet cadre itself is widely diverse" so that cadets can "learn to bring out the best in each individual regardless of his or her background." *Id.* at 3. Similarly, the United States Coast Guard Academy (USCGA), which is operated by DHS, has concluded that "developing the skills to think critically and communicate effectively with people of different backgrounds [is a] fundamental learning outcome[] of the cadet experience." Rear Adm. Sandra L. Stosz, USCGA Superintendent, *Coast Guard Academy Admissions Statement* 2 (2011).

ROTC programs, which provide military and leadership training to undergraduates interested in a military career and are the single largest source of new officers, can best achieve these goals when their participating institutions are diverse. In particular, selective universities that admit talented students with leadership potential and provide the educational benefits of diversity are a critical source of future officers. DoD has found that minority officers who enter the military from "more selective colleges" have "significantly higher performance ratings" than similarly situated officers from less selective colleges. Office of the Under Sec'y of Def. for Pers. & Readiness, DoD, *Career Progression of Minority and Women Officers* 62 (1999).

The University is a prime example of such an institution: it hosts Army, Navy, and Air Force ROTC detachments, provides a dynamic and diverse learning environment, and is highly selective. See *College of Liberal Arts—Academic Units*, http://www.utexas.edu/cola/resources/offices/. Because of the efforts of institutions like the University, the services can confidently rely on ROTC programs to provide a pipeline of highly qualified, diverse officer candidates.

Grutter's holding that post-secondary institutions may, when necessary, consider race as one factor in individualized admissions decisions provides the flexibility necessary to achieve the armed services' objective of assembling an officer corps that is prepared to lead a diverse force. The military relies on the University and other schools with ROTC detachments to ensure that their student bodies are highly qualified, diverse, and trained in a diverse setting—by considering race in individualized admissions decisions, if necessary. See *Grutter*, 539 U.S. at 331. The service academies similarly need to ensure that their student bodies are highly qualified, diverse, and prepared to lead a diverse force.[1]

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[1] Non-individualized measures like the Top Ten plan would not work for the service academies in light of their nationwide applicant base, rigorous academic and physical standards, and the fact that candidates for West Point, the Naval Academy and the Air Force Academy must

If and when outreach and recruiting measures fall short, the academies need the flexibility to be able to consider race as one factor in a holistic review of each applicant in making admissions decisions.

2. *Well-qualified and diverse graduates are critical to other national interests*

Numerous federal agencies, including those discussed below, have concluded that well-qualified and diverse graduates are crucial to the fulfillment of their missions.

a. A pipeline of highly qualified, diverse graduates is critical to the Nation's law-enforcement and national-security needs. As Federal Bureau of Investigation (FBI) Director Robert Mueller III has explained, diversity is "absolutely vital to getting the job done for our country. * * * The reality is, to be effective, we have to look like America. We have to understand and reflect the communities we serve. And we must be global in our reach." *Speech at the Nat'l Conference of the Historically Black Colls. & Univs.: FBI Diversity Employment in a New Age of Global Terror* (Sept. 17, 2002).

Similarly, DHS requires a "workforce with diverse backgrounds, experiences, and competencies" in order to "optimize[] DHS's effectiveness in serving a heterogeneous public and coordinating with international partners to secure the homeland." Office for Civil Rights & Civil Liberties, DHS, *MD-715 EEO Program Status Report* 7 (FY 2009). Accordingly, DHS administers grants to minority-serving educational institutions—including many public universities—to build scientific research and education capacity and increase the num-

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be nominated by public officials. See 10 U.S.C. 4342, 6954, 9342 (2006 & Supp. IV 2010); *Grutter*, 539 U.S. at 340.

ber and diversity of future professionals in areas critical to homeland security. See, *e.g.*, *DHS Funding Opportunity Announcement: 2012 Scientific Leadership Awards for Minority Serving Institutions (MSI) Granting Bachelor Degrees.*

b. The Department of Health and Human Services (HHS), whose mission includes promoting advances in the sciences, medicine, and public health, has made it a priority to foster diversity among undergraduates who major in health-care-related fields. Despite considerable progress, minorities remain less likely to have access to quality health care or to participate in clinical studies, and are more likely to suffer from common serious illnesses. See *Secretarial Statement on National Minority Health Month 2012* (Apr. 2, 2012); Committee on Understanding & Eliminating Racial & Ethnic Disparities in Health Care, Inst. of Med. of the Nat'l Acads., *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* 29-30 (Brian D. Smedley et al. eds., 2003). Developing a national workforce of practitioners and researchers who are prepared to address minority health issues, and who also have diverse backgrounds, will help address these concerns. See *id.* at 2, 186 (citing studies). University sciences programs must therefore be visibly open to qualified minority students and must prepare all students to address minority health concerns.

In the Minority Health and Health Disparities Research and Education Act of 2000, Congress identified a "national need" for minority scientists and doctors, and concluded that federal agencies should promote a diverse scientific workforce and institute programs that "effectively overcome barriers such as educational transition from one level to the next." Pub. L. No. 106-525,

§ 2, 114 Stat. 2495-2497. In addition, Congress has provided that HHS "shall make grants to * * * designated health professions schools * * * and other public and nonprofit health or educational entities, for the purpose of assisting the schools in supporting programs of excellence in health professions education for underrepresented minority individuals." 42 U.S.C. 293(a).[2]

II. THE UNIVERSITY'S CONSIDERATION OF RACE IN ADMISSIONS IS CONSTITUTIONAL

As the flagship university in Texas and one of the Nation's leading public institutions of higher education, the University trains students who will become the next generation of professional, civic, military, and community leaders. Accordingly, the University's educational mission focuses on preparing students to lead the professions and communities in which they will take their place when they graduate. To achieve its mission, the University, relying on the guidance provided in *Grutter*, S.J.A. 23a-24a, instituted a "nuanced, individual evaluation of school needs and student characteristics that * * * include[s] race as a component" of a holistic admissions analysis. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in the judgment). That program is constitutional because it is "necessary to further a compelling governmental interest" and is narrowly tailored. *Grutter*, 539 U.S. at 327.

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[2] Other agencies also have concluded that well-qualified and diverse graduates are essential to their missions. For instance, the Department of Education, whose mission encompasses fostering educational excellence and promoting diversity in post-secondary institutions, encourages grant applicants to develop "[p]rojects that are designed to promote student diversity, including racial and ethnic diversity." 75 Fed. Reg. 78,508 (Dec. 15, 2010); see *id.* at 78,500. It also administers programs designed to increase the number of individuals from underrepresented groups, including minority groups, in many fields. *E.g.*, 20 U.S.C. 1070a-15 (2006 & Supp. IV 2010). In addition, the Department of Commerce has an interest in promoting equal educational and economic opportunities and in promoting diversity among the leaders of commercial enterprises.

Grutter emphasizes that in evaluating the constitutionality of a university admissions program, "[c]ontext matters." 539 U.S. at 327. Here, the University designed its holistic process to work in tandem with the Top Ten plan to build a student body that will fulfill the University's educational mission. These two components—although adopted sequentially by the University—should therefore be considered together.

In 1998, had the University not been limited by *Hopwood*, it could have addressed the limited diversity in its student body—Hispanic and African-American students were 13% and 3% of the class, respectively, S.J.A. 30a—by simply instituting its current admissions process. In other words, the University could have admitted part of its class through the Top Ten plan and the remainder through its holistic analysis, including consideration of race. Admitting its entire class through the Top Ten plan would have required the University to sacrifice many dimensions of diversity—and selectivity—in favor of exclusive reliance on class rank. See p. 32, *infra*; *Grutter*, 539 U.S. at 340-341. And given that the PAI analysis, without consideration of race, had failed to increase diversity, Pet. App. 18a-19a, considering race in the holistic analysis would have been justified as a complementary means of attaining sufficient diversity and ensuring that admitted minority students were diverse in numerous respects. See pp. 28-30, *infra*. As *Grutter* confirms, the University would have had the latitude to experiment with admitting part of its class without individualized consideration of race, and part of it with such consideration, thereby minimizing consideration of race while maintaining values and furthering goals important to the University.

In actuality, the University adopted the Top Ten plan first, and the holistic analysis that included race later. But that should not foreclose the University from concluding that it needed to give limited consideration to race in the non-Top Ten portion of the class to further its educational mission. The Top Ten plan's reliance on class rank to the exclusion of all other attributes made it important to fill the relatively few remaining admissions slots by making nuanced decisions based on a complete contextual understanding of each individual, in order to ensure that the student body contained people who possessed the many attributes valued by the University. And use of the Top Ten plan had not resulted in a level of minority enrollment that, in the University's judgment, was sufficient to provide students with a realistic environment that would prepare them to lead a highly diverse workforce. The University legitimately concluded in these circumstances that the holistic evaluation of each individual student would be both incomplete and insufficient without consideration of the applicant's race along with other factors.

A. The University's Admissions Policy Is Supported By A Compelling Interest In Attaining The Benefits Of Diversity

1. The University has a compelling interest in securing the educational benefits of a racially and ethnically diverse student body. See Pet. App. 33a-35a, 142a-158a. The University concluded that its educational mission,

as the "flagship" state university, is to provide a "comprehensive education," S.J.A. 23a, and "to produce graduates who are capable of fulfilling the future leadership needs of Texas." S.J.A. 24a. Because Texas will soon "have no majority race," its leaders "must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate." *Ibid.* To accomplish these objectives, the University concluded, it was necessary to foster the educational benefits of diversity for all students that *Grutter* identified: enhanced classroom discussion, decreased racial isolation, "a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." S.J.A. 23a; 539 U.S. at 330.

That conclusion is precisely the sort of "complex educational judgment[]" that falls within the core of the University's expertise, *Grutter*, 539 U.S. at 328, as well as its traditional freedom "to make its own judgments as to education," *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). The University's "good faith" in concluding that diversity is essential to its mission should therefore be "'presumed' absent 'a showing to the contrary.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 318-319 (opinion of Powell, J.)).

2. Petitioner contends (Br. 26-30) that the University is not actually pursuing the educational benefits of diversity approved in *Grutter*, but is instead pursuing the "patently unconstitutional" objective of racial balancing. *Grutter*, 539 U.S. at 330; Br. 27. Petitioner is incorrect.

a. Petitioner's argument ignores the fact that, as the lower courts correctly found, Pet. App. 43a-52a, 153a-

156a, the University designed and implemented its admissions process to pursue the educational benefits of diversity, and not any form of proportional representation.

The modest, holistic manner in which the University incorporated consideration of race into its PAI assessment demonstrates that the University's objective is attaining the educational benefits of diversity. *Grutter*, 539 U.S. at 334; *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). Race is one of many characteristics (including socioeconomic status, work experience, and other factors) that admissions officials may consider in evaluating the contributions that an applicant would make to the University, including interactions that occur among students in small classes. J.A. 129a-130a, 207a-209a, 294a; S.J.A. 29a; see *Bakke*, 438 U.S. at 317 (discussing similar plan with approval). Race is not considered on its own, and it is never determinative of an applicant's admission by itself. J.A. 434a; see *Grutter*, 539 U.S. at 337. Rather, race is one of a number of contextual factors that provide a more complete understanding of the applicant's record and experiences. That is a far cry from impermissible racial balancing.

That conclusion is reinforced by the way the University implements its admissions policy. Racial balancing is impermissible because it makes race the predominant consideration at the expense of individualized assessment. See *Grutter*, 539 U.S. at 336-337; accord *id.* at 389 (Kennedy, J., dissenting). But the University has not subordinated individualized consideration of each applicant to the achievement of any level of race-based representation. As petitioner conceded below, the University's policy does not include any "goal, target, or other quantitative objective for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008." J.A. 131a. To the contrary, the process is designed so that officials are unaware of individual applicants' race when making the ultimate admissions decisions. While race (like other characteristics) may have affected some applicants' PAI scores, only the resulting numerical PAI scores, together with AI scores, are plotted on a matrix used to determine which groups of applicants are admitted.[3] J.A. 191a-192a, 213a, 379a-380a, 385a-389a; see p. 4, *supra*. And the University does not track the progression of minority admissions for the purpose of influencing subsequent admissions decisions. J.A. 415a; see *Grutter*, 539 U.S. at 391-392 (Kennedy, J., dissenting). Finally, the results of the policy—the University's admissions and enrollment figures—do not support the charge of racial balancing. The University's consideration of race since 2005 has not resulted in anything approaching proportional representation. See Pet. App. 156a n.11.

b. Petitioner's racial balancing argument (Br. 26-29) relies heavily on the University's recognition that "significant differences" between its student demographics and the State's population—Hispanics and African Americans were substantially underrepresented in the student body, S.J.A. 25a—undermined both its ability to prepare students for success in Texas's diverse community and its ability to ensure that the "path to leadership" was "visibly open" to "qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332; S.J.A. 24a-25a.

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[3] As petitioner observes (Br. 9), an applicant's race is noted on her file during the PAI scoring process. J.A. 169a. The ultimate admissions decisions, however, are based solely on the scores.

Petitioner's argument (Br. 26-27) is based on the erroneous premise that disparities between student-body and state-population demographics can never be a relevant consideration in assessing the educational benefits of diversity recognized in *Grutter*. That is incorrect. *Grutter* recognized that "prepar[ing] students for an increasingly diverse workforce and society," 539 U.S. at 330 (citation omitted), is one of the educational benefits of diversity. That recognition is premised on a demographic fact about the population—that it is becoming increasingly diverse—and presupposes that a university need not ignore the characteristics of the community into which students will graduate when the university evaluates whether it is providing adequate leadership preparation.

In addition, the existence of stark demographic disparities is relevant to a university's interest in being "visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332. A student body that bears little resemblance to the state population, thereby suggesting that the pathway to leadership is not truly open to all, could undermine future leaders' "legitimacy in the eyes of the citizenry." *Ibid.* It could also harm the institution's efforts to recruit highly qualified minorities, who in turn will contribute to the educational benefits of diversity.

Statewide demographics thus may provide information relevant to whether an institution is providing the educational benefits of diversity. The University considered statewide demographics in this limited and permissible manner. S.J.A. 23a-25a. The University concluded that an environment in which the presence of African-American and Hispanic students was approximately half what it was in the state population was not conductive to training the future leaders of an increasingly diverse State and was not consistent with being visibly open to all. S.J.A. 24a-25a. As admissions officials were aware, moreover, J.A. 285a, Texas high schools have high rates of de facto racial segregation. See also Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 Am. L. & Econ. Rev. 312, 312 (2006). The fact that college may be many students' first exposure to an environment that more realistically reflects the State's actual diversity increases the importance of providing many opportunities for cross-racial interaction.[4]

For these reasons, an institution's attention to significant demographic disparities does not in itself establish that it impermissibly seeks racial balancing rather than the educational benefits of diversity. See *Grutter*, 539 U.S. at 336-337. Here, as the lower courts correctly concluded, the factual record regarding the University's design and implementation of its policy refutes petitioner's charge. See pp. 21-22, *supra*.

3. Petitioner erroneously contends (Br. 29-30) that the University is pursuing "classroom diversity" rather

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[4] Petitioner argues (Br. 28) that the University's conclusion that Asian Americans were not underrepresented even though they were present in the 2004 class in approximately the same numbers as Hispanics indicates that the University was engaged in racial balancing. But the University's reasoning is consistent with its focus on being visibly open and providing students adequate opportunities to interact with people of all backgrounds represented in the State. The University had already achieved these goals with respect to Asian Americans, but not with respect to Hispanics and African Americans. S.J.A. 25a-26a. The University's policy, moreover, contemplates that Asian Americans' race may be favorably considered in the holistic analysis. J.A. 130a.

than the "student-body diversity" endorsed by *Grutter*. 539 U.S. at 328-329. The University used its classroom diversity study as one means of measuring cross-racial interaction on campus in those small classes that are most likely to foster discussion and student interactions. S.J.A. 69a; J.A. 266a. Because exposing students to diverse perspectives within the classroom is, as *Grutter* recognized, an important educational benefit of diversity, the University's consideration of classroom-diversity figures is therefore entirely consistent with *Grutter*. 539 U.S. at 330.

In particular, the classroom study demonstrated that as the University increased the number of smaller classes between 1996 and 2002, the percentage of classes with one or no African-American or Hispanic students had increased (to 90% and 43%, respectively). S.J.A. 26a. That trend was of concern to the University, S.J.A. 25a, because the University intended to further increase the number of smaller classes in order to improve educational experiences, S.J.A. 70a, and an unintended consequence of that effort could be greater racial isolation and less cross-racial interaction. The University's concern on that score contributed to its conclusion that increasing diversity in the overall student body was necessary. S.J.A. 24a-25a. But it is wrong to suggest that the University sought to ensure that "every small class has some minimum number of minority students," Pet. Br. 30. The district court found that the University never suggested that it had such a goal in mind, J.A. 267a; Pet. App. 157a, and petitioner points to no evidence to the contrary. Indeed, the classroom representation to which petitioner refers would likely be unattainable. See Pet. Br. 30, 43-44; Pet. App. 157a.

B. Considering Race As One Factor In The Holistic Component Of The University's Admissions Process Was Necessary To Serve The University's Compelling Interests

The University's conclusion that limited consideration of race in its admissions process was "necessary to further a compelling governmental interest" in 2004, and remained necessary in 2008, *Grutter*, 539 U.S. at 327, is amply supported by the record.

1. Because the point at which a university reaches sufficient diversity is defined "by reference to the educational benefits that diversity is designed to produce," *Grutter*, 539 U.S. at 330, whether a university has attained that objective is largely an educational decision that, while based on "empirical data," *id.* at 388 (Kennedy, J., dissenting), ultimately entails a qualitative evaluation of the educational experience the university is providing. Accordingly, the University's conclusion that it had not attained its objectives was based on its assessment of its ability to provide the educational benefits of diversity, rather than a numerical calculation.[5] Whether that conclusion is justified by the empirical data should be evaluated with due regard for the multifaceted educational assessment the University's determination reflects.

Petitioner's exclusive focus on raw numbers is inapposite. As petitioner observes (Br. 35), in 2004, the last year before the University provided for consideration of an applicant's race as one factor in the holistic component of its admissions process, the entering class was

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[5] Petitioner faults the University (Br. 34) for failing to define a "percentage of its student body" that constitutes a critical mass for these purposes, but the plan upheld in *Grutter* also lacked a numerical target. 539 U.S. at 318.

16.9% Hispanic and 4.5% African American. Through a combination of circumstances unique to Texas—the Top Ten plan, operating in conjunction with the State's demographics and largely segregated high schools—the University was able to attain what petitioner labels (*ibid.*) as "substantial" minority enrollment, at least with respect to Hispanics, without considering race in individual admissions decisions. But whether those figures were sufficient does not turn, as petitioner argues (Br. 35-36), on whether they seem "substantial" in the abstract, or how they compare to universities in other States. That approach would ignore *Grutter*'s recognition that sufficient diversity is not a number but the point at which a university concludes that it is achieving the educational benefits of diversity in light of its circumstances and educational mission. 539 U.S. at 330.

2. The University's conclusion that in light of its educational objectives as Texas's flagship university, it had not attained critical mass in 2004 or 2008, is amply supported in the record.

With respect to African Americans, who totaled 309 enrolled students out of 6796 in 2004, and 375 out of 6715 in 2008, S.J.A. 156a, petitioner does not attempt to argue that the University was required to find that those figures were sufficient to avoid racial isolation, break down stereotypes, or promote cross-racial understanding—much less provide a visible path to leadership.[6] *Grutter*,

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[6] Instead, petitioner elides (Br. 35) the considerations specific to African-American representation by considering African Americans and Hispanics as one group. But because individuals from each group bring distinct varieties of diversity—of experience, culture, language—to an institution, the University properly evaluated whether it had achieved its objectives with respect to each group separately. Pet. App. 67a (citing *Parents Involved*, 551 U.S. at 723).

539 U.S. at 332. These circumstances regarding African-American enrollment would alone have justified individualized consideration of race in admissions under *Grutter*. See 539 U.S. at 329-330.

With respect to Hispanic students, the fact that they made up 16.9% of the class in 2004 (and 20% in 2008) may have alleviated concerns about racial isolation and tokenism. S.J.A. 156a. But those figures also showed that Hispanics were substantially underrepresented compared to their numbers in the statewide population (34.9% in 2004 and 36% in 2008). Pet. App. 154a-155a; U.S. Census Bureau, U.S. Dep't of Commerce, *The American Community—Hispanics: 2004*, at 6 (Feb. 2006). In view of the significant—and growing—Hispanic proportion of the State's population and the trend toward less classroom diversity, the University concluded that it could not provide the degree of cross-racial interactions necessary to prepare its students for leadership in Texas. S.J.A. 24a; see pp. 23-24, *supra*. That determination took into account the University's educational mission, its evaluation of on-campus interactions, and student views. J.A. 267a-268a, 395a-396a; S.J.A. 24a.

3. The University's decision to consider race as one factor in the holistic component of its admissions process gains additional support from the Top Ten plan's effect on the University's educational priorities. Because the Top Ten plan guarantees admission based solely on class rank, the University must rely heavily on its holistic admissions process to ensure that the remainder of the student body is composed of students who are "diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340; J.A. 203a, 359a. Only the holistic analysis enables the University to select students

who have exhibited leadership potential or particular talents, but whose class rank does not place them in the Top Ten, as well as out-of-state students and students who are academically qualified but missed the Top Ten cut in the most rigorous high schools.

After the Top Ten plan became law, the University reconciled its desire to admit a significant portion of the student body using the holistic analysis (which did not then take race into account) with its automatic Top Ten admissions by increasing the overall number of students admitted each year. S.J.A. 31a. By 2003, however, the University was unable to sustain those increases, and it significantly reduced the non-Top Ten portion of the entering class. *Ibid.*

At that point, the non-Top Ten admissions process became extremely selective. Pet. App. 59a n.155. Excluding all consideration of race, the University had increasing difficulty ensuring that its non-Top Ten admissions included significant numbers of students who possessed the attributes valued by the University but not accounted for in Top Ten admissions. Taking race into account as one factor in the holistic individual assessment therefore helped ensure that the admissions process remained effective in admitting significant numbers of underrepresented minorities, as well as non-minorities, who would contribute the varieties of experience and attributes that the University sought in assembling its student body.

The University could legitimately conclude that excluding any consideration of race from the PAI analysis would fail to take the measure of the whole person, and would deprive the University of valuable context even as the shrinking size of the non-Top Ten portion of the class forced the University to make increasingly nuanced admissions decisions. A student's "own, unique experience of being a racial minority in a society * * * in which race unfortunately still matters" may affect a student's opportunities and views. *Grutter*, 539 U.S. at 333; accord *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). An applicant's race therefore may provide necessary—and illuminating—context for evaluating the applicant's achievements. For example, knowing that the student-body president at an overwhelmingly white school is African American provides a more complete understanding of his achievement. J.A. 204a-205a, 207a, 210a-211a, 309a-310a.

C. The University's Admissions Policy Is Narrowly Tailored

The University's admissions policy meets *Grutter*'s narrow tailoring requirement. The holistic component of that policy "affords * * * individualized consideration to applicants of all races" rather than operating as a quota system; it was adopted only after the University concluded that other alternatives were not workable; and it is limited in time. 539 U.S. at 337-342.

1. a. As discussed above, see p. 21, *supra*, the University's holistic admissions policy provides individualized consideration to every applicant. *Grutter*, 539 U.S. at 334; *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). The University does not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." *Grutter*, 539 U.S. at 338. While adding race to the PAI assessment "increases the chance" that an applicant of an underrepresented minority will be considered "meritorious and diverse" in all relevant respects, J.A. 434a, race is never determinative by itself. See *Grutter*, 539

U.S. at 337. The policy therefore does not operate as a "classification that tells each student he or she is to be defined by race." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

b. The University's policy also does not function as a quota system. The University does not maintain numerical goals for minority admission or enrollment. S.J.A. 29a. Nor does it insulate individuals of different races from competing with each other, or give race "any more or less weight" based on admissions decisions previously made. J.A. 301a-303a, 407a, 415a; Pet. App. 160a; *Grutter*, 539 U.S. at 334-336. The University has also "taken steps to ensure individual assessment" at every point in the process: because the procedures insulate consideration of an applicant's race from the ultimate admissions decision, the process is not geared to reach desired yearly demographic targets. See p. 22, *supra*; *Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting). There is thus no danger that admissions officials will weigh race more heavily and abandon individualized consideration as the admissions process progresses. Cf. 539 U.S. at 392.

In addition, although petitioner faults (Br. 38-39) the University for being "unable to identify any students" for whom race was determinative, that is hardly a flaw in the system. Rather, it underscores that the University properly treats race as one factor among many, making an attempt to identify *any* one dispositive factor largely futile. The University has built as much concreteness as possible into the analysis by giving admissions officials instructions on considering race only when appropriate to give context to an individual's achievements, J.A. 168a-169a, and by training officials to ensure that scoring is consistent, Bremen Dep. 26-28.

c. The University gave "serious, good faith consideration [to] workable race-neutral alternatives." *Grutter*, 539 U.S. at 339.

Although the University may have been able to increase minority admissions by selecting more of its student body through a percentage plan, that course was not a workable alternative. The University would have had to minimize the portion of the class selected through a holistic analysis, J.A. 203a, which would have curtailed individualized assessments, led to "a dramatic sacrifice of diversity" of all kinds, and stymied the University's efforts to admit the most highly qualified students from more rigorous high schools and non-Texas schools. *Grutter*, 539 U.S. at 339-340.

Until 2003, the University raised its entering class size in an attempt to allow the number of Top Ten admissions—including admissions of underrepresented minorities—to increase without sacrificing holistic admissions. S.J.A. 31a; p. 29, *supra*. But the larger entering classes "threaten[ed] the quality of the educational experience" by straining the University's faculty and budgetary resources. S.J.A. 31a-32a. Also for budgetary reasons, the University concluded that it could not indefinitely increase scholarship incentives designed to boost minority enrollment. *Ibid.*

Within the non-Top Ten portion of the class, the University used the PAI analysis, without consideration of race, but found that that analysis alone did not result in material minority gains. S.J.A. 30a-31a; Pet. App. 18a-19a. In 2003 and 2004, moreover, the proportion of non-Top Ten admittees who were Hispanic declined slightly, and the proportion of non-Top Ten admittees who were

African American remained stagnant. S.J.A. 45a; J.A. 126a.

Thus, the University not only gave good-faith consideration to race-neutral alternatives, *Grutter*, 539 U.S. at 339; it experimented with them over several years. This experience demonstrated that the University could not increase its underrepresented minority enrollment solely through such measures without sacrificing its emphasis on wide-ranging diversity and the quality of the education provided to all students. *Id.* at 339-340.

d. Finally, the University's policy is, as *Grutter* requires, "limited in time." 539 U.S. at 342. The University's policy contemplates performing an internal review every year and a formal review every five years.[7] J.A. 435a. The five-year timeframe reflects the University's commitment to considering race only while it remains necessary, but is expansive enough to allow the University to meaningfully assess trends in its enrollment results.

2. Petitioner contends (Br. 38-42) that the University's program is not narrowly tailored because it has yielded only minimal gains in minority enrollment relative to the overall size of the entering class, suggesting that race-neutral measures would have been equally effective. Petitioner is incorrect.

Petitioner asserts (Br. 39-40) that the University's consideration of race resulted in the enrollment of only 33 additional Hispanic and African-American Texas residents in 2008. Even accepting petitioner's exclusion of non-Texas residents and her assumption that Hispanics and African Americans would have been admitted in the same proportion each year (15.2%, Pet. Br. 39-40) without considering race, petitioner's focus on 2008 is unrepresentative. That year, Top Ten admissions rose from 61% to 72% of admissions, reducing the number of available non-Top Ten slots relative to previous years. S.J.A. 157a, 170a; J.A. 414a. Petitioner's methodology suggests that 126 additional underrepresented minorities from Texas schools were enrolled in 2006, and 173 in 2007. S.J.A. 157a. Given that the University had only 387 and 431 African Americans, and 1386 and 1470 Hispanics, during those years—in freshman classes exceeding 7400—the admissions policy had a significant and positive effect on diversity. S.J.A. 156a.

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[7] The University states that it has not finalized its five-year review because it has concluded that its analysis should be informed by this Court's decision. See Resps. Br. 12 n.4.

In any event, the fact that the University's consideration of race produced measured rather than drastic increases is the inevitable—and salutary—result of the University's structuring of its admissions policy so that race is but one factor within an individualized, holistic assessment of all kinds of diversity. These modest effects confirm that the University is not operating the policy as a quota, and that it has designed the process to minimize the impact on non-minority students. See *Grutter*, 539 U.S. at 390-391 (Kennedy, J., dissenting) (describing plans that had an unpredictable—and relatively minor—effect on the number of admitted minorities as more likely to safeguard individualized consideration).

Petitioner is also wrong to suggest that *Parents Involved* establishes that the University's policy is unconstitutional on the ground that its costs outweigh its benefits. In *Parents Involved*, school districts used race to dictate school assignments. Despite that predominant, mechanical use of race, the policies in question had only minimal impact, suggesting that other less restrictive measures—which the school districts had not considered—would have been as effective. 551 U.S. at 733-734. One such means would have been a "more nuanced, individual evaluation of school needs and student characteristics that might include race as a component" and that would be "informed by *Grutter*." *Id.* at 790 (Kennedy, J., concurring in part and concurring in the judgment). That individualized evaluation is precisely what the University has instituted. *Parents Involved* does not suggest that in order to be narrowly tailored, such a holistic, individualized policy must have drastic effects.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF OF THE ADVANCEMENT PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

In this brief *amici curiae* discuss the historical and social contexts in which the admission policy under challenge developed in order to assist the Court in resolving the issue presented.

Amici curiae, the Advancement Project (AP), is a not for profit organization. In partnership with local communities, AP engages in legal advocacy calculated to achieve universal opportunity and a just democracy. Advancing educational opportunities for all students is integral to AP's mission.

AP has offices in Washington, D.C. and Los Angeles, California, as well as a staff member and Board Chair in Austin, Texas.[2] Gerald Torres, founding board member of the Advancement Project and Bryant Smith Chair in Law, University of Texas School of Law, also is an *amicus curiae*.[3]

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

[2] *See About Advancement Project, available at http://www.advancementproject.org/about-advancement-project* (last visited Aug. 8, 2012).

[3] Institutional affiliations are provided for purposes of identification only. The views expressed in this brief are those of the individual *amici* and do not reflect the views of the institutions at which they teach.

Amicus Julie A. Reuben is a Professor at the Harvard Graduate School of Education who specializes in subject matter pertinent to the issues discussed in this brief. Professor Reuben has published widely on issues related to the purposes of universities, the freedoms necessary for the fulfillment of those aims, and educational equity.

SUMMARY OF ARGUMENT

Fisher v. Texas is unlike any affirmative action case this Court has ever confronted. For the very first time in history, the U.S. Supreme Court is asked to rule on the constitutionality of an admissions program designed to increase racial diversity at a university located in a southern state—Texas.

The history of Texas and of the University of Texas ("UT") distinguishes the present case from *DeFunis v. Odegaard*, 416 U.S. 312 (1974), *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). The aforementioned cases all involved universities located in the North or West that lacked a history of state-mandated segregation. *Fisher* arises out of a profoundly different context.

UT's quest for a racially diverse student body is justified, in part, because it represents an attempt by UT to come to terms with its own history of purposeful discrimination and the history of purposeful discrimination by the state of Texas. Administrators formulated the present admissions policy informed by the institution's and the state's long policy of racial exclusion and long and relatively recent record of resistance to racial inclusion.[4] This resistance continued even after segregation in higher education technically ended as a result of this

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[4] *See* Brief for Respondents at 1-3, Fisher v. Texas, No. 11-345 (S. Ct. Aug. 2012) ("UT is painfully aware of that history [of past discrimination], and the lingering perception that 'UT is largely closed to nonwhite applicants'").

Court's mandates in *Sweatt v. Painter*, 339 U.S. 629 (1950) and *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956); *see also Brown v. Board of Education*, 347 U.S. 483 (1954). UT's admissions policies also developed with awareness of efforts by the federal courts and the Department of Education Office of Civil Rights (OCR) to ensure desegregation of higher education in Texas. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified and aff'd*, 480 F.2d 1159, 1164-65 (D.C. Cir. 1973) (ordering ten states—including Texas—to desegregate their public universities). As recently as the late 1990s, OCR contended in a case involving UT that the state of Texas had not done enough to desegregate its institutions of higher education and demanded that the state take affirmative steps to ameliorate past discrimination. *See Hopwood v. Texas*, 861 F. Supp. 551, 572-573 (W.D. Tex. 1994) ("The OCR findings and the OCR's continuing review of Texas' efforts to desegregate demonstrate the pervasive nature of past discrimination in the higher education system"); *id.* at 573 (finding "strong evidence" of some present effects of past discrimination at UT law school, at the University, and in Texas colleges overall).[5]

These circumstances should inform the Court's assessment of this case. As Justice Sandra Day

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[5] *See* Douglas Laycock, *Hopwood v. Texas Litigation Documents* (Nov. 2001), *available at* http://tarltonguides.law.utexas.edu/content.php?pid=98968&sid=772237 (last visited Aug. 10, 2012). ("Litigation and negotiation with OCR has continued intermittently for more than twenty years; to this day, OCR contends that Texas has not done enough to desegregate its institutions of higher education.").

O'Connor acknowledged in *Grutter v. Bollinger*, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U.S. at 327. In the case at hand, the historical context and the lingering effects of past, purposeful discrimination shape the current campus environment and influence how UT pursues its mission of training leaders to serve the state of Texas. This context explains why UT considers two particular groups—African Americans and Latinos—"underrepresented minorities" in the admissions process.[6] After decades of discriminating against blacks and Latinos, UT now seeks a student body that reflects Texas's multiracial demography and is diverse along every relevant dimension—including but not limited to race—in order to advance its mission of educating leaders of the state.[7]

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[6] In dissenting from the Fifth Circuit's denial of Fisher's petition for rehearing *en banc*, Judge Edith Jones expressed bafflement at UT's interest in certain "preferred minorities." Judge Jones argued that UT's attention to black and Latino students, as opposed to "Pakistanis and Middle Easterners," violates the Constitution. *Fisher v. Texas*, 644 F.3d. 301, 304 (5th Cir. 2011) (Jones, J., dissenting). She asserted that the "pertinent question" in this case is "whether a race-conscious admissions policy adopted *in this context* (where blacks and Latinos are irrationally "favored") is narrowly tailored to achieve the University's goal of increasing "diversity." *Id.* at 306-307. The history and present effects discussed in this brief demonstrate that it is far from irrational for UT to show special concern for black students. This context also suggests why UT has a special interest in Latinos.

In any event, UT's holistic review permits admissions officials to consider special circumstances, including race-related ones, relevant to evaluating any students—not only blacks and Latinos. Thus, the admissions process *could* and does favor those "Pakistanis and Middle Easterners," whose presence in the admitted class contributes to diversity and the educational aims of the University.

Far from being unconstitutional, UT's modest, race-conscious admissions policy is constitutionally compelled. *See United States v. Fordice*, 505 U.S. 717 (1992) (policies and practices traceable to a prior de jure dual system that continue to have segregative effects, including by influencing student enrollment decisions or otherwise fostering segregation, violate the Constitution); *see also Grutter*, 539 U.S. at 328 (noting that "remedying past discrimination" is one "permissible basis for race-based governmental action"); *cf. Parents Involved v. Community Schools*, 551 U.S. 701, 783

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[7] The official mission statement of the UT system includes its commitment:

> To provide superior, accessible, affordable instruction and learning opportunities to undergraduate, graduate, and professional school students from a wide range of social, ethnic, cultural, and economic backgrounds, thereby preparing educated, productive citizens who can meet the rigorous challenges of an increasingly diverse society and an ever-changing global community.

See Mission Statement: The University of Texas System, available at http://www.utsystem.edu/osm/mission.htm (last visited July 19, 2012); *see also Compact With Texans*, Univ. of Tex. at Austin, *available at* http://www.utexas.edu/about-ut/compact-with-texans (last visited Aug. 10, 2012) (discussing importance of diversity and noting that UT "benefits the state's economy, serves the citizens through public programs, and provides other public service").

(2007) (Kennedy, J., concurring) (citing pursuit of equal educational opportunity, amelioration of racial isolation and pursuit of diversity as legitimate rationales for efforts by public schools, once formerly *de jure* segregated, to voluntarily implement assignment plans designed to increase racial diversity in schools). Consistent with its affirmative constitutional obligations, UT adopted an admissions policy that ameliorates its history of purposeful discrimination, and its remedial effort bolsters UT's diversity-based defense of its admissions practices.[8]

UT's pursuit of classroom diversity remedies discrimination and its present effects because it reduces racial isolation, and consequently promotes robust intellectual exchange in the classroom. *See Grutter*, 539 U.S. at 330 (educational benefits include the "livelier, more spirited" conversations possible "when students have 'the greatest possible variety of backgrounds' and the "cross-racial understanding" that can develop out of robust exchange).

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[8] UT argues that its admissions policy is constitutional under *Grutter*'s holding that pursuit of the educational benefits of diversity is a compelling state interest. *See* Brief for Respondents at 1-3, Fisher v. Texas, No. 11-345 (S. Ct. Aug. 2012). *Amici* do not suggest that UT's policy should instead be considered under the line of precedents that permit institutions to voluntarily implement remedies for past purposeful discrimination. *See Fullilove v. Klutznick*, 448 U.S. 448, 484 (1979) (upholding set-aside program designed to remedy purposeful discrimination); *Richmond v. Croson*, 488 U.S. 469, 494, 509 (1989) (where there is relevant history of purposeful discrimination, states or localities can "rectify the effects of identified discrimination within its jurisdiction" and "punish and prevent present discrimination"). Rather, we make an argument intended to supplement UT's diversity-based defense of its admissions policy.

More than fifty years ago in the landmark case challenging segregation at UT, the Court recognized that free intellectual exchange across color lines is a critical intangible element of a quality and equal education. *Sweatt,* 339 U.S. at 634 (ordering admission of black plaintiff to UT's all-white law school because makeshift black school denied intangibles of great education by "isolat[ing]" student from "interplay of ideas and the exchange of views"); *see McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950) (ordering admission of black graduate student on equal basis with whites because separation denied him ability to study and "engage in discussions and exchange views" with other students); *Brown v. Board of Education,* 347 U.S. at 493 (citing important "intangibles").

In *Fisher v. Texas*, history comes full circle.

ARGUMENT

I. UT'S CURRENT ADMISSIONS POLICY REFLECTS THE EVOLUTION OF THE STATE OF TEXAS AND THE UNIVERSITY ITSELF FROM A CLOSED, RACIALLY-EXCLUSIONARY SOCIETY TO A MORE OPEN SOCIETY WHERE THE UNIVERSITY VALUES A MULTIRACIAL CITIZENRY

UT is the progeny of a state that seceded from the Union in 1861 with the explicit goal of preserving "negro slavery" for "all future time."[9] Even after rejoining the Union and despite passage of the Reconstruction Amendments, Texas sought to implement its goal of excluding blacks from public life and political personhood. In the early decades of the twentieth century, the Court repeatedly struck down Texas statutes designed to deny blacks full citizenship.

Nixon v. Herndon, 273 U.S. 536 (1927), ranks among the many Texas-based cases that illustrate the state's relegation of blacks to second-class citizenship. The litigation involved Dr. L.A. Nixon, a black physician in El Paso, Texas and a member of the Democratic Party. Dr. Nixon filed suit claiming he was unlawfully excluded from participating in the Democratic Party primary elections.[10] The case made its way to the Supreme Court, where Justice Oliver Wendell Holmes, writing for a unanimous Court, held that Dr. Nixon's rights had been violated under the Fourteenth Amendment. Speaking with the authority of a Civil War veteran who had witnessed the passage of the Civil War Amendments, Justice Holmes explained that Texas had "direct[ly] and obvious[ly]" infringed the Fourteenth Amendment—"specifically drafted to protect Negroes." Though the Amendment "applies to all," he wrote, it was nonetheless "passed, as we know, *with a special intent to protect the blacks from discrimination against them.*" *Id.* at 541 (emphasis added).

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[9] *See A Declaration of the Causes which Impel the State of Texas to Secede from the Federal Union (Feb. 2, 1861), available at* http://avalon.law.yale.edu/19th_century/csa_texsec.asp (last visited Aug. 10, 2012) ("[Texas] was received as a commonwealth holding, maintaining and protecting the institution known as negro slavery—the servitude of the African to the white race within her limits—a relation that had existed from the first settlement of her wilderness by the white race, and which her people intended should exist in all future time.").

[10] The Judges of Elections in Texas denied him the right to vote in reliance upon a Statute of Texas enacted in May, 1923, and designated Article 3093a which stated that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas." *Herndon*, 273 U.S. at 540.

Despite the Supreme Court's mandate, Texas refused to honor Dr. Nixon's right to participate in the political process. Five years later, Dr. Nixon was back before the Supreme Court alleging discrimination, and once again, the Court vindicated his claims under the Fourteenth Amendment. *Nixon v. Condon*, 286 U.S. 73 (1932). Writing for the majority, Justice Benjamin Cardozo again emphasized that "The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color." *Id.* at 89.

Throughout the Twentieth Century and even into the Twenty-First Century, the Supreme Court of the United States has continued to intervene, as Texas continued to exclude blacks and Latinos from the opportunity to participate effectively in the political process. The struggle between the Court and Texas over equal rights yielded a series of landmark cases, all declaring that African-Americans could not be denied the right to vote. *See Smith v. Allwright*, 321 U.S. 649 (1944) (Democratic Party in Texas operates as an arm of the State and thus its exclusionary practices against black voters violates the Fifteenth Amendment); *Terry v. Adams*, 345 U.S. 461 (1953) (organized in 1889 for the specific purpose of excluding blacks from voting, the Jaybird Party controlled all the election machinery of Fort Bend, Texas from 1889 to the present in order to deprive black citizens of voting rights because of their color and in defiance of the Constitution); *White v. Regester*, 412 U.S. 755 (1973) (based on "a blend of history and an intensely local appraisal of the design and purpose" of the Texas legislature, the Court invalidated multimember districts in Bexar County, Texas because they "invidiously excluded Mexican-Americans from effective participation in political life" and in Dallas County, where "a white dominated organization" used multimember districts to enhance the opportunity for racial discrimination against blacks). As recently as 2006, the Court found, in an opinion by Justice Anthony Kennedy, that Latino voters were deprived of the opportunity to have their votes "count" because of redistricting decisions made by the Texas State Legislature. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

Texas's recalcitrance to black and Latino rights did not end at the voting booth. The state denied blacks and Latinos equal opportunities in every conceivable domain—including education.[11] And it defended its discriminatory admissions policies until the very last decades of the Twentieth Century.

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[11] *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (record was replete with evidence that the school districts in the San Antonio area, and generally in Texas, had a long history of financial inequity that adversely affected Mexican-American students).

A. UT Excluded Applicants Solely on Account of Race for Most of Its History

From its inception in 1881 to 1955, UT accepted all students who graduated from a certified high school.[12] *See* Tex. Const. Art. 7, § 10; *see also* Thomas D. Russell, *Keep Negroes out of Most Classes Where There are a Large Number of Girls: The Unseen Power of the Ku Klux Klan and Standardized Testing at The University of Texas, 1899-1999*, 52 S. Tex. L. Rev. 1, 14 (2010); Karen Nichol LeCompte & O. L. Davis, Jr., *Establishment of Academic Standards for Early Twentieth Century Texas High Schools: The University of Texas Affiliated Schools Program*, 37 J. of Educ. Admin. and History 71 (1995).

Only one barrier—an insurmountable one—stood between a Texas high school graduate and entry to UT: race. Texas's flagship university was founded by white Texans for white Texans. UT categorically barred black Americans from the University and from its graduate and professional schools. State law mandated segregation by race in education. The Constitution of the Republic of Texas, section 7 of article 7, stipulated "[s]eparate schools shall be provided for the white and colored children." *See Sweatt*, 210 S.W.2d at 443.

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[12] The requirements for admission to the graduate school were similarly minimal. Law school applicants needed only to have received an undergraduate degree. *See* Gary M. Lavergne, *Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice* 17-18 (2012).

Thus, in 1946, the UT School of Law rejected applicant Heman Sweatt, a black graduate of Houston's Jack Yates High School and northeast Texas's Wiley College. Lavergne, *supra*, at 15, 18. The young man, a "good and steady" student, *id.* at 18, "possessed every essential qualification for admission, except that of race, upon which ground alone his application was denied." *Sweatt*, 210 S.W.2d at 443. UT excluded the "mild-mannered" Sweatt and every other person of African descent, no matter how virtuous. By contrast, no white person who met minimal qualifications, no matter how vile, would be denied admission to UT. At UT's flagship campus whites alone could acquire the skills necessary to join the ranks of state leaders.[13] *See generally* Brief of the Family of Heman Sweatt as Amicus Curiae in Support of Respondents, Fisher v. Texas, No 11-385 (2012).

In 1950, the U.S. Supreme Court forced UT to admit Sweatt to its School of Law and to admit other black applicants to the undergraduate college. In

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[13] Latinos, who are considered an ethnic group and can be of any race, were not formally excluded from UT. However, they were a tiny percentage of the UT student population for decades, and the few Latinos on campus experienced discrimination. Teresa Lozano Long recalls that Latinos "sort of grouped ourselves together" during the 1940s to survive the university's climate. *See* Liz Farmer, *University's Racial History Traces Back Generations*, Daily Texan, May 4, 2012, at 5, *available at* http://www.dailytexanonline.com/university/2012/05/04/universitys-racial-history-traces-back-generations (last visited Aug. 10, 2012).

Sweatt v. Painter, 339 U.S. 629 (1950), the Court held that UT could not exclude an otherwise qualified applicant on account of race, a holding that it reinforced in *Brown v. Board of Education,* 347 U.S. 483 (1954), the landmark case barring racially restrictive admissions in public education. *See Florida ex rel. Hawkins v. Board of Control,* 350 U.S. 413 (1956) (applying *Brown* to higher education).

As the public face of the struggle against segregation in higher education, Sweatt faced harassment, on and off UT's campus. During Sweatt's first semester at the law school, a cross was burned on the law school grounds. Russell, *Keep Negroes Out, supra,* at 14. Opponents of integration threatened Sweatt's life, in person and by mail. Lavergne, *supra*, at 211. Vandals defaced his home and threw rocks, shattering windows. *Id.* Sweatt fell ill and struggled academically, financially, and personally. Life at UT became unbearable. Sweatt eventually dropped out of school—a "physical and emotional wreck." *Id.* at 280-82.

After the Supreme Court mandated the desegregation of higher education, UT ended its "open" admissions policy. UT imposed "an enrollment restriction plan" that required applicants to take standardized aptitude tests in segregated testing centers; UT implemented the new policy after an official's analysis revealed it would heavily disfavor blacks. Dwonna Goldstone, *Integrating the Forty Acres: The Fifty-Year Struggle for Equality at the University of Texas* 41 (2006). The testing requirement allowed UT to formally comply with *Brown* without compromising its racial integrity. *Id.*; *see also* Russell, *Keep Negroes Out, supra*, at 30.

UT also adopted an inhospitable stance toward the few blacks who did gain admission. Barbara Smith, a black music student who had been cast as the love interest of a white male in a university production, received threats; the administration eventually forced her out of the production "for her safety." Aarti Shah, *The Fight for Integration: How Two Men Broke UT's Color Barrier and Started a Movement,* Daily Texan, Feb. 6, 2002 at 1-2. UT excluded blacks from living in the on-campus dormitories designated for whites and specifically forbade all black students from entering the living quarters of white women. UT established separate and inferior residential housing for blacks. UT barred black students from intercollegiate athletics, excluded them from extracurricular activities such as music and theater, and permitted segregated fraternities and sororities. UT even banned black students from using the same bathroom facilities as whites. *See* Goldstone, *supra*, at 27-28, 43, 58-60, 96. All told, in *Sweatt*'s wake, blacks faced an all-encompassing stigma, purely on account of race.

B. UT and the State of Texas Enforced Segregation and Punished Integrationists Well After *Sweatt v. Painter*

Texas officials and UT administrators also resisted change by attacking proponents of integration and their allies. The state targeted the NAACP and its lawyers for extinction. *See* Jack Greenberg, *Crusaders in the Courts* 217-22 (1994); Gilbert Jonas, *Freedom's Sword*, 135-49 (2005). The lawyers had waged both the court battle that resulted in Sweatt's admission to UT and litigated the series of cases that had banned racial discrimination in the state's political process. *See Condon*, 286 U.S. 73; *Herndon,* 273 U.S. 536; *Smith,* 321 U.S. 649. In 1956, the attorney general of Texas sought and obtained a court order barring the NAACP's lawyers from practicing law in the state. In league with state legislators in Texas and throughout the South who vowed to resist desegregation through every legal means, the Texas attorney general waged a years-long campaign of harassment "aimed at paralyzing the NAACP and its lawyers." *See* Mark V. Tushnet, *Making Civil Rights Law* 273 (1994). The campaign impeded the organization's legal work, decimated its membership, and imperiled the NAACP's future.[14] *Id.*

During the 1960s university officials lashed out against students and faculty who protested racial exclusion. When black students filed suit to force UT to desegregate dormitories in 1961, the Board of Regents threatened those who dared aid the effort. The Board resolved that "any member . . . who directly or indirectly assists the Plaintiffs in this suit would be guilty of disloyalty to his employer and subject to dismissal or other disciplinary action." Goldstone, *supra*, at 107. It specifically targeted Professor Ernest Goldstein, a member of the law school faculty who had conferred with the black students who sought desegregation of the dormitories. The Regents backed down after the harassment of Goldstein precipitated a backlash by other law school faculty, all of whom threatened to resign over the Board's interference. In 1964, the racial bar in the dormitories fell. *Id.* at 109.

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[14] The Court ultimately concluded that the civil rights pursuits of the lawyers and members of the NAACP constituted protected modes of expression under the First and Fourteenth Amendments. *See NAACP v. Button*, 371 U.S. 415 (1963); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (state's demand that NAACP disclose membership lists violated associational rights protected by First and Fourteenth Amendment).

Nevertheless, meaningful desegregation still eluded UT. In 1968, UT created the "Program for Educational Opportunity" to provide special educational assistance to academically talented but disadvantaged students. UT provisionally admitted these students, including blacks and Latinos, and then offered them regular admission if they performed well enough. The Regents quickly eliminated the program, however, declaring that no university funds could be used to recruit "students who otherwise would not have had an opportunity for higher education." Goldstone, *supra*, at 147. After UT Board of Regents Chair Frank C. Erwin, Jr. spoke out against the program, many believed that the Regents had canceled it not because of resource limitations but because of "racism." The Regents did not want to see "too many" blacks and Hispanics on campus. *Id.* at 147-48. The political leadership of UT still had not actively committed itself to reversing the legacy of segregation.

Black students continued to experience a hostile environment. In 1969, for example, Professor Robert Hopper greeted black sociology major Rosetta Williams on the first day of class in a most unwelcoming way. "I want feedback from the students because I don't want you sitting around like a bunch of niggers nodding your heads not saying nothing." *Id.* at 136. Williams was stunned into silence. *Id.* Such casual racism, coupled with UT's anemic efforts at inclusion, discouraged blacks from applying to UT and suppressed the numbers of students of color on campus.

Blacks and Latinos remained sparse on UT's campus well after other institutions of higher education began actively recruiting students from underrepresented communities. Racial isolation endured into the 1980s. *Id.* at 136-37.

The numbers of black and Latino students at UT only began to increase appreciably during the 1980s, and then only after federal intervention. In 1983, at the behest of the U.S. Department of Education Office of Civil Rights ("OCR"), UT instituted "The Texas Plan" to increase the black and Latino presence on campus. *See* John B. Williams, *Race Discrimination in Public Higher Education: Interpreting Federal Civil Rights Enforcement, 1964-1996* (1997); *see also Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). In 1988 the Texas Higher Education Coordinating Board determined that Texas had not met the goals of the plan and voluntarily developed a successor plan to avoid a federal mandate.[15]

Texas remained under active monitoring by the U.S. Department of Education into the late 1990s and some public universities in Texas, including Texas Southern University and Prairie View, remain under active OCR oversight today.[16] *See* Jayne Suhler, *College Inequities Still Reported*, Dallas Morning News, Apr. 23, 1999, at 37A. In 1996, when *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), held that UT could no longer use race in admissions, OCR argued that its mandate, still in place, in fact *required* UT to take affirmative steps, including race-conscious action, to increase the black and Latino presence on campus. *See Hopwood*, 861 F. Supp. at 572-573.[17] In the wake of the Fifth Circuit's *Hopwood* decision (a holding reversed by the U.S. Supreme Court in *Grutter*), the state of Texas re-endorsed the Texas Plan in January 1997.[18] Texas subsequently developed "Access and Equity 2000," a voluntary plan aimed at improving its higher education system and increasing access to Texas college for students of color.[19]

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[15] *See Hopwood*, 861 F. Supp. 551 at 557.

To this day, the state voluntarily pursues greater equity in higher education. Its current plan,

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[16] *See* E-mail from Andrew C. Hughey, General Counsel, Tex. Southern Univ. to Tomiko Brown-Nagin, Professor of Law, Harvard Law School (Aug. 7, 2012) (on file with author).

[17] For background, *see* Laycock, *supra* note 5.

[18] *See* Texas Higher Education Coordinating Board, *The Texas Plan for Equal Educational Opportunity: A Brief History*, (Nov. 1997), *available at* http://www.thecb.state.tx.us/reports/PDF/0021.PDF?CFID=6758024&CFTOKEN=54037207 (last visited Aug. 10, 2012).

[19] *See* Texas Higher Education Coordinating Board, *Access and Equity 2000: The Texas Educational Opportunity Plan for Public Higher Education (September 1994 through August 2000)*, *available at* http://www.thecb.state.tx.us/reports/PDF/0018.PDF (last visited Aug. 10, 2012).

"Closing the Gap by 2015," is designed to achieve equity for all in Texas's system of higher education—and particularly for blacks and Latinos.[20]

Against this background, UT's current racially literate admissions policy,[21] modest in design and impact, is constitutional. The policy both ameliorates past purposeful discrimination and advances UT's compelling interest in diversity. *See U.S. v. Fordice*, 505 U.S. 717, 728 (1992) ("Our decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation."); *Grutter*, 539 U.S. at 332 (recognizing state interest in educational benefits of diversity).

C. UT's Chilly Racial Climate in Recent Years

By the late 1980s, UT had developed a commitment to a racially inclusive campus; however, segregation and its legacy could not be easily erased. UT's long history of discrimination and of resistance to desegregation impeded its efforts to recruit blacks and Latinos. In 2002, for example, African American student Onaje Barnes reported that when it came time to select a college, his family and friends warned him not to attend UT "because, quite frankly, the environment of UT is known for racism." Goldstone, *supra*, at 152-53. Past incidents, coupled with periodic reports of enduring racial hostility at UT,[22] inspired unease about UT and left "lingering feelings of mistrust" among blacks and Latinos. *Id.* at 152.

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[20] *See* Texas Higher Education Coordinating Board, *Closing the Gaps*, *available at* http://www.thecb.state.tx.us/index.cfm?objectid=858D2E7C-F5C8-97E9-0CDEB3037C1C2CA3 (last visited Aug. 8, 2012); Texas Higher Education Coordinating Board, *Accelerated Plan for Closing the Gaps by 2015* 6-9 (Apr. 29, 2010), *available at* http://www.thecb.state.tx.us/reports/PDF/2005.PDF?CFID=31507899&CFTOKEN=70953647 (last visited Aug. 10, 2012) (discussing imperative of increasing black and Latino college participation rates).

[21] Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. Am. Hist. 92, 114-15 (June 2004).

The legacy of discrimination created a chilly environment for students of color who matriculated at UT. The few hundred black students on campus repeatedly complained about racial isolation. Ernest White, a black freshman who studied accounting at UT during the 1970s, articulated the problem in terms echoed by other students of color on the UT campus years later. White felt "out of place, like when you walk up to someone, and he acts like you're not there." *Id.* at 137. Decades later, UT's black students still voiced similar concerns. In 2003 Nailah Sankofa described the problem in blunt terms: "I do not feel welcome here." Katherine Pace,

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[22] Two illustrative incidents from this decade: two white students who wore Reagan masks attacked a black student leader (Terrence Stutz, *UT Struggling to Recruit Blacks: Fewer African-American Freshman Enrolled for Fall Term*, Dallas Morning News, October 14, 1989, at 37A); and students painted a car on campus with racist epithets, and a fraternity sold tee-shirts bearing an offensive black caricature (*UT Black Enrollment Down for Fall Semester: At 1,808 Number Declines for Second Year in a Row,*" Dallas Morning News, September 17, 1991, at 17A). Blacks were reluctant to enroll at a University with such a hostile climate. *Id.*

U. Texas Group: Decline of Affirmative Action a Concern, Daily Texan, Feb. 3, 2003. Persistent complaints that UT's environment was unfriendly to students of color prompted UT to open an on-campus lounge intended as a gathering space for all UT students interested in cross-cultural exchanges, particularly black students, in 1995.[23]

In an April, 2012 article published in the campus newspaper, the *Daily Texan,* Choquette Hamilton described the circumstances that gave rise to the opening of the lounge and that still make it a critically important resource for students. "If you're a black student in your classroom filled with people who don't look like you and possibly say things that are offensive, it's frustrating going through that day in and day out." Rodriguez, *supra,* at 5.

Racial isolation is not the only problem that UT's students of color have reported. These students also have confronted overt racial hostility. UT opened the lounge described above not only to combat loneliness but also because "black students do not feel welcome on all parts of campus." *Id.* Remarkably, even today there are parts of the UT campus, including the West Mall, where black students rarely venture due to an overwhelming sense that they are "not welcome" and should keep out. *Id.*

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[23] *See* Jody Serrano, *Malcolm X Lounge Offers Safe Haven to Students of All Races*, Daily Texan, Apr. 27, 2012, *available at* http://www.dailytexanonline.com/university/2012/04/27/malcolm-x-lounge-offers-safe-haven-students-all-races (last visited Aug. 10, 2012).

Recurrent racially-tinged incidents reinforce the students' feelings of unease. Vandals defaced a statue of Dr. Martin Luther King Jr. in January of 2003 and again in September of 2004. *See* Courtney Morris, *MLK Vandalism in Retrospect*, Daily Texan, Sept. 2, 2004. The campus, embroiled in racial turmoil, required an intervention by UT's President. To address UT's ongoing racial problems the University's President, Dr. Larry R. Faulkner, established a "Task Force on Racial Respect and Fairness" in 2004. UT also hired a Vice Provost for Equity and Diversity to address these concerns. *See A Step Ahead of the Vandals*, Daily Texan, June 2, 2005.

Racial and ethnic tensions persist nevertheless. Channing Holman, a black student currently enrolled at UT, vividly described the campus's racial climate and its adverse impact on learning in a guest column, published in the campus newspaper in the wake of yet another racial controversy on campus provoked by a racially-tinged cartoon. As "one of the blacks that represent 4.5 percent of this university," she wrote:

> [I] came to UT wide-eyed, in awe that I was where many students wanted to be, and I was so excited to begin a new chapter of my life. I knew UT was a predominantly white institution, especially based on the reactions I received from people in my hometown when I told them UT was my school of choice. . .[B]ut I refused to let it deter me from getting a UT education.

> Reality set in during orientation, when there was only one other black girl in my wing and again when I was automatically labeled as an athlete because I was black. I have been the only black in a class of 100, and I have been stared at like I was on display in a museum, perhaps because I'm black. I've been overlooked during office hours because the white girl's question was more important, and I've been called "the n-word" while walking on Dean Keeton [a part of campus].

Channing Holman, *Taking Strides To Make the World Change*, Daily Texan, May 1, 2012, *available at* http://www.dailytexanonline.com/columns/2012/05/01/taking-strides-make-world-change (last visited Aug. 10, 2012).

Black students are not alone in observing or experiencing a chilly environment for students of color on UT's campus. Latinos report being subjected to "stereotypes" and racial epithets on campus.[24] UT is still viewed as a campus that has not "honestly dealt with its past" and that still does not "welcome" Latinos and blacks. Goldstone, *supra*, at 153. Many Latinos also feel isolated at UT, according to Catherine Rodarte, a Latina currently in her junior year at UT. "[I]t's hard for me to speak up in class when it's almost all white students around me."[25]

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[24] *See* Alexa Ura, *Latino Students Defy Statistics by Attending College, Becoming Role Models*, Daily Texan, Apr. 25, 2012, at 2, *available at* http://www.dailytexanonline.com/university/2012/04/25/latino-freshmen-defy-statistics-attending-college-becoming-role-models (last visited Aug. 10, 2012).

This sense of social isolation is exacerbated by demeaning stereotypes that persist on UT's campus. For example, in March of 2012 the Texas Student Publications Board censured *Daily Texan* editor, Colby Angus Black, after he published articles that mocked two Latino students by name.. Black lashed out against the students, Oscar de la Torre and Toni Nelson Herrera, after they staged an on-campus demonstration in favor of diversity.[26] Invoking age-old stereotypes, the paper published a cartoon depicting de la Torre "on horseback, wearing a sombrero and carrying a rifle."[27]

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[25] Tamar Lewin, *At the University of Texas, Admissions as a Mystery*, N.Y. Times, Apr. 1, 2012 at A14, *available at* http://www.nytimes.com/2012/04/02/education/university-of-texas-mysterious-admissions-process.html?_r=1 (last visited Aug. 10, 2012).

[26] *See* Megan Strickland, *A History of Racial Controversy at the Daily Texan*, Daily Texan, Apr. 30, 2012, at 7, *available at* http://www.dailytexanonline.com/university/2012/04/30/history-racial-controversy-daily-texan (last visited Aug. 10, 2012). The demonstration mirrored an incident at UT involving a current UT law professor, who in an April 18th, 1997 editorial wrote: "The only reasons we have racial preferences, of course, is the fact that blacks and Mexican-Americans are not academically competitive with whites and Asians." *Id.* After this law professor's comments triggered outrage among Latino and black UT students, a spokesman for George Bush, then Governor of Texas, felt compelled to disavow "that kind of talk." *See* Mark Levin, *It's Hard to Say* (Feb. 9, 1998), *available at* http://weeklywire.com/ww/02-09-98/austin_pols_feature4.html (last visited Aug. 10, 2012)

In 2012, the *Daily Texan* was compelled to address "race, racism and diversity on the UT campus" in an eight-part series of articles. The series was precipitated by yet another racial controversy, this one over the paper's publication in March of 2012 of a "racially-charged" cartoon that seemed, to some readers, to mock the killing of Trayvon Martin, a seventeen year-old black teenager. The feature, which called Martin "a colored boy," a term that can indicate racial animus when applied to black males,[28] precipitated a backlash on campus.[29] Zoya Waliany, a senior in the Arabic Flagship Program wrote an essay in the aftermath of the backlash. She lamented a campus climate that gave rise to the racially-tinged cartoon. Waliany noted the extent to which racism is present at UT, embedded in its landscape. Too often ignored are:

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[27] Strickland, *supra* note 26, at 7. Rodarte's lament about social isolation and de la Torre and Herrera's offense at being stereotyped are not unusual reactions, that can adversely affect student academic performance according to social science literature. *See* Claude M. Steele, *Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do* 5-7, 118-9, 125 (2010) (discussing "stereotype threat," anxiety and physiological changes precipitated when a person has the potential to confirm negative stereotypes about her social group); *see also* Brief of Social and Organizational Psychologists as Amici Curiae in Support of Respondents, Fisher v. Texas, No. 11-385 (2012); *infra* Part II.A, pp.32-37.

[28] *See Ash v. Tyson Foods*, 546 U.S. 454, 456 (2006) (plant manager's use of the word "boy" to refer to African-American employees was potentially probative of discriminatory animus).

[29] *See* Ben Carrington, Michelle Mott, Vivian Shaw, & Maggie Tate, *Trayvon Cartoon Controversy: Reflecting Back, Moving Forward*, Daily Texan, May 2, 2012.

> the years of racism ingrained in UT's landmarks and building. . . . From buildings named for a KKK Grand Dragon to the three Confederate flags that fly on the forty acres. . . . RLM Hall was named for Robert Lee Moore, a mathematician who refused to let African American students in his classes. Prof. Moore would walk out of class if a black student showed up. . . . Painter Hall is named for the former UT President who defended the case involved in preventing Heman Sweatt, a black UT Law School applicant from attending the school because of his race.

Zoya Waliany, *Building from the University's Racist Past*, Daily Texan, April 30, 2012, at 4, *available at* http://www.dailytexanonline.com/columns/2012/04/30/building-universitys-racist-past (last visited Aug. 10, 2012). *See* 1a (Appendix A: UT Campus Map with Landmarks and Monuments), *available at* http://www.dailytexanonline.com/image/2012/05/01/c campu-statues (last visited Aug. 10, 2012).

One of the most significant racial flare-ups in recent years at UT concerned a campus landmark built in 1954 and named in honor of William Simkins, a professor at UT's law school from 1899 until his death in 1929. Within five weeks of the Supreme Court's decision in *Brown v. Board of*

Education, UT named its new dormitory in honor of Simkins—a man who symbolized violent white resistance to equality.[30] *See* 2a (Appendix B: Simkins Hall). Professor Simkins, who preferred to be called Colonel Simkins for his service during the Civil War, was an active leader of the Ku Klux Klan. Russell, *Keep Negroes Out*, *supra*, at 2-4. Together with his brother, Eldred James Simkins, Colonel Simkins organized the Ku Klux Klan in Florida following the Civil War. Simkins was not merely a member of the Ku Klux Klan. He, along with his brother Eldred James Simkins (a regent of UT from 1882 to 1896), was "a criminal and a terrorist, a gun-toting, mask-wearing, night-riding Klansman who headed a group in Florida that murdered 25 people in three years in just one county."[31] *See* 3a (Appendix C: Portrait of William Simkins). "Simkins threatened an African-American legislator and kept blacks from the polls. In just one of the Florida counties under his command, Klansmen murdered 25 freed slaves during a three-year period."[32] During his tenure at UT, Colonel Simkins delivered an annual address describing with great pride his exploits with his brother, Eldred. That address was ultimately published in the 1916 commencement edition of UT's alumni magazine, The Alcalde. Goldstone, *supra*, at 15. In that article, Professor Simkins boasted of his participation in the Klan's night rides: "The immediate effect upon the Negro was wonderful," he wrote, "the flitting to and fro of masked horses and faces struck terror to the race."[33]

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[30] Ralph K.M. Haurwitz, *Half-Century Later, UT to Reconsider Naming of Dorm for Klansman*, American Statesman, May 20, 2010, ***available at*** http://www.statesman.com/news/local/half-century-later-ut-to-reconsider-naming-of-698255.html (last visited Aug 10. 2012).

[31] *DU Law Professor Tom Russell Battles Klan Ghosts in Texas*, Law Week Colorado, Jul. 26, 2010, ***available at*** http://www.lawweekonline.com/2010/07/du-law-professor-tom-russell-battles-klan-ghosts-in-texas/ (last visited Aug 10. 2012).

[32] Tom Russell, *Professor's Paper Targets Klan Reference on U. of Texas Dorm...And Gets Action*, July 12, 2010, ***available at*** http://www.huffingtonpost.com/dr-tom-russell/professors-paper-targets_b_643347.html (last visited Aug 10. 2012).

UT also honored Simkins with a brass bust, which sat in UT's law library. *See* 4a, (Appendix D: Bust of William Simkins). For decades, students engaged in a ritual of rubbing the head of the Simkins bust before taking exams. *See* Russell, *Keep Negroes Out, supra*, at 29. Officials removed the bust during the 1990s after a complaint by a librarian who was familiar with Simkins' history.

And in 2010, after a campus-wide debate over whether UT should honor Simkins, UT officials removed Simkins's name from the dormitory. It no longer wished to give Simkins and his crimes UT's imprimatur.

D. UT's Current Admissions Policy Helps to Redeem its History and to Remedy Vestiges of Segregation

The numerous and concrete incidents described above documenting UT's chilly campus climate for blacks and Latinos are traceable to Texas' and UT's history of segregation. UT's present effort to diversify its student body is thus an appropriate and necessary response to ongoing racial and ethnic tensions on campus precipitated by its history and its enduring yet often intangible effects.

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[33] *DU Law Professor, supra* note 31.

In *United States v. Fordice*, this Court held that the state of Mississippi could not discharge its constitutional obligation to dismantle segregation in higher education merely by adopting race-neutral policies. 505 U.S. at 729. Public institutions with histories of *de jure* segregation that remain racially identifiable and bear vestiges of segregation traceable to the state are constitutionally obligated to adopt policies that remove remnants of segregation. *Id.* at 729-30.

The historical context that provides the backdrop for *Fisher v. Texas* is substantially similar to the circumstances that compelled the Court's holding in *Fordice*. Texas and UT, like Mississippi and its flagship universities, resisted desegregation well after *Brown,* and also adopted policies—including standardized testing practices—"tainted" by discrimination. Compare *Fordice*, 505 U.S. at 734 with Goldstone, *supra,* at 41 and Russell, *Keep Negroes Out*, *supra*, at 30-31. Texas, like Mississippi, only began to actively desegregate its educational institutions after OCR and the federal courts demanded it. *Hopwood v. Texas*, 861 F. Supp. 551, 572-573 (W.D. Tex. 1994) ("The OCR findings and the OCR's continuing review of Texas' efforts to desegregate demonstrate the pervasive nature of past discrimination in the higher education system"); *id.* at 573 (finding "strong evidence" of some present effects of past discrimination at UT law school, at the

University itself, and in Texas colleges overall). Texas, like Mississippi (*Fordice* 505 U.S. at 741-42), maintained a system of historically black colleges unequal in resources and in other respects to the state's historically white, flagship universities.[34]

It is thus evident that UT, an arm of the state of Texas, bears vestiges of segregation that UT rightly seeks to remedy. *Fordice*, 505 U.S. at 729-30; *see also id.* at 744-45 (O'Connor, J., concurring) (*de jure* segregated states where vestiges of discrimination remain must "counteract[ ]" and minimize[ ]" the "segregative impact" of practices); Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1791 (2004) ("Southern and border state schools have a compelling interest in complying with their desegregation obligations.").

Consistent with UT's affirmative obligations, administrators are now intent on creating a racially diverse and healthy campus climate for all Texans. UT's holistic, race-sensitive admissions policy both remedies vestiges of segregation on campus and satisfies constitutional standards for voluntary adoption of affirmative action policies designed to achieve the educational benefits of diversity. *See Grutter*, 539 U.S. at 336-37 (endorsing race as a "plus" factor where each applicant's file is scrutinized). UT's policy is justified and lawful under two distinct strands of Supreme Court doctrine.

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[34] Texas remains under active OCR oversight regarding its policies toward Texas Southern and Prairie View, historically black colleges. *See supra* note 16.

II. UT'S FOURTEENTH AMENDMENT-COMPELLED ADMISSIONS POLICIES PROTECT AND PROMOTE "EDUCATIONAL INTANGIBLES" LONG- RECOGNIZED AS CRUCIAL COMPONENTS OF A QUALITY AND EQUAL EDUCATION

A. UT's Policy Promotes Students' Freedom to Engage in Robust Intellectual Exchange in the Classroom

"'Livelier, more spirited...more enlightening and interesting' classroom discussions" flow from diverse classrooms and robust classroom exchange is a major benefit of educational diversity. *Grutter*, 539 U.S. at 330. When classrooms feature meaningful, visible diversity, Latinos and blacks are less likely to experience the social isolation that typically is a part of their UT experience. *See supra* Part I.C, pp. 20-29. Such isolation impedes learning by producing "stereotype threat,"[35] the anxiety and accompanying physiological changes that occur when students of color feel scrutinized and in danger of confirming negative stereotypes about their social group. *See* Steele, *supra*, at 5-7. Channing Holman, the black UT undergraduate who explained her discomfort, was "the only black in a class of 100" who was

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[35] "Stereotype threat" and its impact on the learning environment is ably described in the *Amicus* Brief filed in this case by Greg Walton and Jerry Kang. Brief of Greg Walton and Jerry Kang as Amici Curiae in Support of Respondents, Fisher v. Texas, No 11-385 (2012).

"stared at like I was on display in a museum" described circumstances that precipitate "stereotype threat." So did Catherine Rodarte, the Latina in her junior year at the University, quoted *supra*, who found it "hard . . . to speak up in class when it's almost all white." Many Latino students, like many black students at UT, experience a sense of loneliness, even estrangement, and these feelings can often depress performance. *See* Steele, *supra,* at 5-7, 118-19, 125; *cf.* Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (2007) (diversity can facilitate better problem solving and increase productivity).

Fittingly, and long before the *Grutter* Court endorsed the state's compelling interest in diversity's educational benefits, the U.S. Supreme Court recognized the detrimental effects of racial isolation on learning and the importance of free deliberation and robust intellectual exchange to the effectuation of Fourteenth Amendment equality rights. The leading case recognizing the connection between intellectual exchange and quality and equal education involved UT. In *Sweatt v. Painter,* 339 U.S. 629 (1950), the Court endorsed the value of democratic free expression to equal educational opportunity. The Court held that UT's exclusion of black applicant Sweatt from the university violated the Fourteenth Amendment because Sweatt could not access the intangibles of a quality education in a makeshift black law school. Those intangibles, said the Court, included "qualities which are incapable of objective measurement but which make for greatness in a law school." *Id.* at 634. The Court called the "interplay of ideas and the exchange of views" one of these intangibles of a quality and equal education.

Id. The *Sweatt* Court cited *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950), an earlier case in which it held that a university could not relegate a black graduate student to a seat in a classroom, in a row specified for colored students, or to a library or to a special table in cafeteria. The separation denied McLaurin the "ability to study, to engage in discussions and exchange views with other students" and consequently violated McLaurin's "personal and present" right to equal protection of the laws. *McLaurin*, 339 U.S. at 641-42.

The Court again acknowledged that "intangible factors" are vital to a quality and equal education in *Brown v. Board of Education.* Citing *Sweatt* and *McLaurin,* a unanimous Court explained that a learning environment depends in large part on "those qualities which are incapable of objective measurement" but which affect one's "ability to study, to engage in discussions and exchange views with other students." *Brown*, 347 U.S. at 493. When those intangible factors are ignored—as in segregated schools—learning suffered.

The understanding that cross-racial dialogue is vital to education is the essence of *Grutter* and *Bakke*'s holdings. In these recent cases the Court linked students' free expression to a University's entitlement to academic freedom. *See Grutter*, 539 U.S. at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.); *Bakke*, 438 U.S. at 312 (endorsing diversity rationale for affirmative action on grounds that "academic freedom" has "long been a concern of the First Amendment"); *see also Keyishan v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"). The Court did not specifically cite First Amendment interests in *Sweatt*, *McLaurin* or *Brown*, as did the *Grutter* and *Bakke* Courts. Nonetheless, in all of these cases the U.S. Supreme Court recognized the precise student interests at issue in the present case: the ability to freely exchange and the confidence to interact across racial boundaries.[36]

The robust intellectual exchange that is a by-product of the diverse classrooms that UT now pursues is fundamental to "effective participation by members of all racial and ethnic groups in the civic life of our Nation," *Grutter*, 539 U.S. at 332, and is a sound educational policy to which this Court should defer. *See Fordice*, 505 U.S. at 743 (state must take steps to disestablish racially identifiable system of higher education, consistent with sound policy). Free intellectual exchange and cross-racial dialogue are vital to liberal education.

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[36] Robust exchange in the classroom not only is protected by UT's First Amendment right to academic freedom, but also by students' right to freedom of expression on campus. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (curtailing student viewpionts poses danger of chilling expressive rights protected by the First Amendment and is especially dangerous on univeristy campuses, which serve as vital forums of public dialogue); *Carey v. Brown*, 447 U.S. 455 (1980) (vital First Amendment speech principles are at stake when a University withholds benefits because a student chooses to express a particular point of view); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

Within a multiracial, polyglot context,[37] UT's embrace of an admissions policy that can facilitate cross-racial classroom exchange not only is compelling, but also is urgent. In 1996, UT President Robert Berdahl explained why: "as a flagship university, we have always educated leaders of our state and nation. We have an obligation to prepare future leaders who reflect the diversity of the country."[38] *See Grutter*, 539 U.S. at 332 ("because universities . . . represent the training ground for a large number of the Nation's leaders, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity").

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[37] Latinos and blacks now constitute almost fifty percent of the state's population and make vital contributions to social, economic, cultural, and political life in the state. *See Demographic Profile of Hispanics in Texas, 2010*, Pew Hispanic Center, http://www.pewhispanic.org/states/state/tx/ (last visited Aug. 10, 2012).

[38] Felicia J. Scott and William Kibler, *A Case Study: The Effects of the Hopwood Decision on Student Affairs*, 83 New Directions for Student Services: Responding to the New Affirmative Action Climate, 60 (Gehring 1998).

CONCLUSION

Tejas Es Diferente: Texas is different. This brief has argued that the history of Texas and the way it shapes the present provides context that should matter to the outcome of this case. *See Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); *id.* ("Strict scrutiny must take 'relevant differences' into account."). Although Texas is commonly thought of as a Western state and is known today for its cultural diversity, it also is a former Confederate state with a lamentable history of race-based discrimination and exclusion. UT shares in this history; for the majority of its existence, it admitted whites only and consequently cultivated a lily-white state leadership.

UT's present commitment to a meaningful black and Latino presence on campus cannot be fully comprehended or assessed without attention to the ways that history lives on in the present at UT—affecting the social climate on campus and the dynamics inside the classroom. At UT, "The past is never dead; it's not even past." William Faulkner, *Requiem for a Nun*, act 1, sc. 3 (1950).

Yes, Texas is different. Through its current policy, Texas seeks to redeem its history. Its holistic review is driven by a mission to provide an education of the first class to all of the people of Texas.

Respectfully submitted,

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AUGUST 13, 2012

APPENDIX

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APPENDIX A

MAP OF MONUMENTS
UNIVERSITY OF TEXAS CAMPUS
2012

1. Littlefield Fountain

The fountain bears the inscription "To the men and women of the Confederacy who fought with valor..." The fountain was originally intended to serve as the centerpiece of a larger memorial with all the South Mall statues positioned around it.

2. Robert E. Lee Statue

The figure of Lee, who was the chief general of the Confederacy and who was based in Texas while serving the U.S. Army, can be found in the South Mall.

3. Albert Sidney Johnston Statue

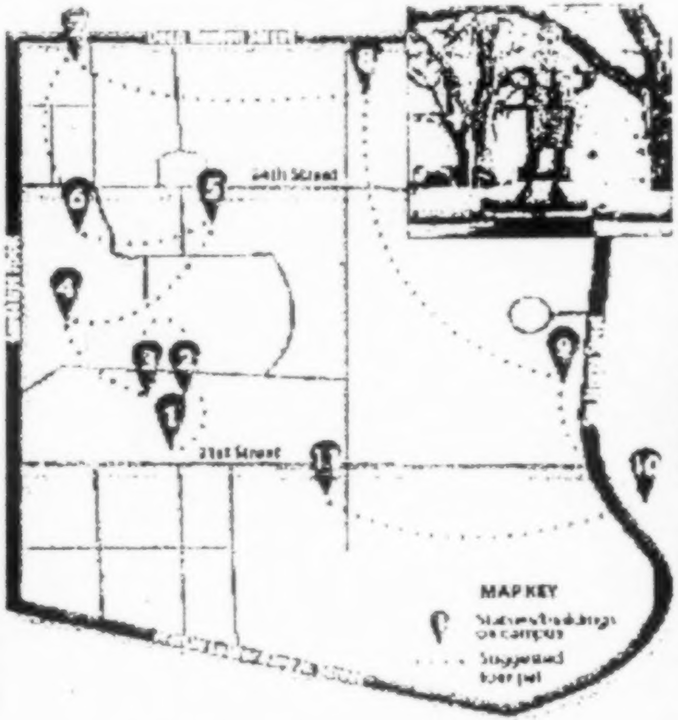
Also in the South Mall, a statue depicts Johnston, who served as a general of the Confederacy. Johnston was the highest ranking officer killed in either army during the war. Johnston also fought in the Texas War of Independence.

4. Cesar Chavez Statue

Unveiled in the West Mall on Oct. 9, 2007, it celebrates Cesar Chavez, the most influential leader in the struggle for Hispanic workers' rights and labor civil rights who founded the National Farm Workers Association.

5. Painter Hall

The hall is named after Theophilus Painter, who served as UT president from 1944-1952 and is known for his role in the Supreme Court case Painter v. Sweatt in which he and the University refused admission of Heman Marion Sweatt to the law school because he was black, claiming he had access to "separate but equal" facilities elsewhere. Sweatt eventually won the case and was allowed admission, despite UT's opposition.



7. Duren Residence Hall

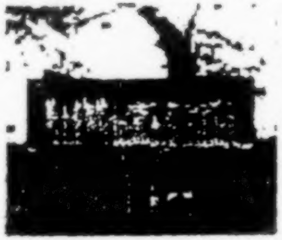
The hall is named after Almetris Duren who served as an adviser, mentor and housemother to black students at UT during its early years of integration. Duren also served as the student development specialist for minority affairs and started the Innervisions of Blackness Choir and founded Project Info, the first minority recruitment program at UT.

11. Perry–Castañeda Library

Opened in 1977, the PCL is named for two former UT professors, Carlos Castañeda and Ervin Perry. Castañeda played a central role in the development of the Benson Latin American Collection and Perry was the first African-American to be appointed to the academic rank of professor.

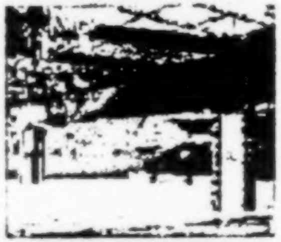
6. Barbara Jordan Statue

Unveiled on April 24, 2009, the statue celebrates the life of civil rights leader and prominent African-American politician Barbara Jordan. In 1966, she was the first African-American elected to the Senate after reconstruction and later became the first southern black woman to be elected to the House of Representatives. In 1976, she became the first African-American woman to deliver the keynote address at the Democratic National Convention.



8. Robert Lee Moore Hall (RLM)

Constructed in 1974, RLM was named after Moore, a mathematics professor at UT from 1920-1969 who insisted he would not teach black students. Moore is infamous for having walked out of a lecture once he realized the speaker was black.



9. Texas Cowboys' Pavilion

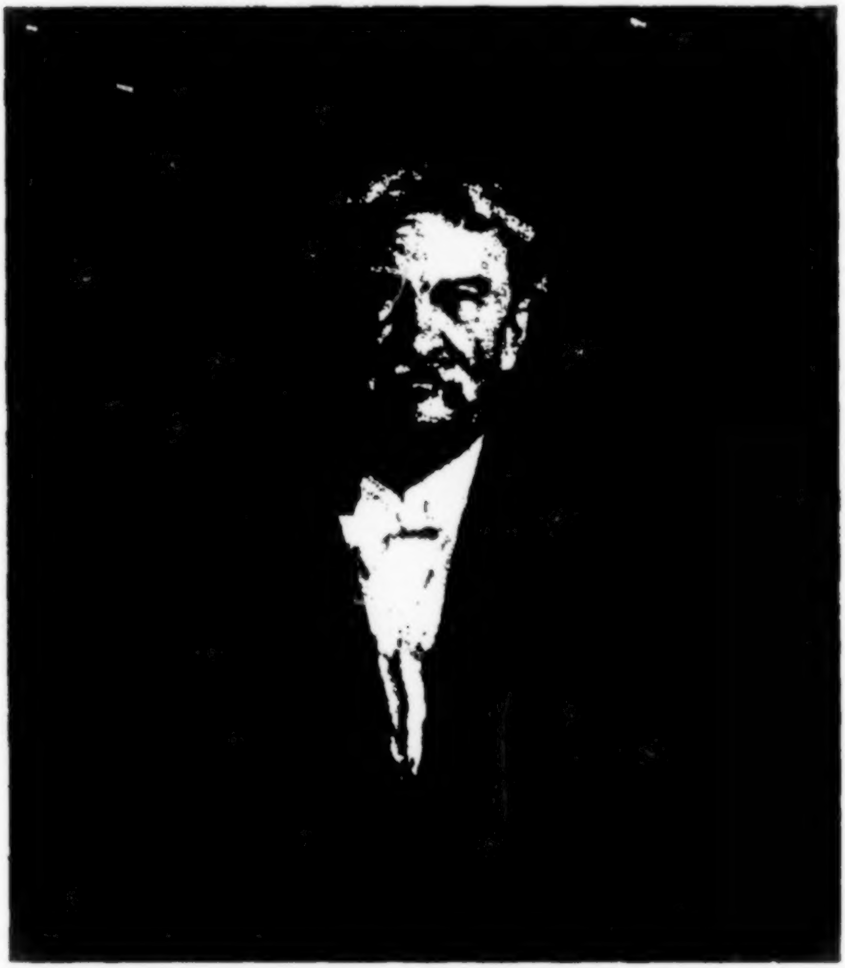
During segregation, the Texas Cowboys were known for hosting the event "Round Up," which featured racially degenerative minstrel shows of white men with black makeup on their faces singing "The Eyes of Texas."

10. Darrell K Royal Texas-Memorial Stadium

The stadium was renamed in 1996 to honor Royal, who coached the last all-white national championship football team in 1970. UT was one of the last football teams to recruit black players.

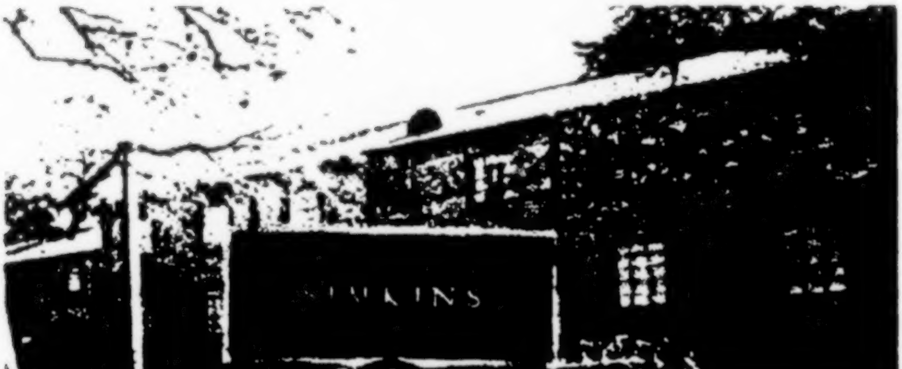
APPENDIX B

PORTRAIT OF WILLIAM STEWART SIMKINS



APPENDIX C

SIMKINS HALL
UNIVERSITY OF TEXAS



APPENDIX D

BRASS BUST OF PROFESSOR SIMKINS

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF OF THE AMERICAN ASSOCIATION FOR AFFIRMATIVE ACTION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE AMERICAN ASSOCIATION FOR AFFIRMATIVE ACTION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Affirmative Action ("AAAA") respectfully submits this brief *amicus curiae* in support of the Respondent University of Texas at Austin ("UT-Austin").[1]

---

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court.

AAAA is a national nonprofit association of professionals managing affirmative action, equal opportunity, diversity, and other human resource programs. AAAA is dedicated to the promotion of affirmative action as an instrument to fulfill the nation's promise of equal opportunity. Its mission is to nurture understanding of and offer advice on affirmative action to enhance access, equity, and diversity in employment, economic, and educational opportunities.

Founded in 1974, the AAAA was created primarily by equal opportunity professionals working for colleges and universities. In 2012, AAAA has approximately 1,000 organizational and individual members throughout the United States including members employed in higher education, the private sector, federal, state, and local government, business, social services, the legal profession, and human resources. Approximately one-half of the current membership works for institutions of higher education.

AAAA members are individuals charged with responsibility for compliance with the laws enacted to promote equal opportunity. AAAA is, therefore, uniquely suited to opine on the importance of diversity programs. Further, given its mission and the composition of its membership, AAAA has an exceptional understanding of both (1) the need for diversity on campus in order to ensure that students receive the best possible education and graduate with the skills and experiences necessary to succeed as citizens, workers, and leaders and (2) the importance of diversity on campus to employers who, in order to remain competitive, must hire qualified workers reflecting the increasingly diverse communities and markets in which their businesses now operate.

SUMMARY OF ARGUMENT

The attack on UT-Austin's admissions process relies upon a number of false premises: that race and ethnicity no longer matter in America; that we can never consider differences in race or ethnicity in a positive way; that we must completely ignore race and ethnicity in order to enforce the Constitution's mandate of equal protection; and that we can perfectly measure academic credentials with race- or ethnic-blind criteria. As an alternative to these false premises, AAAA offers the following arguments in support of UT-Austin's program. First, because race and ethnicity are often important components of identity, barring UT-Austin from ever considering race and ethnicity burdens those applicants who must then be assessed on incomplete information and deprives UT-Austin of the ability to achieve meaningful diversity in the educational setting. Second, Texas has a compelling interest (perhaps even more so than the interest upheld in *Grutter*, due to changing demographics) in obtaining the educational and workplace benefits that flow from a diverse student body. Finally, the purported race- and ethnicity-blind alternatives proposed by opponents to UT-Austin's program are themselves biased. Considering such factors without taking any account of race or ethnicity would fail to advance UT-Austin's compelling interest in achieving a diverse student body.

ARGUMENT

I. CONSIDERATION OF RACE AS A FACTOR IN ADMISSIONS MUST NOT BE SUBJECTED TO A STANDARD OF REVIEW THAT IS STRICT IN THEORY BUT FATAL IN FACT.

A. The Constitution Permits and Protects the University of Texas at Austin's Holistic Consideration of Each Applicant's Complete Identity as Part of an Admissions Process Intended to Achieve Diversity in the Educational Setting.

1. The Importance of "Identity."

What determines who a person "really is" and how each person perceives herself and is perceived by others (what could collectively be called a person's "identity") is a complicated matter. A person's time and place of birth, experiences, and innate abilities are all important elements of identity. So are the communities into which one is born and with which one associates. No student of American history could deny the importance or relevance to personal identity of being, for example, Irish or Italian, Jewish or Catholic, or African-American or Hispanic, depending on the era.

When college admissions officers review applications, they are, first and foremost, trying to figure out the identity of the applicant: who is this person, what will she add to the campus community, how will she benefit from what we offer, and what return will she make to our institution and to society?

Weighing the potential and relative worth of 17- and 18-year olds is neither an art nor a science. While one certainly can look at test scores and class rank as indicators of how a high school student may perform in college in terms of future grades and future test scores, such data do not necessarily shed light on how that individual student and the student's family and community will benefit from her time on campus, nor how the student's identity will benefit her classmates and new community.

As an example of the difficulty in quantifying the benefits of higher education, consider the experience of Steven Jobs who has spoken of the important role Reed College played in his life and how classes there influenced his later work at Apple. *See* Steven Jobs, Stanford University Commencement Address (Jun. 12, 2005), *available at* http://news.stanford.edu/news/2005/june15/jobs-061505.html. In hindsight, no one would question the wisdom of Reed's decision to admit Mr. Jobs. Yet, based on the arguments asserted by the Pacific Legal Foundation *et al.* in its *amicus curiae* brief in support of the Petitioner, the admission of Mr. Jobs must have been a mistake because he dropped out after six months. Brief of the Pacific Legal Foundation *et al.*, as *Amici Curiae* Supporting Petitioner, *Fisher v. Univ. of Tex. at Austin* at 20-24, (May 29, 2012) (No. 11-345).

For all of these reasons, it makes little sense to think of the admissions process as an effort to identify the "best" candidates in any hierarchical or quantitative sense. To the contrary, institutions of higher education are trying to assemble a mix of people with a wide variety of characteristics in the hope that when they have the opportunity to learn from each other interesting and important things will happen. When this process is repeated year after year, across thousands of institutions throughout the country, it ends up working well. *See* Warren W. Willingham *et al.*, SUCCESS IN COLLEGE: THE ROLE OF PERSONAL QUALITIES & ACADEMIC ABILITY, College Board Publications (1985); *see also, e.g.*, William Sedlacek, BEYOND THE BIG TEST: NONCOGNITIVE ASSESSMENT IN HIGHER EDUCATION, Jossey-Bass (2004).

The consideration of race in the college admissions process must be understood in this context. What a person is capable of over a lifetime can hardly be judged at the age of 17 or 18. In the necessarily inexact process of assembling a college class, one can rarely say that one applicant is "better" than another. The applicants are simply different. Accordingly, selective colleges holistically assess candidates for admission. In light of this meritocratic fallacy, the consideration of race as one of multiple factors that may be relevant to a candidate's "identity" is not pernicious. The purported concerns of those who oppose any consideration of race in connection with college admissions are driven in large measure by a misperception that applicants are and should be admitted on the basis of a cardinal ranking in terms of worth.[2] If candidates were so ranked, then changing the ranking based on race would be subject to the strongest criticism. However, since such a ranking is neither possible nor desirable, nor is there any evidence that this happened to Petitioner in this case, the argument is simply a straw man.

---

[2] Such a hypothetical ranking would necessarily overlook the fact that universities consider a litany of other factors in determining an applicant's worth to the school including socioeconomic status, athleticism, geographic diversity, extracurricular activities, and legacy status to name a few.

2. The Relevance of Race.

In the United States in 2012, race and ethnicity still influence how people see themselves and are seen. William A. Cunningham *et al.*, *Rapid Social Perception is Flexible: Approach and Avoidance Motivational States Shape P100 Responses to Other-Race Faces*, 6 FRONTIERS IN HUMAN NEUROSCIENCE 140 (May 2012). To a great extent, Americans continue to live in segregated communities. Huge segments of our children grow up in communities and are educated in schools where one racial or ethnic group dominates. Jonathan Kozol, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA, 10-12 (2006).

For many of these young people, going to college will offer the first opportunity to live and work in a diverse setting. One cannot underestimate the impact of this experience on the student's own sense of identity and on her understanding of the way other people from different backgrounds view themselves and the world. Steve Graham & Irv Cockriel, *A Factor Structure for Social and Personal Development Outcomes in College*, 34 J. STUDENT AFF. RES. & PRAC. 199-216 (Spring 1997). Nor can one underestimate our national interest in making such opportunities possible as we continue to make our way as an increasingly diverse country in an increasingly interconnected and competitive world. *See* Scott L. Thomas, *Globalization, College Participation & Socioeconomic Mobility in* GLOBALIZATION AND HIGHER EDUCATION, 104-30 (Jaishree Kak Odin & Peter T. Manicas eds., 2004). Given the facts, it would be odd, indeed, for admissions officers not to give some consideration to race.

Some consideration of race and ethnicity is also relevant because cultural or other differences between some groups may result in certain traditional admissions criteria favoring some groups over others even though such criteria do not meaningfully predict which students will most benefit from admission. *See* John L. Hoffman & Katie E. Lowitzki, *Predicting College Success with High School Grades and Test Scores: Limitations for Minority Students*, 28 REV. HIGHER EDUC. 455-74 (2005). In other words, college admissions officers must make sure that biases in the process do not result in a failure to properly assess students from minority communities whose ability to benefit an institution or to benefit from an institution may manifest itself in ways that are different from how such abilities are manifested by individuals in communities with which the admissions officer is more familiar or comfortable. Sylvia Hurtado & Christine Navia, *Reconciling College Access & the Affirmative Action Debate in* AFFIRMATIVE ACTION'S TESTAMENT OF HOPE: STRATEGIES FOR A NEW ERA IN HIGHER EDUCATION 113 (Mildred Garcia ed., 1997).

AAAA completely agrees that no one should ever be granted or denied admission to a college or university *because of* her race. But taking all of the above considerations into account, it is untenable to argue that admissions officers should be permitted to consider an applicant's every characteristic and experience *except* race and ethnicity.

Recognizing these realities, this Court has repeatedly held that it is permissible for educational institutions to consider the racial makeup of their classes and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring); *Grutter*, 539 U.S. at 328. At the same time, recognizing the risks involved in considering race as part of any process of decision, this Court has held that such policies must be subjected to strict scrutiny. *Johnson v. California*, 543 U.S. 499, 505 (2005); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

Logic and precedent would seem to leave this Court, in deciding the question here presented, with three choices. One choice would be to hold that the Constitution is, indeed, color blind; that it requires – as Justice Kennedy reads the plurality opinion in *Parents Involved* to argue – that schools must ignore the problem of *de facto* segregation and accept "the status quo of racial isolation in schools." 551 U.S. at 788. This view, Justice Kennedy wrote, is "profoundly mistaken." *Id.* This view also relies upon an interpretation of the Constitution and the Amendment at issue which is unsupported by the history of the applicable texts or their interpretation by this Court. *See* Andrew Kull, THE COLOR-BLIND CONSTITUTION 124, 130 (Harvard University Press 1992). The second choice would be for this Court to substitute its policy preferences for the judgment exercised by the State of Texas in establishing admissions policies for UT-Austin consistent with this Court's holding nine years ago. As discussed below, this is an unwise option. The third, and proper choice, would be to review UT-Austin's program in accordance with the precedent established by *Grutter* and affirm the decisions of the courts below.

B. Strict Scrutiny Must Mean Something Different From Substituting the Justices' Policy Preferences for Those of the State.

Racial classifications are rightfully suspect and should be subject to strict scrutiny. However, given the deeply serious problems that racial classifications are intended to address, it is equally essential that the Court's review not be strict in theory but fatal in fact.

Thus, while this Court has an obligation to strictly scrutinize UT-Austin's admissions policies, such scrutiny must mean something different from simply substituting the policy preferences of a plurality of the Justices for the policy preferences of UT-Austin's administration. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___, ___ (slip op. at 6) (2012). ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments.").

Where there is clear record evidence supporting the State's determination that the consideration of race serves a compelling interest and evidence that the State's use of race is narrowly tailored for the purpose of accomplishing that interest, this Court must defer to the State's determination. Under such circumstances, it is not for this Court to decide whether the State's policy is sound. *Cf., id.* at __ (slip op. at 2).

C. The Fifth Circuit Properly Deferred to the University of Texas at Austin's Careful Crafting of Admissions Policies.

This Court has traditionally given a degree of deference to a university's academic decisions within constitutionally prescribed limits. *Grutter*, 539 U.S. at 328. Such decisions are based on "complex educational judgments in an area that lies primarily within the expertise of the university." *Id.* Educational autonomy is grounded in the First Amendment, and it includes the freedom of a university to make its own judgments as to the selection of its student body. *Id.*, (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)). The majority in *Grutter* thus held specifically, "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.*

The Fifth Circuit, carefully applying *Grutter*, found precisely the right balance between strict scrutiny and deference to the factual determinations of UT-Austin as to what admissions policies would best support its reasonable and appropriate objectives of providing all of its students with an excellent education, serving the state's population, and training the next generation of leaders. Judge Higginbotham's decision below is clear and convincing and requires no elaboration here. However, AAAA does wish to address two points raised by Judge Garza in his separate concurring opinion.

First, Judge Garza asks "whether the University's use of race, which is a 'highly suspect tool,' as part of the Personal Achievement Index ("PAI") score contributes a statistically significant enough number of minority students to affect critical mass at the University of Texas" and concludes that it does not. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 261 (5th Cir. 2011) (Garza, J., concurring). This may be a fair question, but Judge Garza underestimates the impact of UT-Austin's program by focusing only on 2008 admissions data.

In *Hopwood v. Texas*, 78 F.3d 932 (1996), the Fifth Circuit struck down the admissions process then in use by UT-Austin. The Texas legislature responded by passing an act requiring UT-Austin to guarantee admission to all Texas high school students in the top 10 percent of their class. *Fisher*, 631 F.3d at 224. While the 10 percent rule resulted in increased minority enrollment, it also had a negative impact on UT-Austin's educational program and proved less effective in achieving true diversity than a system in which the PAI score is used to select a greater percentage of each class. *Id.* at 240-45; Supplemental Joint Appendix ("SJA") 30a-31a; *see also Grutter*, 539 U.S. at 340.

Responding to UT-Austin's concerns, the Texas legislature agreed to relax the obligation to admit Top 10% students commencing in 2011. TEX. EDUC. CODE § 51.803(a-1). However, the new legislation will not apply should this Court substitute its judgment for the Texas legislature by barring UT-Austin from continuing to fine tune its admissions processes. *Id.* § 51.803(k)(1). If the legislation is permitted to take effect and UT-Austin is allowed to continue to consider race in admissions, the PAI score can be expected to contribute more significantly to UT-Austin's efforts to affect critical mass.

Second, Judge Garza begins the concluding section of his concurring opinion with a moving plea to end race as a divisive facet of American life. *Fisher*, 631 F.3d at 264 (Garza, J., concurring). We are in whole hearted agreement with Judge Garza with one exception. While conceptions of race and ethnicity have become more complicated, they have not become unimportant.[3] The truth is that the color of one's skin continues to matter. It matters when people seek housing and healthcare, it matters in the quality of available early childhood education, it matters when the police engage in racial profiling, it matters when people enter the criminal justice system, it is evident in popular culture, it is evident in differences in outlooks and perceived avenues of opportunity, and it manifests itself in every possible statistical measure of wellbeing. *See, e.g.*, Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. Times, July 12, 2012, at B3; Amy Farrell *et al.*, *Massachusetts Racial and Gender Profiling Study*, Northeastern University Institute on Race & Justice (2004); *Reducing Racial Disparity in the Criminal Justice System*, Sentencing Project (2008); Sarah Staveteig & Alyssa Wigton, *Racial and Ethnic Disparities: Key Findings from the National Survey of America's Families*, Urban Institute No. B-5 (2000) (examining data collected by the National Survey of American Families to determine statistical measure of well-being), *available at* http://www.urban.org/publications/309308.html.

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[3] In her opinion dissenting from the Fifth Circuit's decision to deny rehearing en banc, Chief Judge Edith Jones, argues that the social and cultural differences between people belonging to the same racial or ethnic group are so great as to make meaningless any consideration of race in the admissions process. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 304 (5th Cir. 2011) (Jones, C.J., dissenting). That there are significant differences within larger racial or ethnic groupings is true. Such differences, in fact, drive the need for a critical mass of all types of students to reflect that diversity of experience. Any concerns in this regard are fully resolved through UT-Austin's consideration of race only as part of a holistic process of assessment.

The fact that race *should* not matter does not mean that it no longer *does* matter. Given this reality, judicial intervention to withhold from the states the tools necessary to resolve serious and continuing issues relating to race in America would forestall any resolution of the inequalities in our society. Such a decision would ensure that race will, in fact, remain a divisive facet of American life far into the future.

As noted in *Grutter*, the need to engage in race-based decision making should and will end one day. But that day will come only after we have addressed existing inequalities. There is no better place to address these inequalities than on the campuses of our colleges and universities. This Court should not become the ultimate barrier to progress.

II. TEXAS HAS A COMPELLING INTEREST IN SECURING THE EDUCATIONAL AND WORKPLACE BENEFITS THAT FLOW FROM DIVERSITY IN HIGHER EDUCATION.

In *Grutter*, this Court held that Michigan had a compelling interest in obtaining the educational benefits that flow from a more diverse student body. 539 U.S. at 329-33. Texas has no less a compelling interest in obtaining these benefits than Michigan did in 2003. In fact, in light of demographic trends in Texas, the state may well have an even greater interest than Michigan.

Unlike Michigan in 2003, Texas has been a "majority-minority" state (i.e., a state where the population of minorities is greater than the population of non-minorities) since 2004. Window on State Government, *Texas in Focus: A Statewide View of Opportunities*, www.window.state.tx.us/specialrpt/tif/

population.html. Because the percent of minorities in Texas today significantly exceeds the percent of minorities in Michigan in 2003, Texas has an even greater need for the cross-racial understanding and the breaking down of racial stereotypes recognized as compelling interests in *Grutter*. Diversity in higher education represents a critical means for Texas to achieve this compelling interest.

In addition to its compelling interest in obtaining the educational benefits that flow from a more diverse student body, Texas also has a compelling interest in the economic benefits that flow from diversity on campus. When businesses in the state succeed, Texas and its citizens enjoy higher tax revenue, greater employment opportunities, and other benefits. This Court has already recognized that the benefits to business of diversity are "not theoretical but real." *Grutter*, 539 U.S. at 330. Diversity on campus is a necessary predicate to diversity in the workplace.

Recognizing the importance of diversity to success, employers prefer to recruit at colleges with diverse student bodies. Brief for 65 Leading American Businesses' as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, Nos. 02-241 & 02-516, at 9. Thus, achieving diversity on campus satisfies the twin goals of better employment opportunities for all students[4] and directly meets businesses' demand for well-qualified, diverse workers.

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[4] AAAA notes that increased on-campus recruiting by employers makes UT-Austin more attractive to the most qualified and talented applicants, which further increases the overall quality and desirability of the admissions class.

The importance of diversity to success in business is supported by multiple studies showing that a diverse workforce provides significant business benefits. Specifically, increasing racial diversity in the workplace increases sales revenue, increases the number of customers, increases market share, and, ultimately, increases profits. Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208 (2009). Increased racial diversity leads to increased employee productivity and performance, decreased lawsuits, increased market opportunities, increased recruitment, increased creativity, and a healthier business image. Katharine Esty *et al.*, WORKPLACE DIVERSITY. A MANAGER'S GUIDE TO SOLVING PROBLEMS AND TURNING DIVERSITY INTO A COMPETITIVE ADVANTAGE 9-10 (1995); *see also Grutter*, 539 U.S. at 330 ("[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."); Karen A. Jehn *et al.*, *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 ADMIN. SCI. Q. 741 (1999) (an increase in racial diversity in the workplace increases employee morale); Thomas Kochan *et al.*, *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUM. RESOURCE MGMT. 18 (2003) ("Organizations that invest their resources in taking advantage of the opportunities that diversity offers should outperform those that fail to make such investments.").

The changing demographics in Texas make these workplace benefits even more significant.[5] As the minority population in Texas continues to grow, consumers will expect the workforce of Texas businesses to reflect this change. Likewise, companies will want their workforces to reflect the surrounding population in order to connect with their potential customers and increase sales.[6] In so doing, Texas businesses will look to local institutions like UT-Austin for diverse candidates to fill their workforce. Additionally, the managers of these businesses will need to have skills and experience that can be acquired only through exposure to diverse cultures and ideas in order to relate to increasingly diverse employees. Businesses will again turn to the local public institutions of higher education like UT-Austin to afford the youth of Texas this exposure.

Third, states have a compelling interest in seeing their businesses succeed, providing higher levels of employment for their residents, and generating greater tax revenue to spend on programs for their citizenry. *See* TEX. TAX CODE ANN. §§ 171.001(a) (2012) ("A franchise tax is imposed on each taxable entity that does business in this state or that is chartered or organized in this state."); 151.051(a) ("A tax is imposed on each sale of a taxable item in this state."). The importance of a diverse workforce has been confirmed by some of the biggest names in American business including American Airlines, Inc. and Shell Oil Co. – both based in Texas:

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[5] From 2000 to 2010, the percent of Texas' Hispanic population grew 42 percent and the African-American population grew 22 percent whereas the White population grew just 4.2 percent; by 2020, "Blacks and Hispanics will comprise over half of Texas's workforce." Marta Tienda, *Harnessing Diversity in Higher Education: Lessons from Texas*, FORD POLICY FORUM at 53 (2006), http://net.educause.edu/ir/library/pdf/ff0612S.pdf.

[6] Of course, it is not suggested that changing demographics could ever justify the goal of proportional representation.

> Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from themselves.

Brief for *Amici Curiae* 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, Nos. 02-241 and 02-516, at 5. If for no other reason than ensuring the success of businesses based in Texas, the state has a compelling interest in providing highly educated individuals of a diverse background for those companies to employ.

III. THE UNIVERSITY OF TEXAS AT AUSTIN'S PLAN IS NARROWLY TAILORED AND NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST.

A. Race-Blind Admissions Processes Are Not Race-Neutral.

Petitioner alleges that UT-Austin abridged her right to equal protection by rejecting her application despite "academic credentials that exceeded those of many admitted minority candidates." Brief for Petitioner at 2. Even if this were factually correct,[7]

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[7] The truth of this allegation seems to have been presumed for purposes of Respondent's summary judgment motion, but it is false. Petitioner's achievement index ("AI") of 3.1 was too low to

Petitioner's argument rests on the false premise that "academic credentials" would be perfectly measured by race-blind admissions criteria. Her argument disregards the deep and well-known racial biases in numerical assessments such as test scores.

1. Admissions Criteria Such as Test Scores Have a Significant Adverse Impact on African-American and Hispanic Students.

UT-Austin's primary measure of academic potential is an AI calculated from the applicant's class rank percentile and two test score components from either the SAT or the ACT. African-American and Hispanic students score significantly lower than their White counterparts on every portion of the AI formula. Among more than 3,500 high school students surveyed by the Texas Higher Education Opportunity Project ("THEOP"), the mean self-reported class rank percentile was approximately 75 for Whites, 66 for African-Americans, and 69 for Hispanics. Blanca Plazas Snyder, *The Role of Pre-College Factors and the Texas Top 10% Law on College Attendance*, (unpublished Ph. D. dissertation, University of Houston) at 153 (Table 24) (2008).[8] Discrepancies in SAT and ACT scores are even wider.

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gain admission regardless of her PAI, which is the only admission criterion for which race was considered. Joint Appendix ("JA") at 415a-416a; *see also* Appendix the Petition for Certiorari ("App") at 30a ("Without a sufficiently high AI and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.").

[8] Mean percentiles were calculated by assuming that the group of respondents in each decile ranked, on average, at the midpoint within each decile – i.e., the 95th percentile for the top decile, the 85th percentile for the second decile, and so on.

For 2008, the year in which Petitioner sought admission, mean SAT scores for White test-takers were 528 in Critical Reading and 537 in Mathematics. African-Americans, by contrast, averaged only 430 in Critical Reading and 426 in Mathematics, while the mean Critical Reading and Mathematics scores for Hispanics were 455 and 461 respectively. The College Board, *2008 College-Bound Seniors: Total Group Profile Report* 7 (Table 8), http://professionals.collegeboard.com/data-reports-research/sat/cb-seniors-2008. Racial disparities in test scores have been widening with the 2008 class producing the largest deficit between White and African-American test takers in two decades. *The Racial Scoring Gap on the SAT College Admission Test Is Now Wider Than It Has Been in 20 Years*, 61 J. BLACKS IN HIGHER ED. 74 (2008).

Having already gained proportionately fewer admissions under the Top 10% rule, which relies solely upon class rank,[9] minority candidates suffer even greater deficits in non-Top 10% admissions due to the preeminence of test scores in UT-Austin's AI criteria. Aspiring African-American liberal arts, communications, fine arts, social work, and education students rank an average of 0.4 points lower on the four-point AI scale. Hispanic applicants to those same programs face an average shortfall of 0.3 points. *See* Appendix to Brief of *Amicus Curiae* AAAA, *infra* at Table 1. Greater racial divides infect other programs, with discrepancies ranging as high as 0.7 points for

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[9] In the THEOP sample, 26.0% of White respondents reported that they were ranked in the top 10% of their Texas high school class compared to only 12.3% of African-Americans and 19.9% of Hispanics. Snyder, *supra* at 153 (Table 24).

African-Americans and 0.4 points for Hispanics seeking admission to the School of Business. *See id.*

Under a system in which swings of as few as 0.8 AI points can spell the difference between automatic admission and nearly certain rejection,[10] race-based scoring deficits of 0.3 to 0.7 AI points can have devastating consequences. The extent of the adverse impact is obvious from UT-Austin's global 2008 admissions statistics. UT-Austin received a total of 29,501 applications for the Class of 2008, of which 14,038 came from White candidates, 4,344 from Asian-Americans, 2,245 from African-Americans, and 6,081 from Hispanics. SJA at 156a. Setting aside applicants who qualified under the Top 10% program, the group of non-Top 10% candidates included 9,598 Whites, 2,600 Asian-Americans, 1,652 African-Americans, and 3,863 Hispanics. *Id.* at 158a (figures calculated by subtracting Top 10% admissions in Table 2 from total applications in Table 1). Admission rates from this non-Top 10% group were 22.3% for Whites (2,142 of 9,598) and 21.7% for Asian-Americans (565 of 2,600) but only 8.8% for African-Americans (146 of 1,652) and 10.4% for Hispanics (403 of 3,863). *Id.* (non-Top 10% admissions calculated by subtracting Top 10% admissions from total admissions in Table 2).

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[10] Non-top 10% applicants for many UT-Austin programs who achieve specified minimum AI scores are placed in an "A" group and offered admission based solely on their AI. "A" group scoring standards range from a high of 3.9 in Liberal Arts to a low of 3.4 in UT-Austin's Special Education and Bilingual Education programs. On the other end of the spectrum, applicants with AI scores below 2.6 are relegated to a "C" group rendering their admission "highly unlikely." JA at 410a. The full span between guaranteed "A" group admission and the almost hopeless "C" group classification thus is only 0.8 to 1.3 points depending upon the program in question.

In short, even with the benefit of UT-Austin's modest consideration of race for non-Top 10% applicants, acceptance rates for White and Asian-American applicants more than doubled the rates for African-American and Hispanic candidates. The likelihood that such a huge gap could occur by random chance is less than 1 in 24 novemvigintillion (2.4×10^{91}) representing a disparity exceeding 20 standard deviations.[11]

2. Lower Standardized Test Scores Do Not Mean that Minorities Are Academically Inferior.

Such enormous admission rate disparities could only be justified by extremely compelling evidence that African-American and Hispanic students lag behind in collective academic prowess by similarly gaping margins. As a starting point, any contention that members of a certain race are inherently less capable of success in their chosen field should be approached with extreme skepticism. *See Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) ("[I]ncreased opportunities have produced an ever-increasing number of demonstrations that members of disadvantaged races are entirely capable not merely of competing on an equal basis, but also of excelling in the most demanding professions."). The deeply-flawed tests used to evaluate college admission candidates do not come close to rebutting the presumption of equal capability. To the contrary, surveys of SAT and ACT data produce such weak correlations between scores and college performance that the findings would fall short of minimum validation standards established for selection tests under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

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[11] The reported probability was calculated by applying a two-tailed Fisher's Exact Test to a distribution of 549 successful and 4,966 unsuccessful African-American and Hispanic applicants and 2,707 successful and 9,491 unsuccessful White and Asian-American applicants. The standard deviation value was calculated by evaluating this probability under a standard normal distribution.

The most current validation study for the SAT, which applies to a majority of UT-Austin applicants,[12] was released in 2008. Jennifer L. Kobrin *et al.*, *Validity of the SAT® for Predicting First-Year College Grade Point Average*, College Board Research Report 2008-5 (2008). That study assesses validity through a "correlation coefficient" that quantifies the relationship between test scores and first year grade point averages. *Id.* at 5. Correlation coefficients are reported on a scale from −1.0 to 1.0 with the former indicating a perfectly negative relationship and the latter indicating a perfectly positive relationship between test scores and college success. *Williams v. Ford Motor Co.*, 187 F.3d 533, 540 (6th Cir. 1998). Courts generally require correlation coefficients of at least 0.3 to establish test validity. *See, e.g.*, *Brunet v. City of Columbus*, 1 F.3d 390, 410 (6th Cir. 1993), *cert. denied sub nom.*; *Brunet v. Tucker*, 510 U.S. 1164 (1994); *Clady v. Los Angeles County*, 770 F.2d

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[12] *See* Gary M. Lavernge & Bruce Walker, *Developing a Concordance Between the ACT Assessment and the SAT I: Reasoning Test for The University of Texas at Austin*, University of Texas Office of Admissions Research, at 4 (July 30, 2001) ("Historically, . . . UT-Austin receives far more SAT than ACT score reports.").

1421, 1431-32 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986).[13] When a test has adverse impact against specific groups, this threshold increases. *Clady*, 770 F.2d at 1432 ("As a general principle, the greater the test's adverse impact, the higher the correlation which will be required.") (citing *Guardians Ass'n of the New York City Police Dep't v. Civil Service Comm'n*, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981)).

The unadjusted correlation coefficients for the SAT critical reading and mathematics tests are 0.29 and 0.26, respectively. Kobrin *et al.*, *supra*, at 5. These correlations do not even reach the minimum validity threshold of 0.3 before any further compensation for the SAT's substantial adverse impact on minority groups such as African-Americans and Hispanics.

The minuscule proportion of SAT score variability that is linked to true academic ability leaves ample room for strong non-academic influences. Not surprisingly, therefore, research reveals many factors unrelated to academic potential that disproportionately depress the average scores of specific minority groups. A seminal article by research psychologist Roy O. Freedle concludes that cultural and statistical biases contribute significantly to poorer outcomes for African-Americans, evidenced by the fact that scoring differences are narrower for harder questions and wider for easier items that are more likely to be tainted by cultural differences in reactions to verbal cues. Roy O. Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 HARV. ED. REV. 1 (2003). Psychological factors such as "stereotype threat" also lead non-Asian minorities to underperform as compared to Whites and Asians with similar cognitive and academic abilities. *See, e.g.*, Charles A. Scherbaum *et al.*, *Examining the Effects of Stereotype Threat on Test-Taking Behaviors*, 14 SOC. PSYCHOL. ED. 361 (2011). Differences in test preparation appear to contribute further to racial disparities. *See* Aleksander Ellis & Ann Marie Ryan, *Race and Cognitive-Ability Test Performance: The Mediating Effects of Test Preparation, Test-Taking Strategy Use and Self-Efficacy*, 33 J. APPLIED SOC. PSYCHOL. 2607 (2003).

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[13] Although a correlation coefficient less than 0.3 can be statistically significant, it is not usually considered "practically significant" because so little of the variation in success is correlated with test scores in comparison to the much larger proportion of the distribution that is randomly scattered. *See Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 161 (D. Mass. 2006).

The faulty presumption that UT-Austin is admitting less qualified African-Americans and Hispanics to the detriment of more qualified Whites, which rests so heavily on unreliable test scores, infects virtually every aspect of the arguments put forward by Petitioner and supporting *amici*. Petitioner argues, for example, that UT-Austin's policy "places an unwarranted badge of inferiority on the thousands of Hispanic and African-American applicants who are admitted to UT-Austin each year based on merit and achievement," Petitioner's Brief at 42, as if student peers would be "warranted" in placing a "badge of inferiority" on minority students with marginally lower test scores who gain admission after UT-Austin's very limited consideration of race.[14] Similarly, the Pacific Legal Foundation *et al.* assert that race-conscious policies harm minority students by creating an "academic mismatch" with the institutions to which they gain admission, Brief *Amicus Curiae* of the Pacific Legal Foundation *et al.* at 20-21, but the alleged "mismatch" is measured by the faulty metric of "test scores." *Id.* at 21 (quoting Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. TOL. L. REV. 377, 384 (1970); *see also* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 415 (2004) (cited in Brief *Amicus Curiae* of the Pacific Legal Foundation *et al.* at 20) (defining "mismatches" using an "admissions index" giving 60% weight to LSAT scores and 40% weight to undergraduate grade point average).

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[14] If students are truly treating African-American and Hispanic colleagues as "inferior" without knowledge of their individual circumstances, they are engaging in blatant race discrimination. The proper remedy for this is education to alter

B. Socioeconomic Status Is Not a Proxy for Race in Higher Education Admissions.

AAAA posits that there are no alternatives that are truly and effectively "race-neutral." However, in any "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks," *Grutter*, 539 U.S. at 339, socioeconomic status cannot serve as a proxy for race.

Race continues to matter in America. *Id.* at 333. Segregation patterns in housing,[15] persistent racial

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these attitudes, not admissions policies that exclude qualified minority students from environments that have the potential to turn hostile.

[15] John Iceland *et al.*, United States Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980-2000*, at 3-4 (Oct. 31, 2002), *available at* http://www.census.gov/hhes/www/housing/housing_patterns/pdftoc.html

disparities in unemployment rates,[16] the vast wealth gap between racial minorities and non-minorities,[17] inequalities in elementary and secondary education,[18] disparities in sentencing and arrests,[19] hate crimes,[20] and the thousands of race discrimination charges filed every year,[21] serve as ample indicators of the continuing problem of the "color line" in the 21st

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[16] Bureau of Labor Statistics, *The Employment Situation – June 2012*, at Table A-2 (Jul. 6, 2012), http://www.bls.gov/news.release/empsit.nr0.htm/; *see also*, Emily Jane Fox, *African-American Jobless Rate Surges*, CNN Money (Jul. 6, 2012), http://money.cnn.com/2012/07/06/news/economy/black-unemployment-rate/index.htm

[17] *See* Hope Yen, *Wealth Gap Widens Between Whites, Minorities*, Associated Press (Jul. 26, 2011), http://news.yahoo.com/wealth-gap-widens-between-whites-minorities-040224418.html

[18] *See, e.g.*, Children's Defense Fund, "Elementary and Secondary Education," http://www.childrensdefense.org/policy-priorities/elementary-high-school-education/ (last visited Aug. 6, 2012); Jonathan Jacobson *et al.*, *Educational Achievement and Black-White Inequality*, U.S. Department of Education, National Center for Education Statistics (July 2001), http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2001061

[19] *See, e.g.*, *Reducing Racial Disparity in the Criminal Justice System*, Sentencing Project. *See, e.g.*, *10 Years Later, Dragging Death Changes Town*, Associated Press (Jun. 6, 2008), http://www.msnbc.msn.com/id/25008925/ns/us_news-life/t/years-later-dragging-death-changes-town/

[20] *See, e.g.*, *10 Years Later, Dragging Death Changes Town*, Associated Press (Jun. 6, 2008), http://www.msnbc.msn.com/id/25008925/ns/us_news-life/t/years-later-dragging-death-changes-town/

[21] U.S. Equal Employment Opportunity Commission, Race-Based Charges FY 1997 - FY 2011, http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm (last visited Aug. 6, 2012). In FY 2011, 35,395 charges of race-based discrimination were filed with the EEOC; in FY 1997, 29,199 charges were filed. For National Origin discrimination, 11,833 charges were filed compared with 6,712 in FY 1997.

Century. W.E.B. Du Bois, THE SOULS OF BLACK FOLK 1 (Oxford University Press 2007) (1903) ("The problem of the Twentieth Century is the problem of the color-line."). One study of "ethnic sounding names" serves as a cautionary tale for those who would suggest that race is no longer an issue. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991-1013 (2004), *available at* http://www.aeaweb.org/articles.php?doi=10.1257/0002828042002561.

It has been argued, nevertheless, that institutions of higher education should replace race as a factor in admissions with alternatives such as socioeconomic status ("SES") or class. According to this view, SES serves as a proxy for race and is a more desirable alternative to race. Advocates of this alternative suggest that the consideration of race in admission decisions has a stigmatizing effect and perpetuates stereotypes against those who are the beneficiaries of such programs. They further suggest that a socioeconomic model would make the beneficiaries less visible and susceptible to isolation and stigma and less inclined to self-segregate. Richard H. Sander, *Class in American Legal Education*, 88 DEN. UNIV. L. REV. 631, 668 (2011).

These individuals also argue that a system based on SES would be fairer because it would avoid giving disadvantaged minorities greater preferences than others, including low income White students. *Id.* at 633. While the Court has held that public institutions of higher education must consider race-neutral alternatives before using race as a factor in admissions, *amicus* submits that "class" or SES, as a proposed race-neutral alternative, cannot serve as a proxy for race and should not be considered a suitable substitute. Research shows that Whites outperform underrepresented minorities in standardized testing within income groups. Carson Byrd *et al.*, *Class-Based Policies Are Not a Remedy for Racial Inequality*, CHRON. OF HIGHER EDUC. (Sept. 25, 2011), http://chronicle.com/article/Class-Based-Policies-Are-Not-a/129097/. The consideration of class or SES cannot compensate for these deficiencies:

> When we assume that class-based affirmative-action policies will automatically help low-income minority students get into college, we also assume that poor minority students are just as prepared as poor White children for higher education, which is not the case. . . . Low socioeconomic status has not been the basis for systematic exclusion of students from higher education; race and ethnicity have.

Id.

The contribution of minorities to SES diversity is modest. "Eliminating a number of high SES Blacks to take up more slots for low SES White students is not going to make much of a difference because their numbers are simply too small to have a large impact." Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DEN. UNIV. L. REV. 732-33 (2011). By removing the higher income minority students, an SES-based admission system would also result in a loss of students whose performance more closely resembles that of their White peers. This would lead to a drop in overall African-American student performance and an increase in stigma. *Id.* at 734.

In defending its limited consideration of race and ethnicity as part of a holistic process, UT-Austin is being whipsawed between those who claim that affirmative action significantly burdens Whites or Asians and those who claim (like Petitioner) that the use of racial classifications is unconstitutional precisely because it has only a "minimal impact" on those it intends to benefit. Petitioner's Brief at 38. Clearly both claims cannot be true; and, in fact, they are both wrong.

First, the burden of affirmative action programs on Whites or Asians is actually small. As Professor Goodwin Liu reminds us:

> Using 1989 data from a representative sample of selective schools, former university presidents William Bowen and Derek Bok showed in their 1998 book, "The Shape of the River," that eliminating racial preferences would have increased the likelihood of admission for White undergraduate applicants from 25 percent to only 26.5 percent.

Goodwin Liu, *The Myth and Math of Affirmative Action*, Washington Post, Apr. 14, 2002, at B1, *available at* http://www.vpcomm.umich.edu/admissions/statements/liu.html. Second, the positive impact on the beneficiaries of affirmative action and on the college community as a whole is actually immense. Even a small number of diverse candidates can have an outsized impact on the overall diversity of an admissions class by furthering UT-Austin's important goals of promoting cross-racial understanding, helping to break down racial stereotypes, promoting learning outcomes, better preparing students for an increasingly diverse workforce and society, and enabling students to better understand persons of different races. *See Grutter*, 539 U.S. at 330. There is little numeric difference in a political science class of 30 individuals between one and two Hispanic students. However, when those additional Hispanic students present views that are different not only from the White students, but from each other, the impact of a diverse class becomes self-evident.

The challenges of disadvantaged minorities attending institutions of higher education persist in the 21st century. Although the share of African-American students participating in postsecondary education increased from 51 percent to 53 percent between 1994 and 2005, their shares in the more competitive colleges[22] declined in relation to their increasing share of the high school class. Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access Is Increasing Inequality, and What to Do About It, in* REWARDING STRIVERS 133-134 (Richard D. Kohlberg ed., 2010). Hispanic students have also lost ground relative to their growing population. The rate of college attendance among Hispanics has not kept up with their population, and Hispanics who do pursue postsecondary education are overrepresented in community colleges and underrepresented in more selective institutions. *Id.* at 134-35.

While there may be good reason to increase the emphasis on SES-based affirmative action, this does not mean that there are good empirical reasons to abandon race-based or ethnically-based affirmative action, either as a separate strategy or as a factor in class-based affirmative action. *Id.* at 166. The disadvantages of low socioeconomic status are more "onerous" for minorities, especially African-Americans. *Id.* "Socioeconomic differences, when combined with race, have more powerful disadvantaging effects, and overcoming those effects is more difficult for the minority student." *Id.* Abandonment of race considerations in favor of SES, moreover, would worsen the racial divide in higher education. Indeed, even Professor Richard Sander, the leading advocate of the SES alternative, concedes that a substitution of SES for race in the admissions process would result in a diminution of racial and ethnic diversity. Sander, *supra* at 664 n.90. Thus, while public institutions of higher education must consider race-neutral alternatives before using race as a factor in admissions, neither class nor SES can effectively serve as a proxy for race or as a substitute approach to achieve the compelling need for diversity in higher education.

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[22] Research has shown that the more selective the school, the more beneficiaries achieved after graduation both in terms of earnings and leadership in community and social service organizations. Derek Bok & William G. Bowen, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 281-82 (1998).

CONCLUSION

As this nation becomes increasingly diverse, institutions of higher education cannot abandon race-based programs of inclusion. As equal opportunity professionals working in higher education and other sectors, AAAA members are on the front lines of the diversity debate. From our perspective, colleges and universities need to allow for the fullest productivity in order to be internationally competitive. The United States is being surpassed by China, India, and other nations that are investing in their students, particularly in science, technology, engineering, and mathematics. This is a matter beyond just national interest; it is a matter of national security.

We are also concerned that a disaffected class may be created when opportunities are foreclosed from identifiable groups. The Court in *Grutter* articulated the importance of legitimacy of our institutions. 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."). With changing demographics, this legitimacy becomes a serious concern. This nation must be – in theory and in fact – as inclusive as possible.

As compliance officers, AAAA members know that the laws enacted to promote equal opportunity in education and employment enable us to encourage our colleagues to match behavior with thought and policy. We need those tools to remain in place; otherwise we are left with rhetoric and pragmatism and little progress. The color line remains an issue. We have few minorities at the highest levels as chancellors and presidents. We continue to observe racism and racial stereotyping on our campuses, and we have witnessed the isolation of students of color. The community at large is reflected on campus, and we are a microcosm of that community.

As professionals representing major employers, AAAA members have also seen the importance of recruiting top notch talent and understand the relationship between graduating excellent students of all races and employing outstanding, qualified members of the workforce. Many of AAAA's members are responsible for preventing and investigating acts of discrimination against students and employees, and therefore have a dual responsibility to promote equal education opportunity as well as equal employment opportunity. We know that students in non-diverse classrooms are unprepared to go to work whether as educators, physicians, or sales people sent out to serve a community that is diverse.

This is the wrong case in which to overturn all of the Court's prior decisions by holding that the Constitution, without exception, bars all racial classifications. Such a major change in the Court's jurisprudence should not be based upon the unusual facts in this case, particularly when there are real doubts as to whether this petitioner has even presented a case or controversy sufficient to support the Court's exercise of jurisdiction and without any other federal circuit having considered the issues before the Court. This is also the wrong case in which to substitute the Justices' policy preferences for those of state officials. The record demonstrates that UT-Austin designed and implemented its program in strict compliance with the Court's holding in *Grutter*.

The State of Texas has offered many compelling reasons for considering race holistically, as one factor among many, as part of a carefully constructed admissions process. These reasons are supported by empirical evidence and shared by an overwhelming majority of educational institutions. This Court can only find UT-Austin's admissions procedure to be unconstitutional by substituting its judgment for the judgment of the State of Texas. Respectfully, it should not do so.

As Justice Blackmun wrote in *Bakke*, "[i]n order to get beyond racism, we must first take account of race. There is no other way." 438 U.S. at 407 (Blackmun, J., concurring). Some holistic consideration of race as a factor in higher education admissions is an essential link to ensuring equal education *and* equal employment opportunity. The Framers of the Fourteenth Amendment would agree that the intended beneficiaries of this law should not be the ones foreclosed from its reach.

Respectfully submitted,

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Table 1: Differences in Average AI Score by Race and Program[1]

African-American Applicants Submitting SAT Scores, Compared to White Applicants:

Program(s)		*Verbal*	*Math*	*Rank*	*Total*
Liberal Arts, Communications, Fine Arts, Social Work, and Education	Regression Coefficient	.00142000	.00191000	.01459000	
	Average Race Deficit	98	111	9	
	Impact on AI	.13916000	.21201000	.13131000	.48248000
Nursing, Natural Sciences, and Architecture	Regression Coefficient	.00088166	.00230000	.02416000	
	Average Race Deficit	98	111	9	
	Impact on AI	.08640268	.25530000	.21744000	.55914268
Engineering	Regression Coefficient	.00072937	.00313000	.02285000	
	Average Race Deficit	98	111	9	
	Impact on AI	.07147826	.34743000	.20565000	.62455826
Business	Regression Coefficient	.00157000	.00229000	.03419000	
	Average Race Deficit	98	111	9	
	Impact on AI	.15386000	.25419000	.30771000	71576000

---

[1] Regression Coefficients are reproduced from App. at 372a-373a (Defendants' Statement of Facts). Average Race Deficits are the reported differences in average White test scores or rank percentiles and comparable figures for African-Americans or Hispanics, as applicable. SAT data were taken from The College Board, *supra*, at 7 (Table 8); ACT data were taken from Susan Aud *et al.*, *Status and Trends in the Education of Racial and Ethnic Groups* 85 (National Center for Education Statistics) (2010) (Table 15.2b, data for 2008); and class rank percentile data were taken from Snyder, *supra*, at 153 (Dec. 2008) (Table 24). Impact on AI was calculated by multiplying each Average Race Deficit by the corresponding Regression Coefficient and adding them to produce a total. Adverse impacts reported in this brief were rounded down to the nearest tenth and, to that extent, are potentially underestimated.

African-American Applicants Submitting ACT Scores, Compared to White Applicants:

Program(s)		*Verbal*	*Math*	*Rank*	*Total*
Liberal Arts, Communications, Fine Arts, Social Work, and Education	Regression Coefficient	.02513000	.04577000	.01351000	
	Average Race Deficit	5.6	4.8	9	
	Impact on AI	.14072800	.21969600	.12159000	.48201400
Nursing, Natural Sciences, and Architecture	Regression Coefficient	.00824000	.05007000	.02199000	
	Average Race Deficit	5.6	4.8	9	
	Impact on AI	.04614400	.24033600	.19791000	.48439000
Engineering	Regression Coefficient	.01074000	.07335000	.02708000	
	Average Race Deficit	5.6	4.8	9	
	Impact on AI	.06014400	.35208000	.24372000	.65594400
Business	Regression Coefficient	.02892000	.05405000	.03409000	
	Average Race Deficit	5.6	4.8	9	
	Impact on AI	.16195200	.25944000	.30681000	.72820200

Hispanic Applicants Submitting SAT Scores, Compared to White Applicants:

Program(s)		*Verbal*	*Math*	*Rank*	*Total*
Liberal Arts, Communications, Fine Arts, Social Work, and Education	Regression Coefficient	.00142000	.00191000	.01459000	
	Average Race Deficit	73	76	6	
	Impact on AI	.10366000	.14516000	.08754000	.33636000
Nursing, Natural Sciences, and Architecture	Regression Coefficient	.00088166	.00230000	.02416000	
	Average Race Deficit	73	76	6	
	Impact on AI	.06436118	.17480000	.14496000	.38412118
Engineering	Regression Coefficient	.00072937	.00313000	.02285000	
	Average Race Deficit	73	76	6	
	Impact on AI	.05324401	.23788000	.13710000	.42822401
Business	Regression Coefficient	.00157000	00229000	.03419000	
	Average Race Deficit	73	76	6	
	Impact on AI	.11461000	.17404000	.20514000	.49379000

Hispanic Applicants Submitting ACT Scores, Compared to White Applicants:

Program(s)		***Verbal***	***Math***	***Rank***	***Total***
Liberal Arts,					
Communications,	Regression Coefficient	.02513000	.04577000	.01351000	
Fine Arts,	Average Race Deficit	4	2.8	6	
Social Work,	Impact on AI	.10052000	.12815600	.08106000	.30973600
and Education					
Nursing,	Regression Coefficient	.00824000	.05007000	.02199000	
Natural Sciences,	Average Race Deficit	4	2.8	6	
and Architecture	Impact on AI	.03296000	.14019600	.13194000	.30509600
		.01074000	.07335000	.02708000	
Engineering	Average Race Deficit	4	2.8	6	
	Impact on AI	.04296000	.20538000	.16248000	.41082000
	Regression Coefficient	.02892000	.05405000	.03409000	
Business	Average Race Deficit	4	2.8	6	
	Impact on AI	.11568000	.15134000	.20454000	.47156000

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

AUG 13 2012

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

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QUESTION PRESENTED

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permits the University of Texas at Austin's use of race in undergraduate admissions decisions.

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") as *amicus curiae* respectfully submits this brief in support of Respondents. The ABA requests the Court to hold that Respondents' use of admissions policies that take race into account as merely one of a myriad of factors is consistent with the principles enunciated in this Court's precedents, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), and furthers the compelling interest of diversity in undergraduate colleges and universities, which is essential for diversity in law schools and the legal profession.

The ABA is the largest voluntary professional membership organization and the leading national membership organization for the legal profession. Its nearly 400,000 members practice in all 50 States, the District of Columbia, and the U.S. Territories, and include attorneys in private firms, corporations, non-profit organizations, and government agencies. They also include judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council

The ABA has worked for decades to ensure that members of all racial and ethnic groups in the United States are well represented in our legal profession, judicial system, and political and business institutions. In 1967, the ABA endorsed the development of a national program to encourage and assist qualified but underprivileged persons from minority groups to enter law school and the legal profession. In 1972, the ABA formally adopted a policy reaffirming this position.[3] In 1974, based on this position, the ABA filed an *amicus* brief in *De Funis v. Odegarard*, 416 U.S. 312 (1974), in support of the University of Washington School of Law's admissions program.[4]

The ABA also filed an *amicus* brief in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), in which the ABA noted that in 1976 African Americans accounted for only two percent of the

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participated in this brief's preparation or in the adoption or endorsement of the positions in it.

[3] Resolutions become ABA policy only after adoption by vote of the ABA's House of Delegates (HOD). The HOD now has 560 delegates, representing States and Territories, state and local bar associations, affiliated organizations, sections and divisions, individual ABA members, and the Attorney General of the United States, among others. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited Aug. 9, 2012).

[4] Brief of Am. Bar Ass'n as Amicus Curiae in Support of Respondents, De Funis v. Odegaard, 416 U.S. 312 (1974), 1974 WL 185633.

bar.[5] In anticipation of this Court's opinion, the ABA created a task force to analyze its implications for law schools and to develop recommendations for constructive implementation. In addition, public meetings and conferences were held by the ABA's Section on Legal Education and Admission to the Bar. This Section was formed by the ABA in 1879, and its Council has been approved by the (now) U.S. Department of Education since 1952 as the national agency for accrediting programs leading to the Juris Doctor degree. The Section's work following *Bakke* resulted in the adoption of Standard 212 of the ABA Standards and Procedure for Approval of Law Schools.[6] As adopted in 1980, this Standard 212 stated in pertinent part:

> Consistent with sound educational policy and the Standards, the law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) which

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[5] Brief of Am. Bar Ass'n as Amicus Curiae in Support of Respondents, Regents of the University of California v. Bakke, 438 U.S. 265 (1974), 1977 WL 188006, at *1-2 n.*

[6] Information on the Section on Legal Education and Admission to the Bar and the current version of the Standards are available at http://www.americanbar.org/groups/legal_education/resources/standards.html (last visited Aug. 9, 2012).

> have been victims of discrimination in various forms.[7]

Subsequently, the ABA filed an *amicus* brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003), in support of the University of Michigan Law School's use of race and ethnicity as one factor in making admissions decisions.[8] The ABA also asserted that ensuring full minority participation in the legal profession is a compelling state interest. [9] In 2006, consistent with *Grutter*, Standard 212 was amended; it continues to state, in pertinent part:

> Consistent with sound legal educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities

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[7] Am. Bar. Ass'n, *Standards and Rules of Procedure for Approval of Law Schools*, 16, Standard 212 (1980). Standard 212 was based on the ABA's firmly-held "belief that diversity in the student body and the legal profession is important both to a meaningful legal education and to meet the needs of a pluralistic society and profession." Lawrence Newman, Am. Bar Ass'n Section of Legal Education and Admissions to the Bar, Recommendation on Standard 212 (1980), *available at* http://www.americanbar.org/content/dam/aba/publications/syllabus/1998_vol29_no1_syllabus.authcheckdam.pdf (last visited Aug. 9, 2012).

[8] Brief of Am. Bar Ass'n as Amicus Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 982 (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/amicus/grutterfinal.authcheckdam.pdf (last visited Aug. 9, 2012).

[9] *Id.* at 7-30.

> for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race and ethnicity.

Standard 212 thus urges law schools to "take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups and backgrounds."[10]

The ABA has taken other steps to promote diversity in the legal profession. In 2010, for example, the ABA Presidential Initiative Commission on Diversity completed its assessment of the state of diversity in the legal profession and issued its report.[11] That report found that while there has been some progress, "the lack of genuine diversity remains a disappointment" and racial and ethnic groups "continue to be vastly underrepresented in the legal profession."[12]

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[10] Am. Bar Ass'n, Standards and Rules of Procedure for Approval of Law Schools, 17, Interpretation 212-2 (2011-12 ed.).

[11] Am. Bar Ass'n, *Diversity in the Legal Profession: The Next Steps*, 25 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf (last visited Aug. 9, 2012) (hereinafter *Next Steps*).

[12] *Id.* at 5.

The ABA has also worked to encourage the development and strengthening of the educational pipeline necessary for a diverse and inclusive legal profession. For example, the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline, which provides services to increase diversity among students in the educational pipeline, is housed in the ABA Center for Racial and Ethnic Diversity.[13] The ABA has also adopted educational pipeline policies, including one in 2006 that urges state, territorial, and local bar associations to work with national, state, and territorial bar examiners, law schools, universities, and secondary and even elementary schools to address the problems facing minorities within the pipeline to the profession.[14]

As this long history demonstrates, the ABA is convinced that increased participation by our nation's racial and ethnic minorities in its legal and leadership positions remains critical today and that undergraduate institutions are an important part of the pipeline to law schools and the legal profession.

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[13] The Center is comprised of three entities, the ABA Commission on Racial and Ethnic Diversity in the Profession, the ABA Coalition on Racial and Ethnic Justice, and the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline. Information on the Center is available at http://www.americanbar.org/groups/diversity.html (last visited Aug. 9, 2012).

[14] Am. Bar Ass'n, *House of Delegates Report No. 113* (2006), *available at* http://www.americanbar.org/groups/diversity/pages/DiversityRelatedResolutions.html (last visited Aug. 9, 2012).

The ABA accordingly urges this Court to affirm the decision of the court below.

SUMMARY OF ARGUMENT

This case requires the Court to consider whether its decisions, including *Grutter*, permit the University of Texas at Austin to use race-conscious procedures in making undergraduate admissions decisions. The University's admissions program takes race into account as one of many factors in a holistic consideration of an applicant, and was designed to reap the benefits of diversity that the Court held in *Grutter* to be a compelling state interest. The ABA supports the University and believes that its merits brief persuasively shows that the admissions policies in question comport with the Court's precedent.

The ABA submits this brief as *amicus curiae* to urge the Court to continue to endorse the use of such race-conscious admissions policies at institutions of higher learning. The ABA is convinced that such policies, which have been used in reliance on the Court's precedent by both public and private colleges and universities for many decades, remain important tools for the achievement of diversity in higher education, which in turn is necessary for diversity in law schools and the legal profession, and essential to our democracy. The ABA accordingly addresses two points that the ABA believes should be included in the Court's consideration of the use of race in admissions decisions.

First, full representation of racial and ethnic minorities in the legal profession is essential to the legitimacy of our legal and political systems, and therefore constitutes a compelling state interest. As the Court has recognized, the legal profession plays a critical role in American society. Lawyers formulate and implement our laws, resolve disputes and protect the rights of citizens. Drawing on their training and talents, they serve as judges and as leaders in national, state and local government affairs. Diversity in the profession shows that the path to leadership is open to all citizens and demonstrates that the justice system serves the public in a fair and inclusive manner. Moreover, such diversity improves the quality of legal services and judicial decisions, and is necessary for successful competition in the global marketplace.

Second, to date race-conscious admissions policies have helped to make law schools and, consequently, the legal profession more inclusive of racial and ethnic minorities. The constitutionality of such policies was endorsed by the Court more than 30 years ago in *Bakke* and sanctioned again in *Grutter* only nine years ago, and such policies are used on a widespread basis today, reflecting the experience and expertise of educators across the nation. Nevertheless, African American and Latino representation in the legal profession remains inadequate and is not keeping pace with the nation's demographic trends. The ABA submits that now is not the time to restrict institutions of higher education from considering race in admissions decisions as they pursue the benefits of diversity, and that doing so would also present a serious risk that the progress made so far would be lost. Indeed, in the nine years since *Grutter* was decided, nothing has happened in our nation's colleges and universities, in the legal profession or in American society at large, that would support a conclusion that race-conscious admissions procedures no longer remain valuable—and constitutionally permissible—tools for achieving diversity.

For these reasons, the ABA urges the Court to reaffirm that admissions policies that take race into account as merely one factor out of many, consistent with the principles espoused in *Grutter,* further the compelling interest of diversity in higher education, and therefore satisfy the requirements of the Equal Protection Clause.

ARGUMENT

Diversity in the legal profession is a compelling state interest, and race-conscious admissions policies are essential to increasing minority representation in the legal profession. Simply put, without the promotion of diversity in undergraduate colleges and universities, it would be impossible to achieve advancements in diversity in the profession.

I. THERE IS A COMPELLING STATE INTEREST IN A DIVERSE LEGAL PROFESSION

As advisers, advocates, judges and arbitrators, lawyers are central to the implementation of the rule of law. Lawyers help individual, corporate and government clients abide by the law and achieve their goals within legal frameworks. They defend individual rights and liberties. As judges and arbitrators, they resolve disputes and dispense justice.

Lawyers owe duties not only to their clients, but also to the justice system and the public. To be a lawyer is to accept a charge to advance democratic ideals and institutions.[15] Lawyers have historically had a "unique cultural position in American society, not only [of] administering but reflecting ideals of fairness and justice."[16] As stated in the Preamble to the ABA Model Rules of Professional Conduct:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice

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[15] *See also* Albert P. Blaustein & Charles O. Porter, *The American Lawyer: A Summary of the Survey of the Legal Profession*, vi (1954) ("Under a government of laws the lives, the fortunes, and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an independent judiciary and an independent bar. The legal profession is a public profession. Lawyers are public servants.").

[16] *Next Steps, supra* note 11, at 25.

> system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

American Bar Association, Model Rules of Prof'l Conduct Preamble (2010).[17]

Lawyers often serve as our nation's political and civic leaders, "perform[ing] functions that go to the heart of representative government." *Sugarman v. Dougall,* 413 U.S. 634, 647 (1973). As legislators, government officials, and judges, lawyers craft and interpret our laws and our national, state and local governmental policies. Twenty-five of our nation's forty-four presidents have been lawyers; lawyers have long been the single largest occupational group in the U.S. Congress; and virtually every judge is a lawyer.[18]

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[17] The Model Rules are developed by task forces composed of members of the ABA and national, state and local bar organizations; they are then reviewed by academicians, practicing lawyers and the judiciary before presentation to the ABA House of Delegates for adoption as ABA policy. The Model Rules have been adopted in all but a handful of jurisdictions, and are available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Aug. 9, 2012).

[18] *See generally* Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 Geo. J. Legal Ethics 155, 169-76 (2006) (discussing the historic role of lawyers in the development of American government and democracy); Blaustein et al., *supra* note 15, at 97-119 (discussing historic contributions of lawyers in public service).

Given the leadership role lawyers play throughout our democratic system, diversity in the legal profession is needed to generate and sustain trust in our government. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter,* 539 U.S. at 332. Indeed, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332.

Racial and ethnic diversity in the legal profession is necessary to demonstrate that our laws are being made and administered for the benefit of all persons. Because the public's perception of the legal profession often informs impressions of the legal system, a diverse bar and bench create greater trust in the rule of law. If the legal profession is not racially inclusive, the public may conclude that the justice system is unfairly controlled by one racial group and does not represent the interests of the population as a whole.[19] Judge Edward M. Chen, the first Asian American appointed to the United States District Court for the Northern District of California, has observed:

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[19] *See Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

> The case for diversity is especially compelling for the judiciary. It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority. How can the public have confidence and trust in such an institution if it is segregated—if the communities it is supposed to protect are excluded from its ranks?

Judge Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Cal. L. Rev. 1109, 1117 (2003).[20]

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[20] *See also* Justice Ming W. Chin, *Looking Ahead on the Journey for Diversity*, Am. Bar Ass'n Judges' Journal, Vol. 48, No. 3, at 20 (Summer 2009) ("[T]he public's respect for judgments and the courts, and the importance of judicial integrity, are reasons why increasing diversity on the bench is so imperative. With diversity on the bench at all levels, we are seeking to improve the quality of our justice system and to enhance the public perception of courts as fair, impartial, and independent."); Judge Michael B. Hyman, *What the Blindfold Hides*, Am. Bar Ass'n Judges' Journal, Vol. 48, No. 4, at 33 (Fall 2009) ("Greater diversity demonstrates a commitment to equality in all areas of the law and provides assurance to litigants that the judicial system is attentive to issues of racial discrimination, language barriers, cultural norms, and economic factors that may have an effect on the legal issues in the case.").

Racial and ethnic diversity in the legal profession also improves the quality of legal services and judicial decisions. The ABA firmly believes, based on the experience of its members and on the research it has conducted, that "a diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes."[21] As Justice Ruth Bader Ginsburg recognized: "A system of justice is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of its judgments, if its members—its lawyers, jurors, and judges—are all cast from the same mold." Justice Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 Sw. U. L. Rev. 189, 190 (2003).

Lawyers who are members of racial minority groups often provide valuable perspectives to those who are not members of those groups by imparting their personal histories and unique experiences, challenging stereotypes, and breaking down cultural barriers. As Justice Sandra Day O'Connor said of former Justice Thurgood Marshall:

> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective . . . . At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only

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[21] *Next Steps, supra* note 11, at 5.

> his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Justice Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217 (1992). Similarly, Judge Arthur L. Burnett Sr., who in 1969 became the first African American U.S. magistrate judge, attributed his judicial philosophy in part to his experience growing up in the segregated South of the 1940s and 1950s: "My life in a segregated society and my initial educational and professional experiences were the influences that led me to approach the law much as a scientist approaches the task of looking through a microscope." Judge Herbert B. Dixon Jr., An Interview with Judge Arthur L. Burnett Sr., Am. Bar Ass'n Judges' Journal, Vol. 48, No. 4, at 6 (Fall 2009).[22]

Experience has taught that the protection and advancement of the interests of persons who experience racial and ethnic discrimination is enhanced through representation by lawyers who have shared such challenges and can more easily generate the trust of such clients. It is crucial that clients of legal professionals have the ability to choose lawyers with whom they feel comfortable. *Trammel v. United States*, 445 U.S. 40, 51 (1980) (lawyers must be able to satisfy "the imperative need for confidence and trust" of their clients). This is not to say that it is necessary for minority clients to be represented by minority attorneys. Rather, the ABA recognizes that many marginalized members of society understandably put their trust more readily in lawyers who possess a shared background because a shared background can improve communication, comfort level, trust, decision-making and advocacy in the attorney-client relationship.[23]

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[22] *See also* Judge Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329 (2002) ("[R]acial diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberative process. . . . A more diverse judiciary also reminds judges that all perspectives inescapably admit of partiality.").

The availability of minority lawyers may also help to determine whether certain clients seek legal assistance at all. "Effective access to legal representation not only must exist in fact, it must also be perceived by the minority law consumer as existent so that recourse to law for the redress of grievance and the settlement of disputes becomes a realistic alternative to him."[24]

Not surprisingly, attorneys who are members of minority groups have historically taken on some of the most challenging legal issues in an effort to bring justice to their communities. From the Asian American lawyers who reopened the Japanese internment case of *Korematsu v. United States*, 323 U.S. 214 (1944) to the African American attorneys who were at the forefront of the struggle for civil rights, attorneys from racial minority groups have contributed to some of the most important legal, social and political reforms in American history.[25] One study of the career choices of University of Michigan Law school graduates reported that graduates who were African American, Latino, and Native American were more likely to begin their careers in public service, and those who entered private practice tended to do more pro bono work, than their white counterparts. Moreover, the study reported minority graduates provided "considerably more service to minority clients than white alumni d[id]."[26]

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[23] *Next Steps, supra* note 11, at 3.

[24] Erwin N. Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 517 (1975).

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[25] Eric K. Yamamoto, *The Color Fault Lines: Asian American Justice from 2000*, 8 Asian L.J. 153, 154 (2001); Rosen, *supra* note 18, at 185-87 (discussing the extensive contributions of Justice Thurgood Marshall and Judge Constance Baker Motley to civil rights causes).

[26] David L. Chambers, Richard O. Lempert & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Soc. Inquiry 395, 401 (2000); *see also* Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 Rutgers L. Rev. 1011, 1016 (Summer 2009) ("Of course, addressing the justice gap should not solely be minority attorneys' responsibility, nor should they be saddled with repairing the consequences of historical injustice against people of color. Nevertheless, it appears that attorneys of color do more to address the justice gap than do white attorneys.").

A diverse legal profession is also required for the United States to remain competitive in the global economy. As the Court observed in *Grutter,* the educational benefits of diversity are valued by "major American businesses [that] have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter,* 539 U.S. at 330. In the years since that case was decided, the amount of U.S. legal services that are provided to clients outside the U.S. each year has grown dramatically.[27]

Finally, it is beyond doubt that diversity in educational environments encourages "more enlightening and interesting" classroom discussions, "promotes learning outcomes," and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* As one law school dean recently put it: the concept that "diversity among the students in a law school generally contributes to a better legal education than that offered by a more homogeneous student body . . . has become the conventional wisdom that is warmly embraced by the vast majority of leaders in higher education today."[28] The ABA is convinced that it remains critical for undergraduate and law students to reap the "substantial, . . . important and laudable benefits" of diversity on campus and in the classroom. *Grutter*, 539 U.S. at 330.

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[27] The export of U.S. legal services generated $7.3 billion in receipts in 2010, a nearly 40 percent increase over 2006. Bureau of Econ. Analysis, *Detailed Statistics for Cross-Border Trade,* Table 1. Trade in Services, 1999-2010, *available at* http://www.bea.gov/international/international_services.htm #detailedstatisticsfor (last visited Aug. 9, 2012).

II. RACE-CONSCIOUS ADMISSIONS POLICIES ARE ESSENTIAL TO INCREASING MINORITY REPRESENTATION IN THE LEGAL PROFESSION

Racial and ethnic diversity in the legal profession cannot be produced without diversity in undergraduate institutions and law schools. Undergraduate institutions are the pipeline to law schools, and law schools are the portal to the legal profession. Public universities in particular are a primary source of law school applicants. For example, nine out of the top ten "feeder schools" for law school applicants for the 2009-10 school year were public universities.[29]

Admissions policies in higher educational institutions that take race into account as only one of many factors remain essential to the achievement of diversity within the legal profession. To date, such policies have increased minority enrollment at law schools. From the time in 1965 when Dean Erwin Griswold of Harvard Law School called attention to the need for diversity at law schools until today, African American enrollment at law schools has grown from barely one percent to more than seven percent.[30] Nevertheless, neither African American nor overall minority representation in the legal profession is keeping pace with the national demographic trends toward a more diverse population.

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[28] Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law School: One Dean's Perspective*, 96 Iowa L. Rev. 1549, 1553 (2011); *see Grutter*, 539 U.S. at 329-33.

[29] *See* Law School Admission Council, *Top 40 ABA Applicant Feeder Schools for Fall Applicants*, *available at* http://www.lsac.org/LSACResources/Data/PDFs/top-240-feeder-schools.pdf (last visited Aug. 9, 2012).

During the decade from 2000 to 2010, the percentage of Americans who identified themselves as Latino, black, Asian/Pacific Islander, American Indian/Alaska Native, or having multiple racial backgrounds increased from 30.9 to 36.3.[31] This trend toward an increasingly diverse American society is expected to continue. The Census Bureau recently announced that, during the 12-month period ending July 2011, racial and ethnic minority births represented a majority of births, 50.4 percent, for the first time in the country's history.[32] It is projected that during the next three or four decades, racial and ethnic minorities will together make up a majority of the U.S. population.[33]

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[30] William G. Bowen & Derek Bok, *The Shape of the River* 5 (1998); Law School Admission Council, *LSAC Volume Summary: Matriculants by Ethnic and Gender Group*, *available at* http://www.lsac.org/lsacresources/data/vs-ethnic-gender-matrics.asp (last visited Aug. 9, 2012).

[31] U.S. Census Bureau, U.S. Dep't of Commerce, *Overview of Race and Hispanic Origin: 2010* Table 1 (Mar, 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (last visited Aug. 9, 2012). A substantial portion of this increase is attributable to a sharply rising Latino population, which experienced a 43 percent increase, from 12.5 percent of the total population in 2000, to 16.3 percent in 2010, and accounted for more than half of the growth in the total population of the United States during this period. U.S. Census Bureau, U.S. Dep't of Commerce, *The Hispanic Population: 2010*, Table 1 (May 2011), *available at*

Today, however, members of racial and ethnic minority groups remain vastly underrepresented in America's legal institutions. Last year, Asian, African American, and Latino lawyers made up only 20 percent of associates at law firms, and a drastically smaller portion—less than seven

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http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf (last visited Aug. 9, 2012).

[32] Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, Most Children Younger Than Age 1 Are Minorities, Census Bureau Reports (May 17, 2012), *available at* http://www.census.gov/newsroom/releases/archives/population/cb12-90.html (last visited Aug. 9, 2012).

[33] *See* Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008), *available at* http://www.census.gov/newsroom/releases/archives/population/cb08-123.html (last visited Aug. 9, 2012); *see also* Jeffrey Passel & D'Vera Cohn, *U.S. Population Projections 2005-2050*, Pew Research Center (Feb. 11, 2008), *available at* http://www.pewhispanic.org/2008/02/11/us-population-projections-2005-2050/ (last visited Aug. 9, 2012).

percent – of partners at law firms.[34] Minorities are also underrepresented among lawyers who practice outside of law firms. Minority lawyers made up an estimated 16 percent of corporate legal departments in 2010.[35] Fewer than nine percent of the lawyers serving as general counsel at Fortune 500 companies in 2010 were members of minority groups.[36] Similarly, only 13 percent of members of the federal judiciary were minorities in 2009.[37] Among federal government lawyers, minorities accounted for only 17.6 percent of general attorneys.[38] And in the legal academy, minorities were only 13.6 percent of law professors and a similar percentage of law school deans in 2009.[39]

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[34] Press Release, Nat'l Ass'n for Law Placement, Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline (Nov. 3, 2011), *available at* http://www.nalp.org/2011_law_firm_diversity (last visited Aug. 9, 2012); *see also* Emily Barker, *Diversity Scorecard 2010: One Step Back*, The Am Law Daily (March 1, 2010), *available at* http://amlawdaily.typepad.com/amlawdaily/2010/03/onestepback.html (last visited Aug. 9, 2012).

[35] Minority Corporate Counsel Ass'n, *Sustaining Pathways to Diversity: A Comprehensive Examination of Diversity Demographics, Initiatives, and Policies in Corporate Legal Departments* 8-9 (2011), *available at* http://www.mcca.com/_data/global/images/Research/MCCA_CLDD_Book.pdf (last visited Aug. 9, 2012).

[36] Thomas Threlkeld, *2010 Fortune 1000 Minority General Counsel Survey*, Minority Corporate Counsel Ass'n, Diversity and the Bar, (Sept./Oct. 2010), *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewPage&pageID=2129 (last visited Aug. 9, 2012); *see also* Alea Jasmin Mitchell, *Report on General Counsel of Color Leading Fortune 500 Companies*, Minority Corporate Counsel Ass'n, Diversity and the Bar, (May/June 2004), *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=747 (last visited Aug. 9, 2012).

The ABA recognizes that the low percentage of minorities in the legal profession represents an improvement over the much lower historical figures. For example, the percentage of minority associates at law firms has increased by 50 percent since 2000, from almost 13 percent in 2000 to about 20 percent in 2011.[40] The percentage of minorities serving as general counsels of corporations in 2010 represents a near 200 percent increase since 2000 when only

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[37] Russell Wheeler, *The Changing Face of the Federal Judiciary*, Brooking Inst'n, 1 (2009), *available at* http://www.brookings.edu/~/media/research/files/papers/2009/8/federal%20judiciary%20wheeler/08_federal_judiciary_wheeler.pdf (last visited Aug. 9, 2012).

[38] Inst. for Inclusion in the Legal Profession, *IILP Review: The State of Diversity and Inclusion in the Legal Profession* 30 (2011), *available at* http://www.theiilp.com/resources/Documents/IILP2011_Review_final.pdf (last visited Aug. 9, 2012).

[39] *Id.* at 32.

[40] Nat'l Ass'n for Law Placement, *supra* note 34; Press Release, Nat'l Ass'n for Law Placement, Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly (Nov. 15, 2000), *available at* http://www.nalp.org/2000presenceofwomenattorneysofcolor (last visited Aug. 9, 2012).

15, or 3 percent, of such corporations had general counsels who were minorities.[41] In addition, as of March 2012, 36 percent of the federal judges confirmed during the current presidential administration have been African American, Latino, or Asian American compared to 17 percent during President Bush's tenure in office and 24 percent during President Clinton's tenure.[42]

Nevertheless, the ABA believes the current state of diversity within legal institutions demonstrates that there remains substantial work to do to ensure diversity in the profession, particularly in light of the current and projected national demographic changes. The ABA is also mindful of the Court's guidance in *Grutter* that race-conscious admissions programs are anticipated to have a termination point: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 342-343. The ABA respectfully submits that this point has not yet been reached.

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Race-conscious admissions policies are in widespread use throughout public and private colleges and universities. As one study reports,

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[41] Threlkeld, *supra* note 36; Mitchell, *supra* note 36.

[42] White House, Quick Facts: President Obama's Judicial Nominees: Historic Successes and Historic Delays (Mar. 13, 2012), *available at* http://www.whitehouse.gov/infographics/judicial-nominees (last visited Aug. 9, 2012).

"[d]ata from more than 1,300 four-year colleges and universities in the United States" show that 45% of private institutions and 35% of public institutions consider minority status in admissions.[43] Educators across the country have determined that such race-conscious admissions policies are necessary for the advancement of racial and ethnic diversity at their institutions, as demonstrated by the groundswell of support from the education community nine years ago for the University of Michigan's admissions policies considered in *Grutter*, and again today for the University of Texas's admissions policies.[44]

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[43] William M. Chace, *Affirmative Inaction*, The American Scholar (Winter 2011), *available at* http://theamericanscholar.org/affirmative-inaction (last visited Aug. 9, 2012).

[44] In *Grutter*, over 90 public and private institutions of higher education filed such *amicus curiae* briefs supporting the University of Michigan Law School's consideration of race as a factor in admissions. *See Grutter v. Bollinger*, Docket No. 02-241 (S. Ct.). One such institution, the American Law Deans Society (formerly the American Law Deans Association) ("ALDS") filed an *amicus* brief on behalf of 171 individual law schools emphasizing their support, not only for affirmative action, but for "the explicit consideration of race" in law school admissions. Brief of Am. Law Deans Ass'n as Amicus Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003), 2003 WL 399070, at *2. The ALDS emphasized that "if [law schools] could not consider race, they would have very few students from disadvantaged minority groups." *Id.* at *3. For this and other reasons, the ALDS asserted, "explicit consideration of race protects the compelling interest in selective admission standards." *Id.* at *2. In addition to the ALDS, the law school deans of Georgetown Law Center, Duke Law School, University of Pennsylvania Law School, Yale Law School, Columbia Law School, University of Chicago Law School, Stanford Law School, Cornell Law School, and

Moreover, the development of race-conscious accreditation standards and admissions policies that promote student body diversity at institutions of higher learning has been grounded in this Court's decisions, most significantly *Bakke* and *Grutter*.[45] The ABA is persuaded that in the nine years since *Grutter* was decided, there have been no changes in society or in the law that "dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).[46] To the contrary, the need for race-conscious admissions policies in higher education is as compelling today, if not more so, given the rapid

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Northwestern University School of Law in their individual capacities, as well as numerous other professional and academic organizations, filed *amicus curiae* briefs supporting affirmative action. The ABA understands that many of these same institutions and organizations will file *amicus curiae* briefs supporting Respondents in this case.

[45] *See, e.g., supra* pp. 4-5 (discussion of Standard 212 of the ABA Section on Legal Education and Admission to the Bar, which requires law schools to demonstrate commitment to diversity by concrete action).

[46] "[A]ny departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984); *see also Dickerson* v. *United States*, 530 U.S. 428, 443 (2000); *Adarand Constructors* v. *Pena*, 515 U.S. 200, 231 (1995); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 864 (1992). To determine the existence of special justifications, the Court looks to reliance on the established rule, the workability of that rule and whether the law or the understanding of society has so changed that the rule is plainly indefensible. *See Dickerson*, 530 U.S. at 443-44; *Casey*, 505 U.S. at 854-55. No such special justifications exist here.

demographic changes taking place in the nation and the trend toward globalization sweeping the legal community.

The ABA therefore respectfully submits that this Court should once again affirm the constitutionality of admissions policies that use race as merely one of many factors. Adhering to the precedents set out in *Bakke* and *Grutter*, these admissions policies have been used throughout American institutions of higher education for more than three decades and reflect the experience and expertise of educators that such policies are necessary if diversity is to be fostered. Affirmance by this Court that such admissions policies satisfy the requirements of the Equal Protection Clause, moreover, would sustain the important progress that has been achieved in promoting diversity, not only in the nation's undergraduate colleges and universities, but also in its law schools and legal profession.

CONCLUSION

For the reasons set forth herein, the American Bar Association respectfully urges this Court to affirm the Fifth Circuit's ruling that the University of Texas at Austin's admissions policy is constitutional.

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BRIEF

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AND
BRIEFS

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No. 11-345

In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *City of Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003), or for amici, *e.g.*, *FCC v. Fox TV*, No. 10-1293 (U.S. argued Jan. 10, 2012); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

The ACLJ strongly believes in the unity of all people in one human nature, from fertilization through natural death. Just as there is no difference in kind between prenatal, neonatal, adolescent, or adult human beings, there is likewise no difference in kind between black, white, Asian, or other ethnic groups of human beings. There is one race - - the human race. "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment). "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The ACLJ therefore opposes any government effort to attach consequences to racial labels for individuals.

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[1] The parties in this case have filed blanket letters of consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

There is only one "race" of humans – the human race. Government efforts to pigeonhole groups of people into racial boxes – what Chief Justice Roberts called a "sordid business," *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part) – is both ultimately incoherent (as people of mixed ethnicity illustrate) and the hallmark of racism (as with the Nazi efforts to define Jews and the segregationist efforts to define "colored" people). The use of racial labeling by the University of Texas is incompatible with one of the basic premises of the Constitution: the inherent, equal dignity of all persons.

ARGUMENT

I. GOVERNMENT HAS NO BUSINESS ATTACHING SIGNIFICANCE TO RACIAL LABELS.

When the government *forbids* the differential treatment of individuals on the basis of racial labels, it properly sets itself against race discrimination. But when the government *undertakes* to treat people differentially on the basis of racial labels, it runs afoul of the norm of color-blindness that should be the touchstone of government action in light of the Equal Protection Clause of the Fourteenth Amendment.

In particular, a government's use of racial classifications as qualifications for preferences or disabilities suffers from two glaring flaws: first, such labeling is ultimately incoherent, as racial categories are both arbitrary and porous; and second, such labeling, and the concomitant need to decide who fits into which racial "box," associates the government with some of the worst historical pedigrees in human history.

A. Racial Categories Are Arbitrary and Ultimately Incoherent.

The enforcement of any system of racial preference necessarily requires a determination of who counts as belonging to which race. "When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite?" *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment).

In a world of completely segregated populations, it might be possible to maintain the fiction that there are intrinsically distinct, identifiable ethnic groups such as "black" and "white," or "Hutu" and "Tutsi," or "Asian" and "Hispanic." But in a cosmopolitan world, such pretensions are exposed as utterly illusory. Countless children are born each day with a heritage drawing upon a host of varied ethnic and cultural backgrounds. Indeed there are websites devoted to identifying and celebrating such "multiracial" children. *E.g.*, The Daily Multiracial, http://dailymulitracial.com (listing, and providing ethnic background information for, prominent individuals of mixed ethnic heritage, including Queen Noor, Steve Jobs, Carol Channing, Bob Marley, Naomi Campbell, Bruce Lee, Salma Hayek, Booker T. Washington, Lani Guinier, Eddie

Van Halen, Cher, Ben Kingsley, Jennifer Beals, Tiger Woods, Halle Berry, Jim Thorpe, Carly Simon, Barack Obama, and Lena Horne); Multiracial Celebrities, www.blackflix.com/articles/multiracial. html (similar); http://multiracialidentity.com/ (documentary on "multiracial movement"). Human beings cannot be pigeonholed into racial boxes, and it is offensive to insist that the government can – or must, as for purposes of state college admissions – do so. As the Supreme Court of California stated:

> If the [government rule assigning significance to racial categories] is to be applied generally to persons of mixed ancestry the question arises whether it is to be applied on the basis of the physical appearance of the individual or on the basis of a genealogical research as to his ancestry. If the physical appearance of the individual is to be the test, the [rule] would have to be applied on the basis of subjective impressions of various persons. Persons having the same parents and consequently the same hereditary background could be classified differently. On the other hand, if the application of the [rule] to persons of mixed ancestry is to be based on genealogical research, the question immediately arises what proportions of [the pertinent ethnic groups of] ancestors govern the applicability of the statute. Is it any trace of [the pertinent ethnic] ancestry, or is it some unspecified proportion of such ancestry that makes a person a [member of the pertinent ethnic group]?

Perez v. Sharp, 32 Cal. 2d 711, 738, 198 P.2d 17, 28 (1948).

For that matter, the very notion of discrete human "races" is, at best, highly questionable. As this Court unanimously observed:

> There is a common popular understanding that there are three major human races – Caucasoid, Mongoloid, and Negroid. *Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary* and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. *Clear-cut categories do not exist.* The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that *racial classifications are for the most part sociopolitical*, rather than biological, in nature.

St. Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (emphasis added) (citing extensive authorities). As Judge Garza explained below, "The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible biologically into any set number of races." *Fisher v. University of Texas at Austin,* 631 F.3d 213, 264 (5th Cir. 2011) (Garza, J., specially concurring) (footnote omitted).

To be sure, individuals can take great pride in asserting their own ethnic identities, whether Irish, African-American, Italian, Chinese, or what have you. But it is an entirely different matter *for the government* to attach legal significance to such a label, whatever its source.[2]

B. The History of Government Racial Classification of Individuals Is Not One that Should Be Imitated.

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[2] It is no answer for the government to have individuals self-designate their race for purposes of government action. (UT currently asks applicants to "select the racial category or categories with which you most closely identify," https://www.applytexas.org/adappc/html/preview12/frs_1.html, providing five categories.) Even if the government defers completely to an individual's unfettered self-description, the government is still conferring official significance upon one's status as, e.g., "black" or "Semitic." And if the government exercises any supervision over the racial designations, it raises the sorry prospect of state agents asserting, for example, that someone is "too white" to qualify for minority status (or vice-versa). This is not an unrealistic scenario, even in the modern world. *E.g.*, Rick Chandler, "Driver sues NASCAR, says he was 'too Caucasian' for diversity program," http://offthebench.nbcsports.com/2012/04/20/driver-sues-nascar-says-he-was-too-caucasian-for-diversity-program (Apr. 20, 2012) (driver of Puerto Rican and Spanish descent sues over exclusion from program for minorities); Mem. in Support of Deft. Access Marketing & Communication LLC's Mot. for Sum. Judg. at 12 n.7, *Rodriguez v. NASCAR*, No. 3:10-cv-00325 (W.D.N.C. Jan. 17, 2012) ("Plaintiff did not fit the purpose of the affirmative action program because he looked like a Caucasian male"). *See also* Michael Olesker, "When 'black' apparently was not quite black enough," Baltimore Sun (Sept. 3, 2002) (African-Lebanese plaintiff sues, alleging failure to be hired for "diversity" position at college because he was "not visibly black").

Governments have tried before to undertake the "sordid business" of "divvying us up by race," *LULAC*, 548 U.S. at 511 (Roberts, C.J., joined by Alito, J., concurring and dissenting) – and the results have not been pretty.

1. Germany and Rwanda

The ugliest examples are associated with genocide. In Germany in the early 20th Century, for example, the national regime composed detailed formulae for determining who would or would not be deemed Jewish. As Justice Stevens acidly observed, "If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935 . . . ." *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (citing German law defining Jews by ancestry or by combination of ancestry and marriage or religious practice). The horrific steps following this categorization led to the deaths of millions of Jews.

In Rwanda, racial labeling immensely facilitated the genocidal massacre of hundreds of thousands of Tutsis in 1994. Mandatory government identification cards listed bearers as belonging to supposedly distinct tribal groups, most notably either Hutu or Tutsi. "[T]he designation 'Tutsi' spelled a death sentence at any roadblock." Jim Fussell, "Group Classification of National ID Cards as a Factor in Genocide and Ethnic Cleansing," Presentation to the Seminar Series of the Yale University Genocide Studies Program (Nov. 15, 2001), *available at* www.preventgenocide.org/prevent/removing-facilitating-factors/IDcards/.

2. United States

The United States has had its own unhappy experiments with government conferral of significance upon racial labels. In particular, enforcement of racial segregation and miscegenation laws required the government to attach legal significance to the question what racial "box" a person belonged to.

In *Morgan v. Virginia*, 328 U.S. 373, 382 (1946), this Court observed: "In states where separation of races is required . . ., a method of identification as white or colored must be employed." *See also id.* at 383 & n.28 (listing as examples tests for "any ascertainable Negro blood" and "one-fourth or more Negro blood"). Lower courts consequently had to wrestle with the ultimately arbitrary question, "Who exactly is white and who is nonwhite?" *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment).

The case of *Wall v. Oyster*, 36 App. D.C. 50 (1910), is illustrative. The *Wall* case involved the use of racial labels to determine admission to educational institutions. In the District of Columbia, the government maintained separate schools for "white" and "colored" children. *Id.* at 53. A child named Isabel Wall began attending the "white" school, but the principal excluded her "shortly thereafter . . . on the ground that she was a 'colored child,'" despite the fact that Isabel asserted "she is a white child in personal appearance, and is so treated and recognized by her neighbors and friends." The trial court acknowledged that "'[T]here was to be observed of the child no physical characteristic which afforded ocular evidence suggestive of aught but the Caucasian,'" but ruled that because "'the child is of negro blood of one eighth to one sixteenth . . . her racial status is that of the negro [and s]he is, therefore, "colored," according to the common meaning of the term . . . .'" *Id.* at 50-52.

The D.C. Court of Appeals affirmed. That court observed that "the duty was necessarily devolved . . . upon the board of education to determine what children are white and what are colored whenever that question shall arise in a particular case." *Id.* at 54. The court noted the variety of approaches taken by the states: "In some States 'colored persons' are declared by the statute to be those having a certain proportion of negro blood in their veins, – in some instances one fourth; in some one eighth; in some one sixteenth; and in others any admixture." *Id.* at 56. Since Congress had provided no such mathematical definition, the appeals court believed itself "compelled to ascertain the popular meaning of the word 'colored.'" *Id.* at 57. After reviewing the approach taken in several cases and consulting the dictionary, the court concluded that "the word 'colored,' as applied to persons or races, is commonly understood to mean persons wholly or in part of negro blood, or having any appreciable admixture thereof." *Id.* at 58.

The *Wall* court's struggle with the delineation of racial categories was by no means unique. Other courts undertook similar challenges. *E.g.*, *State ex rel. Farmer v. Board of School Comm'rs*, 226 Ala. 62, 145 So. 575 (1933) (upholding exclusion of creole children from "white" school and their relegation to "colored" school, and discussing similar precedents and policy of racial separation); *Weaver v. State*, 22 Ala. App. 469, 471 (1928) (miscegenation prosecution) ("It was proper to prove that defendant's grandfather had 'kinky hair.' This is one of the determining characteristics of the negro. This also applies to the questions involving the nose and other features. It is proper in a case of this kind to prove the race of defendant by description of any or all the characteristics belonging to the negro race, and even a photograph has been held to be admissible"); *State v. School Dist. No. 16*, 154 Ark. 176, 179 (1922) ("it cannot be said there was no substantial evidence tending to show a trace of negro blood in the veins of said children"); *State v. Treadway*, 126 La. 300, 52 So. 500 (1910) (miscegenation prosecution) (extensive treatment of distinction between "Negro" and "colored" to determine that an "octoroon" was not a "Negro"); *Messina v. Ciaccio*, 290 So. 2d 339 (La. App. 1974) (birth certificate designation of race) (discussion of imprecision of various racial terms). *Cf. McLaughlin v. Florida*, 379 U.S. 184, 187 (1964) ("At the trial one of the arresting officers was permitted, over objection, to state his conclusion as to the race of each appellant based on his observation of their physical appearance").

These official excursions into racial classification rightly strike the modern mind as appallingly racist and insensitive to the fundamental humanity of all persons, regardless of skin color, features, or ancestry. "The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting).

In the present case the University of Texas, a governmental entity, gives significance – and thus potentially dispositive significance – to a prospective student's racial label. Ishop Dep. at 19 (JA 169a). Indeed, the applicant's race appears on the front page of the application. *Id. See also* https://www.applytexas.org/adappc/html/preview12/frs_1.html (sample current application form). That the university professes a benign motive for this exercise does not change the fact that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove v. Klutznick*, 448 U.S. at 534 n.5 (Stevens, J., dissenting). Regardless of whether the government itself makes the racial labeling determination or puts upon the individual the task of self-labeling (with or without any government oversight to forestall manipulation of the system, *see supra* note 2), it is the *government* that ultimately says the label *matters*. That is inconsistent with the Fourteenth Amendment.

CONCLUSION

"The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). This Court should reverse the judgment of the Fifth Circuit.

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AMICUS CURIAE BRIEF

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UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared in numerous affirmative action cases before this Court both as direct counsel and amicus curiae including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

STATEMENT OF THE CASE

After the Fifth Circuit's 1996 decision in *Hopwood* struck down the use of race in admissions, the number of minority students at the University of Texas at Austin [hereinafter "the University"] "decreased immediately" because admitted minority students did not enroll in 1996 and fewer minority students applied in 1997. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 223 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012); *see Hopwood v. Texas,* 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518

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[1] No counsel for either party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief. Blanket letters of consent to the filing of *amicus* briefs have been lodged by both parties with the Clerk of the Court.

U.S. 1033 (1996). African American and Latino applicants "dropped by nearly a quarter," while overall applicants decreased by only 13 percent. *Fisher*, 631 F.3d at 224. Specifically, African American enrollment in 1997 was almost 40 percent less than in 1995 and Latino enrollment decreased by five percent. *Id.*

In an effort to diversify the student body, the University implemented a series of race-neutral programs, including holistic reviews of applications,[2] scholarships,[3] targeted recruiting efforts, and the Top Ten Percent Law.[4] *Proposal to Consider Race and Ethnicity in Admissions*, Dist. Ct. Dkt. No. 96, Tab 11, Ex. A, 26, 30, 31 [hereinafter "*2004 Proposal*"]. In order to holistically review applicants, the University added the Personal Achievement Index ("PAI") to the existing Academic Index ("AI").

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[2] In 1997, the University began to "holistically read[] files" and "broaden[ed]" review of applications to include "subjective criteria" by considering essays, awards and honors, service, work experiences, and "special circumstances that put an applicant's achievements into context." *2004 Proposal* at 30.

[3] The University created the Longhorn Opportunity Scholarship program in 1999, which provided scholarships to Top Ten Percent students from high schools with "no history of sending students to the University of Texas at Austin and with an average parental income of $35,000 or less." *2004 Proposal* at 31.

[4] In 1997, the Texas legislature enacted the Top Ten Percent law, which provided for automatic admission to the University for Texas high school seniors in the top ten percent of their class. Tex. Educ. Code § 51.803; *2004 Proposal* at 30.

Fisher, 631 F.3d at 223. Previously, with the AI, the University had only considered an applicant's class rank, standardized test scores, and high school classes. *Id.* at 222. The addition of the PAI to the AI was "facially race-neutral" but was "designed to increase minority enrollment" by considering the applicant's socio-economic status, languages spoken, and whether the student was from a single-parent household. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 591-92 (W.D. Tex. 2009). Despite the implementation of these programs, admission of African American and Latino freshmen still "declined in real numbers and as percentages of the class" during the two-year period immediately following *Hopwood*. *2004 Proposal* at 30.

In the 2003 *Grutter* opinion, this Court held that racial diversity in higher education was a compelling government interest and upheld the University of Michigan Law School's use of race in admissions. 539 U.S. at 328, 343. In response, the University began to evaluate whether it would reintroduce the use of race in admissions under the guidelines set forth in *Grutter*. *Fisher*, 631 F.3d at 225. The University underwent a "year of study" after *Grutter* and issued a forty-page report before implementing a race-conscious admissions policy for the incoming class of 2005. *Id.* at 226; *see 2004 Proposal*. The University assessed the numbers of minority students in classrooms and surveyed the perceptions of students and faculty about the necessity of implementing race-conscious admissions. *Fisher*, 631 F.3d at 225; Walker Aff., Dist. Ct. Dkt. No. 96, Tab 11, ¶ 10 [hereinafter "Walker Aff."]

In its year of study, the University found that in Fall 2002, 90 percent of student classrooms with five to twenty-four students had zero or one African American student, 46 percent had zero or one Asian American student, and 43 percent had zero or one Latino student. *Fisher*, 631 F.3d at 225. This study looked at classes of five to twenty-four students because these were classes of "participatory size," which were "most of" the undergraduate courses and which "offered the best opportunity for robust classroom discussion[s], rich soil for diverse interactions." *Id.* The University later studied classes of ten to twenty-four students and found that 89 percent of those classes had either zero or one African American student, 41 percent had zero or one Asian American student, and 37 percent had zero or one Latino student. *Id.* These numbers meant that in Fall 2002, there were more classes with zero or one African American or Latino student than in Fall 1996. *Id.* at 241. A second study surveyed undergraduate students on their "impressions of diversity on campus and in the classroom." *Id.* at 225. Minority students "reported feeling isolated, and a majority of all students felt there was 'insufficient minority representation' in classrooms for 'the full benefits of diversity to occur.'" *Id.* (citing Walker Aff. ¶ 12).

In addition to not achieving diversity at the classroom level, the Top Ten Percent Law did not achieve diversity at the programmatic level. *Fisher*, 631 F.3d at 240. African American and Latino students enrolled in programs such as the College of Social Work in disproportionate numbers and were underrepresented in programs such as the College of Business Administration. *Id.* Almost a quarter of the undergraduate students in the College of Social Work were Latino and more than ten percent were African American. *Id.* However, only 14.5 percent of the students in the College of Business Administration were Latino and 3.4 percent were African American. *Id.*

The 2004 Proposal found that race-neutral attempts at achieving diversity were unsuccessful at the classroom level and the University had "no reason to believe" that these methods would succeed in the future. *2004 Proposal* at 39. Therefore, under the 2004 Proposal, the University decided to retain its race-neutral admissions policies and add the "consideration of race and ethnicity" as part of the "holistic, individual assessment of each student's background." *Id.* Race is considered "as one element of the personal achievement score, which itself is only a part of the total PAI." *Fisher,* 631 F.3d at 228-29. Race is not and cannot be determinative of admissions because it can only impact "a small part of the applicant's overall admissions score." *Id.* at 228.

Plaintiff Abigail Fisher was denied admission after the 2004 Proposal went into effect and has now challenged the program, alleging that the University's use of race in admissions denied her equal protection under the Fourteenth Amendment and violated her rights under 42 U.S.C. § 1983. Petition for Writ of Certiorari at 11, *Fisher v. Univ. of Tex. at Austin,* (No. 11-345), 2011 WL 4352286 (U.S. Sept. 15, 2011) [hereinafter "Petition for Certiorari"]. The district court granted summary judgment for the University, finding that the University complied with *Grutter* and the requirements of strict scrutiny. *Fisher*, 645 F. Supp. 2d at 613.

The U.S. Court of Appeals for the Fifth Circuit also upheld the University's use of race as constitutional, holding that the University had complied with *Grutter*. *Fisher*, 631 F.3d at 247. The University's admissions policy furthered the compelling interest of diversity by providing educational benefits and it was narrowly tailored in its holistic, individualized consideration of applicants. *See id.* On June 17, 2011, the Court of Appeals denied plaintiff's petition for rehearing en banc. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 303 (5th Cir. 2011) (per curiam). Plaintiff petitioned for writ of certiorari, arguing that the Court of Appeals did not apply the strict scrutiny test. Petition for Certiorari at 20. Specifically, plaintiff argued that the University did not have a compelling interest in using race to achieve classroom diversity. *Id.* at 22. Plaintiff asserted that the admissions policy was not narrowly tailored because using race was unnecessary given the Top Ten Percent Law. *Id.* at 22, 34.

This Court granted certiorari to determine whether the University's race-conscious admissions plan complies with *Grutter*.

SUMMARY OF ARGUMENT

The ACLU agrees with the University that its admissions program is constitutional. We write separately to address the arguments made by the Cato Institute ("Cato") in its Brief in Support of Petitioner. Brief for the Cato Institute as Amicus Curiae Supporting Petitioner, *Fisher v. Univ. of Tex.*

at Austin, (No. 11-345), 2012 WL 1961247 (U.S. May 29, 2012) [hereinafter "Cato Brief"].

1. Cato argues that the "strong basis in evidence" formulation of strict scrutiny ought to be used here both to decide if diversity at a university is a compelling state interest, and whether the University's use of race to achieve diversity is sufficiently narrowly tailored. Cato Brief at 21-23.

This Court developed the "strong basis in evidence" formulation of strict scrutiny in cases turning on a government's factual claim that it had discriminated in the past, or could be guilty of contemporaneous discrimination if it did not use race. The Court has not imported the "strong basis in evidence" formulation into the context of admissions where a university is attempting to use race not to undo past discrimination but rather to achieve part of its core educational mission. Instead, this Court has held that strict scrutiny of a university's use of race in admissions in pursuit of a diverse student body requires that the university give good faith consideration to race-neutral means, and use race only in a holistic, time limited process for evaluating applicants. *Grutter*, 539 U.S. at 339.

2. Under this Court's formulation of strict scrutiny in the admissions context, the University's program is constitutional. The University uses race as one limited factor in pursuit of the compelling goal of student diversity, it has given serious consideration to race-neutral alternatives, and it uses race in a non-determinative, holistic way in the applicant evaluation process.

I. THE “STRONG BASIS IN EVIDENCE” FORMULATION OF STRICT SCRUTINY DOES NOT APPLY IN THE CONTEXT OF UNIVERSITY ADMISSIONS.

Cato argues that the University should be required to make three evidentiary showings for its use of race in the admissions program to be constitutional. Cato Brief at 21. According to Cato, the University should be required to (1) “demonstrate, by empirical evidence or precedent, that its particular conception of racial diversity among students actually furthers a legitimate educational objective,” (2) “present evidence that minority enrollment is sufficiently low as to necessitate the use of . . . racial classifications” and that the compelling interest is “compelling in fact in this instance,” and (3) “validate[] each aspect of its use of racial preferences” with “evidence.” *Id.* at 21-23. In her Petition for Certiorari, the Petitioner also argues that the University should be required to make this strong evidentiary showing. Petition for Certiorari at 29-34. (“[The University] has failed to establish under any legitimate standard, let alone a ‘strong basis in evidence,’ that its use of race in admissions is ‘necessary’ . . . .” (internal citations omitted)).

Cato grounds its argument not in this Court’s decisions about the use of race in university admissions, *Grutter* and *Bakke*, but instead in decisions about when a government may use race to undo the effects of past race discrimination or to avoid engaging in contemporaneous race discrimination. *See* Cato Brief at 5-17. Those cases did require the government to show a “strong basis in evidence" that its use of race was calculated to vindicate a compelling government interest. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) and *Shaw v. Hunt*, 517 U.S. 899. 910 (1996) (*Shaw II*). But when it decided *Grutter*, this Court did not draw on those cases and it did not use the "strong basis in evidence" formulation for what the government needed to show to satisfy strict scrutiny. And as an examination of the cases using the "strong basis in evidence" standard shows, it would have made little sense for this Court to graft that approach onto the very different context of university admissions.

The "strong basis in evidence" formulation of strict scrutiny relevantly appears in ten Supreme Court opinions. Three are contracting or employment cases in which the government said it sought to use race to undo the effects of past discrimination: *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion), *Croson*, 488 U.S. at 500 and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995). Three are voting rights cases in which the government sought to justify its use of race in drawing district lines as a way to reverse the effects of past discrimination: *Shaw v. Reno*, 509 U.S. 630, 656 (1993) (*Shaw I*), *Shaw II*, 517 U.S. at 910, 915, 916 and *Miller v. Johnson*, 515 U.S. 900, 922 (1995). Two are voting rights cases in which it was argued that the government could use race in drawing district lines in order to avoid a violation of the Voting Rights Act's ban on race discrimination: *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) and *Bush v. Vera*, 517 U.S. 952, 977-79 (1996). One is a voting rights case where the formulation is used in a concurring and dissenting opinion on the use of race to remedy past discrimination and to avoid a violation of the Voting Rights Act. ***League of United Latin American Citizens v. Perry,*** 548 U.S. 399, 519 (2006) (Scalia, J., concurring in part and dissenting in part). Finally, in a closely related context, this Court used the "strong basis in evidence" formulation in a case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k), where the government said it wished to use race to avoid disparate impact liability under Title VII: *Ricci v. DeStefano*, 557 U.S. 557, 558 (2009). [5]

The "strong basis in evidence" formulation first appears in this Court's decisions in Justice Powell's plurality opinion in ***Wygant***, 476 U.S. at 277. In ***Wygant***, a school district implementing an agreement with a union protected minority employees from layoffs at the expense of white teachers. *Id.* The school board initially argued that the government interest served by the policy was to provide role models for students of color and to remedy past societal discrimination. *Id.* Later, at the

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[5] The standard is also mentioned in a dissent to a denial of a petition for writ of certiorari regarding governmental racial preferences in contracting. *See Concrete Works of Colo., Inc. v. City and Cnty. of Denver*, 540 U.S. 1027, 1029-30, 1033-34 (2003) (Scalia, J., dissenting). Finally, this standard is discussed in a concurrence in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701,754 (2007) (Thomas, J., concurring), in response to the dissent's claim that Seattle's school choice program was in place to remedy prior acts of discrimination. It was not part of the majority opinion.

Supreme Court, it argued that the policy was in place to "remedy prior discrimination" by the Jackson School District. *Id.* at 274-75, 277. The *Wygant* plurality rejected the first two interests as insufficiently compelling. *Id.* at 274-75. It then held that prior to taking race-based action to remedy past discrimination, the government must have a "strong basis in evidence" that the institution in question had been guilty of discrimination in the past. *Id.* at 277.

Since *Wygant*, this Court has applied the "strong basis in evidence" formulation of strict scrutiny to government attempts to justify the use of race in order to undo the effects of past discrimination. In *Croson*, the Court concluded that the City of Richmond did not have the kind of strong basis in evidence that would justify its requirement that contractors set aside thirty percent of their contract dollars for minority subcontractors. 488 U.S. at 500. The City simply did not make even a *prima facie* showing that anyone in the construction industry in Richmond had engaged in past discrimination that would violate either the U.S. constitution or a statute. *Id.* at 499-500. In *Adarand*, the Court applied the strong basis in evidence formulation to assess the federal government's highway contract program which provided financial incentives for hiring "subcontractors controlled by 'socially and economically disadvantaged individuals.'" 515 U.S. 200, 204 (citations omitted). The *Adarand* Court ruled that the standards applicable to state and local government—including the strong basis in evidence formulation—apply to the federal government as well. *Id.* at 222.

Relying on *Croson* and *Wygant*, this Court applied the "strong basis in evidence" formulation to situations in which the government sought to use past discrimination to justify redistricting plans where race was the predominant factor in how some lines were drawn. *See, e.g.*, *Shaw I*, 509 U.S. at 656, *Shaw II*, 517 U.S. at 910, 915, 916 and *Miller*, 515 U.S. at 922.

In both the employment/contracting cases and these voting rights cases, the government's justification for using race rests on essentially the same factual predicate: that its use of racial classifications was to remedy past racial discrimination. *See, e.g.*, *Croson*, 488 U.S. at 500; *Shaw II*, 517 U.S. at 910. In the other four cases, the government's justification for using race rests on a similar predicate. In *Vera*, the State of Texas argued that its use of race in drawing district lines was justified because the failure to do so would have resulted in a violation of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq*. 517 U.S. at 977-79. This Court struck down the districting plan, holding that the state had not shown a strong basis in evidence that without using race, it would have violated § 2. *Id.* Similarly, this Court used the "strong basis in evidence" formulation on the closely related question of assessing the government's claim that it sought to avoid disparate impact liability under Title VII. In *Ricci*, the City of New Haven refused to use the results of a promotional exam for firefighters because reliance on the exam would have given a disproportionate percentage of the promotions to whites. 577 U.S. at 579. The City argued that its refusal to certify the test results was justified by the disparate impact using the test would have had; had it used the test, the city argued, it would have violated the disparate impact provisions of Title VII. *Id.* at 575. However, the Court found that the City had only a "good-faith belief" that it would violate the disparate impact provisions of Title VII by using the test results. *Id.* at 581. That, this Court held, was not enough; the City needed instead a "strong basis in evidence" that it would violate Title VII before decertifying the exam results. *Id.* at 584.

Strict scrutiny calls for a "strong basis in the evidence" when the government's asserted compelling state interest for the use of race is based on the claim, i.e., that it had been or would be guilty of discrimination. Were a university to seek to justify the use of race in an admissions program in order to undo the effects of past discrimination, it may be that it would have to show a strong basis in evidence that it had discriminated in the past. But that is not what the University seeks to do. Instead, the University aims to obtain a racially diverse student body in order to "promote cross-racial understanding, break down racial stereotypes, enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as 'spokespersons' for their race." *Fisher*, 645 F. Supp. 2d at 603 (quoting *Grutter*, 539 U.S. at 319-20). As this Court held in *Grutter* and a number of other cases, context matters and remedying the effects of past discrimination is not the only compelling interest that can justify a government's use of race. In the university context, "securing the educational benefits of a diverse student body" is also a compelling state interest. *Grutter*, 539 U.S. at 333.

A university admissions plan is narrowly tailored to that end as long as the university has given serious, good faith consideration to race-neutral alternatives, its system uses a holistic approach to evaluating each student, it does not use quotas, and it has a logical endpoint in time. *Id.* at 337, 339, 342. Most tellingly, while a university must explain "how and when it employs" racial classifications so that the program can be measured against these criteria (*see, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 784-85 (2007) (Kennedy, J., concurring)), in *Grutter*, this Court did not insist that the law school provide evidence that diversity was essential to its educational mission; it deferred to the educators' judgment, at least absent a showing that the institution was not acting in good faith. *Grutter*, 539 U.S. at 329.

Although strict scrutiny does not require a "strong basis in evidence" for a university's holistic use of race in admissions, as the next section of this brief illustrates, the University has powerful evidence that its limited use of race in admissions is essential to reap the benefits of a diverse student body. The University attempted to achieve diversity through its holistic review of applicants, scholarships, targeted recruiting efforts, and its Top Ten Percent Law. *See 2004 Proposal* at 30, 38; Tex. Educ. Code § 51.803. Its experimentation with race-neutral policies provides ample data confirming the absence or near absence of racial diversity in classrooms and programs where discussion is likely to take place. The University's only option after seven years was to implement the modest program described. *2004 Proposal.* This data makes clear that the University's use of race is necessary and narrowly tailored to achieve the state's interest in diversity.

That the University in fact has strong evidence to support its limited use of race in admissions is, however, no reason to alter the formulation of strict scrutiny that this Court announced in *Grutter*. The distinctly different way this Court formulated the application of strict scrutiny in the educational diversity cases as opposed to the "strong basis in evidence" cases reflects two critical considerations. First, achieving diversity in education is not an effort to correct the consequences of past discrimination; it is instead an aspiration for the future. It looks not to what was or was not done, but to what the University hopes to achieve; it rests not on a factual premise, but lies instead at the heart of the University's mission. *See Grutter,* 539 U.S. at 329. Second, as this Court explained in *Grutter,* universities "occupy a special niche in our constitutional tradition." *Id.* Universities provide the training ground for a large number of our leaders, and our "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 324 (quoting *Bakke,* 438 U.S. at 313). "'[Education]'", according to this Court, "'is the very foundation of good citizenship.'" *Id.* at 331 (quoting *Brown v. Bd. of Educ.,* 347 U.S. 483, 493 (1954)). To perform those crucial roles of training leaders and providing the basis for good citizenship, the First Amendment accords universities expansive freedom of speech and autonomy to make judgments about how to educate, including who to include in a student body. *Grutter*, 539 U.S. at 329.

The proper application of strict scrutiny to university admissions was set out by this Court in *Grutter*.[6]

II. THE UNIVERSITY'S PLAN MEETS THE REQUIRMENTS OF STRICT SCRUTINY.

Securing the educational benefits of diversity is a compelling interest. Cato does not question that those benefits are the university's goal. Nor does it suggest that the University is not acting in good faith. The first part of strict scrutiny—the presence of a compelling state interest—is therefore established. *See Grutter*, 539 U.S. at 327-29.

Under *Grutter* and *Parents Involved* the second part of the analysis, narrow tailoring, requires a university to: (1) give "serious, good faith consideration" to "workable race-neutral alternatives;" (2) use an "individualized, holistic" process for considering candidates and not use quotas; and (3) create a program with a "logical end point." *Grutter*, 539 U.S. at 334-42; *see also Parents*

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[6] Moreover, importing the "strong basis in evidence" formulation to university admissions would require that every university in the country separately prove that diversity is a compelling state interest rather than permitting them to rely upon this Court's holding in *Grutter*. The Court's "legitimacy requires, above all, that [it] adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds." *Vera*, 517 U.S. at 985. Such a requirement would undermine the "long established precedent . . . integrated into the fabric of the law" created by both *Grutter* and *Bakke*. *Adarand*, 515 U.S. at 233.

Involved, 551 U.S. at 783 (Kennedy, J., concurring). For a court to verify that the process is holistic, the University needs to explain "how and when it employs" race, *Parents Involved*, 551 U.S. at 784-85 (Kennedy, J., concurring).

A. The University Gave Serious Good Faith Consideration to Race-Neutral Alternatives.

The University is not required to "exhaust[] . . . every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. But prior to implementing a race-conscious admissions policy, a university or school district must consider workable race-neutral alternatives. *Id.*; *Parents Involved*, 551 U.S. at 704.

The University has a long and deep history of attempting to achieve diversity without race-conscious policies. For seven years, following *Hopwood* and prior to reintroducing race in its admissions program in 2004, the University used only the race-neutral Top Ten Percent Law and other race-neutral means, such as scholarships, for deciding whom to admit. During that time, it gathered statistics and other information on the impact of the race-neutral policies on student diversity. *See Fisher*, 631 F.3d at 225. After conducting its study in 2004, the University concluded that it had not achieved a sufficient number of underrepresented students in many of its classrooms and programs, and therefore it was not adequately providing the educational benefits of diversity to its students. *See 2004 Proposal* at 32-33. It was only after its 2004 study, for the incoming class of 2005, that the University reintroduced race into its admissions process as a "factor of a factor of a factor of a factor" in its PAI index. *Fisher*, 645 F. Supp. 2d at 608.

B. The University's Decision that Classroom and Program Diversity is Part of its Educational Mission is Entitled to Deference.

Although conceding that the University's aim of diversity at the classroom level appears closely tied to the legitimate goals of promoting cross-racial understanding and diminishing the force of stereotypes about the existence of minority viewpoints, Cato suggests that the University has not justified its goal of diversity at the department level. *See* Cato Brief at 33 (The University "asserts an interest in achieving a 'critical mass' within every classroom and every major. . . [and its] goal may actually be more closely tailored to the aim of 'encourag[ing] underrepresented minority students to participate in the classroom and not feel isolated.' But it is impossible to extract from that generalization any firm sense of necessity . . . ." (second alteration in original) (internal citations omitted)).

Public universities have an interest in achieving a diverse student body in order to promote cross-racial understanding, break down racial stereotypes and achieve classroom discussion that is "livelier, more spirited, and simply more enlightening and interesting." *Grutter*, 539 U.S. at 328, 330 (opinion of O'Connor, J.) (internal quotations omitted).

It is difficult to see how the University could obtain the benefits of diversity without a program calculated to bring about diversity at the classroom level. With the enrollment figures described in the 2004 Proposal,[7] the one or two students in each classroom could hardly help but be "spokes[people] for their race" despite this Court's acknowledgement that the educational benefits of diversity are not achieved when this occurs. *Grutter*, 539 U.S. at 380; *see Bakke*, 438 U.S. at 316, 323. "[I]f [a university] is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers." *Bakke*, 438 U.S. at 323 (third alteration in original). "[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no minority viewpoint but rather a variety of viewpoints among minority students." *Grutter*, 539 U.S. at 319-20 (internal quotation marks and citation omitted).

The University's efforts to achieve diversity at the classroom level rest on its judgment about how it can in fact realize the benefits of diversity. It is, therefore, a quintessentially educational judgment that is entitled to deference under this Court's decisions about academic freedom. As this Court has held, the wisdom of university officials should determine who a university will teach, what will be taught, how it will be taught, and who may be admitted to study. Those educators are in a better position to make those determinations than are the courts. The academic freedom of American universities is both essential to their missions and "almost self-evident." *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957)(plurality opinion). In academic freedom cases at both the secondary and university level, the Court has refused to second-guess educators about academic policy and how best to carry it out. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2976, 2988 (2010) ("[J]udges lack the on-the-ground expertise and experience of school administrators" and should not "'substitut[e] their own notions of sound educational policy for those of the school authorities which they review.'") (quoting *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206 (1982)). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (noting the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."). *See, e.g.*, *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."). This Court should then defer to the University's judgment that diversity at the classroom level is essential to reap the educational benefits of a diverse student body.

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[7] *See supra* "Statement of Facts."

C. There is Ample Evidence About the Admissions Program and it Shows that Student Files are Reviewed Holistically.

The court must have information about "how and when [a school] employs" racial classifications. *Parents Involved*, 551 U.S. at 784-85 (Kennedy, J., concurring). If the explanation for a race-conscious education program is too "broad and imprecise," it fails the narrowly tailored prong of strict scrutiny. *Id.* at 785. In this case, the University has given a detailed explanation of its use of race in its 2004 Proposal, which demonstrates that the applications of students not admitted via the Top Ten Percent Law are reviewed holistically. *2004 Proposal* at 23.

Under the 2004 Proposal, the University considers race as part of an overall review of scores on two essays; leadership; extracurricular activities; work experience; service to school or community; and "special circumstances," such as socio-economic status, whether the applicant is from a single-parent household, language spoken at home, family responsibilities, and the student's SAT/ACT score in relation to the average score of students from his or her high school. Walker Aff. ¶ 14. The race of an applicant is just one of a number of factors considered in developing the PAI score, which is always considered with the AI index. *2004 Proposal* at 27-28. And the race of any student, including white and Asian American students, could be a factor. *Fisher*, 645 F. Supp. 2d at 606; *see also* Brief for Respondent at 26, *Fisher v. Univ. of Tex. at*

Austin, (No. 11-345) (Aug. 6, 2012) (describing how "any applicant—of any race—can benefit from UT's contextualized consideration of race."). The University's consideration of race as a minor factor in its admissions process is unlike the Seattle school district's reliance on "crude racial categories of white and non-white" in student assignments in *Parents Involved*. 551 U.S. at 786 (internal citations omitted).

Quotas are not narrowly tailored because they do not provide individualized, holistic consideration of applicants. *See Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.); *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting); *see also Grutter*, 539 U.S. at 334. The factors, which gave rise to the concern that a quota was in fact in operation in Michigan, are not present here. *Grutter*, 539 U.S. at 337. In the University admissions process, the race of a candidate is not "outcome determinative" and admissions personnel do not keep track of how many students are being admitted of each race. *See Fisher*, 631 F.3d at 597; *cf. Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting). In fact, the University gives "serious consideration to all the ways an applicant might contribute to a diverse educational environment." *See Grutter*, 539 U.S. at 337. The admissions process at Texas is "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.'" *Id.* (quoting *Bakke,* 438 U.S. at 317 (opinion of Powell, J.)).

While the use of race has produced modest results, this is precisely because the University does not use quotas or keep track of its results. Cato criticizes the University for this, but the district court properly recognized that such a criticism is an "attempt to force [the University] into an impossible catch-22" between the requirement that the use of race be narrowly tailored and that it "have more than a minimal effect." *Fisher*, 645 F. Supp. 2d at 609 (citing *Parents Involved*, 551 U.S. at 703). The district court and the Fifth Circuit correctly rejected the idea that any program which generates fewer students than a quota is ineffectual. As those courts explained, *Parents Involved* criticized the "minimal effect" that the use of race had on school assignments "as evidence that the school districts had failed to 'consider[] methods other than explicit racial classifications to achieve these stated goals.'" *Fisher*, 645 F. Supp. 2d at 610 (quoting *Parents Involved*, 551 U.S. at 735); *see also Fisher*, 631 F.3d at 246. But here, as explained, the evidence is clear that the University considered and employed other methods unsuccessfully for seven years. To require greater success from this program would demand that the university devise targets or set aside seats – both actions that are prohibited by this Court's jurisprudence. *Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.); *Grutter*, 539 U.S. at 394 (Kennedy, J. dissenting).

D. Texas' Program is Limited in Time

The final "narrowly tailored" requisite is that the program have "reasonable durational limits" and have a "logical end point." *Grutter*, 539 U.S. at 342. The University easily meets this requirement. Every five years, it reviews whether "racial preferences are still necessary to achieve student body diversity." *Id.*; *see Fisher*, 645 F. Supp. 2d at 611. Cato does not and cannot contest this point.

CONCLUSION

This Court developed an analysis for applying strict scrutiny to the use of race in university admissions that is sensitive both to the commands of equal protection and the mission and context of higher education. It should apply that analysis here, and not graft onto it "tests" that do not make sense in this context.

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ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we seek to ensure that the protections of the Constitution apply to all Americans equally regardless of race, without politically correct bias.

STATEMENT OF THE CASE

White female Abigail Noel Fisher was denied admission to the University of Texas (UT) in 2008, even though her academic qualifications exceeded those of many minority applicants who were admitted. Before the decision in *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996), UT directly considered race in admissions, and it was often a controlling, determinative factor. App. 16a.

After *Hopwood* prohibited UT from using race in admissions, the University adopted an admissions system involving a Personal Achievement Index (PAI) for each applicant, designed to increase minority enrollment through race neutral means. App. 17-18a. The PAI was subjectively based on two essays and several "special circumstances" disproportionally affecting minority applicants, such as ""the socioeconomic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household." App. 121a. This was considered in addition to the applicant's Academic Index (AI), which was based on the student's high school class rank and standardized test scores. App. 15a.

Also in 1997, Texas enacted the Top 10% Law, which required UT to admit all Texas high school seniors in the top 10% of their graduating classes. H.B. 588, Tex. Educ. Code Sect. 51.803 (1997). But the AI and PAI scores still determined whether students would be admitted to particular majors, courses of study, and academic programs within the university. App. 129a, 130a; JA 164a. The race-neutral Top 10% Law substantially increased minority enrollment, returning it to the levels before the *Hopwood* decision by 1999, App. 19a; JA 343a, and beyond by 2003, JA 348a; App. 20a.

Despite the success of these race neutral policies, UT announced on the very day of the release of *Grutter v. Bollinger*, 539 U.S. 306 (2003) that it would restore race as a factor in admissions decisions. JA 356a-357a. Under the adopted policy, race was added to the list of "special circumstances" in calculating each applicant's PAI score. JA 432a-433a; SJA 29a. UT uses race in admissions to favor African-Americans and Hispanics, but to disfavor Asian-Americans, who it considers overrepresented among UT students even though the UT student body includes fewer Asian-Americans than Hispanics. App. 154a. UT's explanation for restoring race to the admissions process in spite of record minority enrollments under the former race neutral admissions criteria is that it considers minorities inadequately represented in every small class with as few as 5 to 24 students, App. 21a; SJA 25a-26a, and to achieve racial balance between the university's undergraduate population and the state's population. SJA 24a. This racial component of the PAI score also affects placement of all those admitted among particular majors, courses of study, and academic programs within the university. App. 30a-31a.

UT officials have conceded on the record that race "can make a difference" in individual admission decisions. App. 33a. But for the student body overall, the racial component of the admissions process makes little difference. Just over 80% of incoming freshmen are automatically admitted each year under the Top 10% Law. In 2008 when Petitioner applied, with the racially based admission policies in force, a total of 216 African-American and Hispanics students were admitted who were not among the top 10% in a Texas high school, comprising 3.4% of the incoming Freshman class. SJA 157a.

Moreover, many of these would have been admitted without regard to their race, qualifying on the basis of AI scores, or under the former race-neutral PAI system. App. 103a-104a; JA 410a. Indeed, assuming the same proportion of minorities in the student population admitted under the race neutral policies of 2004 would have been admitted under those policies in 2008, the racially based admissions policies of 2008 admitted a total of 33 additional African-American and Hispanic students that year, out of a total incoming freshman class of 6,322 students. SJA 157a. So the racially based admission policies accounted for 0.5% of the freshman class of 2008. That is what led Judge Garza to observe in his special concurrence below that UT's "use of race has had an infinitesimal impact on critical mass in the student body as a whole." App. 107a.

Indeed, by 2008 African-American and Hispanic students accounted for 25.5% of the incoming freshmen class, up from 16.2% in 1998, almost all due to the race neutral Top 10% Law that dominates admissions at UT. SJA 156a. By 2010, a majority of the incoming freshmen class were minority students, with only a negligible impact from the racially based admissions criteria.[2] Yet UT continues to use racial considerations in its admission decisions.

Denied admission to UT based on her race, Petitioner Abigail Fisher sued UT in the United States District Court for the Western District of Texas, alleging that UT's use of race in admissions is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. Sections 1981 and 1983, and Title VI of the Civil Rights Act of 1964. App. 3a. On cross motions for summary judgment, the district court concluded that UT's race-based admission's policy was constitutional "as long as *Grutter* remains good law." App. 169a.

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[2] The University of Texas at Austin, Division of Diversity and Community Engagement, 2010-2011 Impact Report, at 6 ("Fifty-two percent of our freshmen are minority students, including 23 percent who are Hispanic...."); *Class of First-Time Freshmen Not a White Majority This Fall Semester at [UT]* (Sept. 14, 2010), *available at* www.utexas.edu/news/2010/09/14student_enrollment2010/ (last visited May 25, 2012).

On appeal, the Fifth Circuit recognized that UT's admissions policies discriminate between applicants based on race, and so are subject to strict scrutiny. App. 35a. The court, however, did not apply strict scrutiny, but rather its own novel test that could perhaps best be called "due deference," in practice amounting to the rational basis test at best, if not just total deference to the university. The court held that the university did "reintroduce race as a factor in admissions" but upheld that because the decision to do so "was made in good faith," apparently meaning that as long as the decision to discriminate was made with good intentions, it is constitutional. App. 47a. That does not accord with the strict scrutiny test, however, that the court recognized does apply.

Judge Garza specially concurred with the majority because he felt that the court was bound by *Grutter*, which he saw as

> "abandon[ing] [strict scrutiny] and substituting in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades."

App. 109a. Moreover, Judge Garza found that UT's use of race could not be "narrowly tailored where the University's highly suspect use of race provides no discernible educational impact." App. 108a. Judge Garza concluded, regarding *Grutter*, "Like the plaintiffs and countless other college applicants denied admission based, in part, on government sponsored racial discrimination, I await the Court's return to constitutional first principles." App. 114a.

The Fifth Circuit denied rehearing en banc 9 to 7. Chief Judge Jones writing for five of the dissenters argued that the panel had "extended *Grutter* in three ways" and consequently "abdicated judicial review of a race-conscious admissions program for undergraduate students." The decision, Jones wrote,

> "in effect gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires."

App. 175a.

Jones added,

> "*Grutter* does not countenance 'deference' to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications."

App. 178a. She noted that, "the Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment," but here the "additional diversity contribution of the University's race-conscious admissions program is tiny, and far from indispensable." App. 182a. She concluded that the panel had "approve[d] gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of

University entrants being African-American or Hispanic. *Id.*

SUMMARY OF ARGUMENT

Under the applicable strict scrutiny standard, and on the undisputed facts of this case, it could not be more clear that the time has come to end all racial preferences and quotas for admission to UT, and to any major, course of study, or academic program within the university.

Moreover, at this time in our nation's history, it would be desirable for this Court to announce a bright line decision that ends once and for all any racial preferences, quotas and discrimination for admission to any college or university in America. Such racial preferences in admissions have proved harmful to the very minority students that are supposed to be helped.

But even under *Grutter*, UT's racial preferences for admission are unconstitutional. The compelling interests advanced by UT to justify its racial preferences do not fall within the educational interest in student body diversity permitted under *Grutter*. Given that a majority of students at UT today are already minorities, clearly UT has already more than attained the critical mass necessary to achieve the educational benefits of diversity.

That was achieved, moreover, with race-neutral policies, particularly the Top 10% Law, and the race-neutral policies formerly mandated by *Hopwood*. The "infinitesimal" number of minority students added to UT's minority majority by racial preferences further shows that such preferences are no longer necessary to achieve the educational benefits of diversity, and so should not be allowed under the Constitution's Equal Protection Clause.

Consequently, this Court should reverse the court below, with a decision making clear that racial preferences can no longer be used in any form for admission to UT, or to any academic activities within UT. It would be most desirable to do that by overruling *Grutter*. But even under *Grutter*, UT's racial preferences in admissions are unconstitutional under the Equal Protection Clause. This Court consequently can strike down those racial preferences without overruling *Grutter*.

ARGUMENT

I. THE TIME HAS COME TO END RACIAL PREFERENCES IN COLLEGE ADMISSIONS.

The Equal Protection Clause provides, "No State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV, Sect. 1. The state of Texas has denied that equal protection to Petitioner Abigail Fisher.

Petitioner Fisher applied for admission to UT expecting to be treated the same as anyone else under the law, as she has a right to expect under the rule of law and the United States Constitution. But she was denied admission even though she presented superior academic qualifications to many others who were admitted.

The undisputed reason for that denial is that she is white, a member of the Caucasian race or classification, while those favored with admission despite lesser academic qualifications were of different racial classifications. This institutionalized, government racism has no place in 21st century America.

The greatest warrior in the 20th Century for equality under the law, the very principle embodied in the Constitution's Equal Protection Clause, was the Reverend Martin Luther King, who called for a day when every American would be judged by the content of their character rather than the color of their skin. But Petitioner Fisher was judged for admission to UT by the color of her skin, in violation of the Equal Protection Clause.

The motivation for such institutionalized government racism may be different today than in the past, involving more political favoritism for the preferred class than hatred or disdain or unreasoned stereotyping for the disfavored class. But it still amounts to inequality under the law, in violation of the Equal Protection Clause.

And such discrimination based on political favoritism can be just as stubborn and long-lasting as discrimination based on old-fashioned racism, because it can be the root of political power for the governing or ruling class. But our Constitution does not respect or provide protection for such political favoritism. It provides protection for equality under the law, which is what Petitioner Abigail Fisher has a right to expect. Only this Court can now enforce that right.

In *Miller v. Johnson*, 515 U.S. 900, 904 (1995) this Court recognized that the "central mandate" of equal protection is "racial neutrality in governmental decisionmaking." That is why any government classification based on race is subject to "the strictest judicial scrutiny" regardless of the race of those "burdened or benefited by a particular classification." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). *ACCORD: Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Grutter*.

Under strict scrutiny, a racial classification must be "necessary to further a compelling governmental interest," and must be "narrowly tailored to that end." *Johnson*, 543 U.S. at 514; *Adarand*, 515 U.S. at 227, 236; *Croson*, 488 U.S. at 495, 500; *Grutter*, 539 U.S. at 342. "[T]he mere recitation of a benign or legitimate purpose" is not "an automatic shield which protects against any inquiry" into the necessity of race-based preferences. *Croson*, 488 U.S. at 500. "[G]overnment may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227.

This Court, of course, is deciding only the case before it, and not setting policies for the entire nation in all circumstances. Under the applicable strict scrutiny standard, and on the undisputed facts of this case, it could not be more clear that the time has come to end all racial preferences and quotas for admission to UT, and to any major, course of study, or academic program within the university.

There is no dispute that race is currently used by the university in such admission considerations. But UT is now a university where minority students constitute a majority of the entire student body. Moreover, there is not a whiff of invidious racial discrimination against minorities anywhere among the administration at UT. On such facts there can be no compelling interest in government racial discrimination any longer. The compelling interest at UT is now equal protection for all.

Consequently, this Court should reverse the court below, with a decision making clear that racial preferences can no longer be used in any form for admission to UT, or to any academic activities within UT. It would be most desirable to do that by overruling *Grutter*, for Judge Garza is right that *Grutter* abandons strict scrutiny and substitutes instead "an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades." App. 109a. *Grutter* today serves only to confuse rather than clarify the law.

But, as discussed in detail below, the continued racial preferences and discrimination at UT cannot be justified even under the loose, open-ended standards of *Grutter*. Consequently, this Court can end any further racial preferences in admission anywhere at UT without overruling that case.

Moreover, at this time in our nation's history, it would be desirable for this Court to announce a bright line decision that ends once and for all any racial preferences, quotas and discrimination for admission to any college or university in America. There is no continuing, meaningful, invidious discrimination today against minorities among our nation's colleges and universities. Indeed, today an African-American sits as President of these United States, and numerous minority officials hold office in the Congress, in the federal courts, and throughout state and local governments. This Court does need to find that there is no racism anywhere in the United States to conclude that it is time to end all such racism and discrimination in admission to our nation's colleges and universities, even where well-intentioned.

Indeed, such racial preferences in admissions have proved harmful to the very minority students that are supposed to be helped. Because of such racial preferences, some minority students are admitted to schools that are more academically competitive than their academic skills warrant. Consequently, they perform less well, or drop out altogether at higher rates, than if they had been admitted to schools better matched to their capabilities. That result harms or disadvantages their future careers, rather than helping to advance them.[3] That problem has been recognized by this Court. *Croson*, 488 U.S. at 493 (Racial preferences "carry a danger of stigmatic harm" and may "promote notions of racial inferiority."); *Adarand*, 515 U.S. at 229 (Because a racial preference "inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified by their race," it can perversely harm its supposed beneficiaries.).

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[3] Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier & Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681 (1996); Frederick Smyth & John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 Res. Higher Ed. 353 (2004); Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?*, Working Paper 23-24 (Draft July 2009)("Minority attrition in science is a very real problem, and the evidence in this paper suggests that 'negative mismatch' probably plays a role in it....[S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers."); Elizabeth Culotta, Black Colleges Cultivate Scientists, 258 Science 1216, 1218 (Nov. 13, 1992) ("The way we see it, the majority schools are wasting large numbers of good students. They have black students with admissions statistics [that are] very high, tops. But these students wind up majoring in sociology or recreation or get wiped out altogether."); Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124, 212 (2003)("African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools."); Richard Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 367 (2004); James Davis, The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men, 72 Am. J. Socio. 17 (1966).

But, for all of the reasons stated above, this Court should at a minimum reverse the court below, and end all racial preferences, quotas and discrimination for admission to UT, or to any academic activities within UT.

II. EVEN UNDER *GRUTTER*, UT'S RACIAL PREFERENCES FOR ADMISSION ARE UNCONSTITUTIONAL

Grutter held that universities can have "a compelling interest in obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. *Grutter* consequently allows racial preferences in college and university admissions to produce a "critical mass" of minority students in the student body to obtain these educational benefits. *Id.* at 333.

This "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id.* at 330. In other words, racial preferences in admissions are allowed to produce the critical mass of minority students needed to achieve the educational benefits of diversity. But a university is not allowed to utilize racial preferences in admissions "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin," such as to achieve a racial balance in its student population in proportion to the racial balance of the general population. *Id.*

The compelling interests advanced by UT to justify its racial preferences do not fall within the educational interest in student body diversity permitted under *Grutter*. UT asserts a compelling interest in using racial preferences for admissions to achieve student body demographics in the same proportions as the racial demographics of the state. App. 47a - 51a. But this is exactly what was expressly not allowed by *Grutter* or by *Parents Involved*. Just as in *Parents Involved*, 551 U.S. at 727, there is "no evidence that the level of racial diversity necessary to achieve the [compelling] educational benefits [of diversity] happens to coincide with the racial demographics" of Texas.

In other words, UT's goal is not the racial diversity necessary to achieve the educational value of campus experiences and exchanges that result from a racially diverse student body where minority students do not feel "isolated or like spokespersons for their race," 539 U.S. at 319, which is what *Grutter* allowed as a compelling interest. Rather, UT's goal or asserted compelling interest is "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin," *Id.* at 329, which is nothing more than the "outright racial balancing" which this Court actually found "patently unconstitutional" in *Grutter*. *Id.* at 330. As this Court said in *Grutter*, "proportional representation" can never be a constitutional "rationale for programs of preferential treatment." *Id.* at 343.

The problem with racial preferences to achieve racial balance is shown by UT's differing treatment of Asian-Americans and other minorities. UT's racial preferences in admissions actually disfavor Asian-Americans, which UT considers "over-represented" in its student body, while those preferences favor Hispanics, even though "the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT." App. 154a. This disparity demonstrates that UT's racial preferences are not designed to achieve "the educational benefits of a diverse student body," 539 U.S. at 333, which is only what was allowed by *Grutter*. Otherwise, why would fewer Asian-Americans than Hispanics be needed to achieve the educational benefits of diversity?

Indeed, allowing universities to employ race in admissions decisions to achieve racial balance in student populations reflecting the racial balance of state populations could result to the detriment of qualified minority applicants in racially homogenous states, just as it has for Asian-Americans at UT.

The Fifth Circuit argued that UT's racial preferences were constitutionally acceptable because they represented "measured attention to the community [UT] serves" to "send a message" to that community "that people of all stripes can succeed at UT." App. 48a, 50a. But the Constitution does not allow racial preferences to send a message. If UT wants to send a message, it can use Western Union.

Given that a majority of students at UT today are already minorities, clearly UT has already more than attained the critical mass necessary to achieve the educational benefits of diversity. Indeed, UT is already one of the most diverse universities in the entire country. That is why it has already been recognized as one of the nation's "Best Schools for Hispanics" by *Hispanic Business Magazine*, JA 325a, and as one of the "top producers of undergraduates for Hispanics" in the nation by *Diverse Issues in Higher Education* magazine, JA 320a.

That was achieved, moreover, with race-neutral policies, particularly the Top 10% Law, and the race-neutral policies formerly mandated by *Hopwood*. The "infinitesimal" number of minority students added to UT's minority majority by racial preferences further shows that such preferences are no longer necessary to achieve the educational benefits of diversity, and so should not be allowed under the Constitution's Equal Protection Clause. Where "a nonracial approach...could promote the substantial interest about as well and at tolerable administrative expense," then racial preferences are prohibited by the Equal Protection Clause. *Wygant v. Jackson Board of Education*, 476 U.S. 276 (1986); *Parents Involved*, 551 U.S. at 728, 733-734, 745, 746; *see also id.* at 790 (Kennedy, J., concurring). That is the case here, with the racial preferences identified as ultimately resulting in 33 additional minority students attending UT, out of an incoming class of 6,322, or 0.5% of the class.

UT also argues that its racial preferences serve a compelling interest because otherwise its student body racial diversity would not "translate[] into adequate diversity in the classroom." App. 68a. That is because UT defines adequate classroom diversity as at least two African-Americans, two Hispanics and two Asian-Americans in its small class sections of 5 to 24 students. App. 21a; SJA 25a-26a. But that goal is mathematically impossible to achieve in the smallest class sections. Moreover, UT's anti-Asian-American racial preferences in admissions actually work against this stated goal of classroom diversity.

In any event, this Court made clear in *Grutter* that the critical mass of minority students that racial preferences can be used to achieve is to be measured against the enrolled student body, and not the proportion of minority students in each individual class. *See id.* at 318, 325, 328, 329, 343. As Judge Garza recognized, if race based admissions are to be allowed until critical mass is attained "not merely in the student body generally, but major-by-major and classroom-by-classroom," the result will be "race-based preferences in seeming perpetuity." App. 87a. Chief Judge Jones added, "Will the University accept this 'goal' as carte blanche to add minorities until a 'critical mass' chooses nuclear physics as a major?" App. 183a.

Grutter retained limits on racial preferences in college and university admissions because of the "serious problems of justice connected with the idea of preference itself." *Id.* at 341. As Justice Kennedy added in dissent in *Grutter*, "Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality." *Id.* at 388. For these reasons, UT cannot be allowed to extend *Grutter* to an unprecedented classroom-diversity interest.

Consequently, even under *Grutter*, UT's racial preferences in admissions are unconstitutional under the Equal Protection Clause. This Court consequently can strike down those racial preferences without overruling *Grutter*.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully submits that this Court should reverse the judgment of the Fifth Circuit below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND 39 OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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American Association of University Professors
American College Personnel Association
American Indian Higher Education Consortium
American Speech-Language-Hearing Association
Association of American Colleges and Universities
Association of American Universities
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Association of Community College Trustees
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Association of Jesuit Colleges and Universities
Association of Public and Land Grant Universities
Association of Research Libraries
Association to Advance Collegiate Schools of Business
College and University Professional Association for Human Resources
The Common Application
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Council for Higher Education Accreditation
Council for Opportunity in Education
Council of Graduate Schools
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National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
National Collegiate Athletic Association
Southern Association of Colleges and Schools Commission on Colleges
Student Affairs Administrators in Higher Education
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND 39 OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

Amici are 40 associations of colleges, universities, educators, trustees, and other representatives of higher education in the United States. *Amici* represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. American higher education institutions enroll over 20 million students. For decades *amici* have worked to achieve student diversity.

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[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to the brief. All parties filed blanket *amicus* consent letters.

Amicus American Council on Education (ACE) represents all higher education sectors. Its approximately 1800 members include a substantial majority of United States colleges and universities. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system to be the cornerstone of a democratic society. Among its initiatives, ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, chaired by former Presidents Ford and Carter, which issued *One-Third of a Nation* (1988), a report on minority matriculation, retention, and graduation. ACE regularly contributes *amicus* briefs on issues of importance to the education sector.

The Addendum contains information on the other *amici* on this brief.

SUMMARY OF ARGUMENT

A diverse student body is essential to the educational objectives of colleges and universities. This Court held in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), that obtaining the educational benefits that flow from a diverse student body is a compelling governmental interest that justifies narrowly tailored consideration of race in college admissions. The holding in *Grutter* is even more urgent today than it was in 2003. Higher education institutions must equip their students to work and live in an interconnected world, stimulate students' interest in the new and unfamiliar, and prepare them to understand and account for differences. Diversity thus remains a compelling interest in higher education.

Diversity is not a one-size-fits-all concept, however. Each higher education institution must define student body diversity in a manner consistent with its educational mission. As the Court recognized in *Grutter*, when an institution determines its educational goals—including its conception of diversity—it makes an educational judgment that merits deference. Courts may rightly scrutinize the means chosen to pursue diversity, but they defer to educators' experience and expertise in determining what sort of diversity, and how much, their institution needs.

Petitioner would depart from this settled analysis and invite judicial superintendence of institutions' educational objectives. Rather than focus analysis on whether the means chosen fit the articulated educational goals, she would change the focus of judicial scrutiny to the goals themselves—asking courts to supervise and supersede educators' context-specific educational judgments. That approach would be at odds with the longstanding beneficial tradition of governmental forbearance in American higher education, and should be rejected.

ARGUMENT

I. THE INTEREST IN STUDENT DIVERSITY IS EVEN MORE COMPELLING NOW THAN IT WAS A DECADE AGO.

This Court held in *Grutter* that obtaining the educational benefits that flow from a diverse student body is a compelling interest that can justify the narrowly tailored consideration of race in college admissions. That holding was prescient. In an increasingly interconnected world, diversity in higher education is now more urgent than ever.

A. Student Diversity Is A Compelling Interest.

This Court has long recognized that the Equal Protection Clause does not categorically prohibit colleges and universities from considering race in admissions. In *Regents of the University of California* v. *Bakke*, the Court reversed an injunction barring the State from "ever considering the race of any applicant." 438 U.S. 265, 320 (1978) (opinion of the Court). Higher education institutions, the Court explained, have a "substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.*

The Court elaborated twenty-five years later in *Grutter*. At issue was the University of Michigan Law School's use of race as a means to "obtain[ ] 'the educational benefits that flow from a diverse student body.' " 539 U.S. at 328 (citation omitted). The Law School explained that student body diversity was " 'of paramount importance in the fulfillment of its mission.' " Br. for Respondents in No. 02-241, at 28 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)). A racially integrated learning environment helped its students "learn how to bridge racial divides, work sensitively and effectively with people of different races, and simply overcome the initial discomfort of interacting with people that are very different from themselves that is a hallmark of human nature." *Id.* at 25. Those educational benefits, moreover, could be attained only through a race-conscious admissions policy. The Law School had considered a number of race-neutral means of assembling a racially diverse student body, but concluded that all were "demonstrably unworkable or would substitute a different institutional mission for the one that the Law School has chosen." *Id.* at 33.

This Court upheld the Law School's admissions policy and endorsed the pursuit of diversity in higher education. Echoing Justice Powell's *Bakke* opinion, the Court held that higher education institutions have a compelling interest in "obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343; *see also Bakke*, 438 U.S. at 314 (opinion of Powell, J.) ("the interest of diversity is compelling in the context of a university's admissions program"). Those benefits, the Court recognized, are "substantial." *Grutter*, 539 U.S. at 330. "[N]umerous studies show that student body diversity promotes learning outcomes, * * * 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.' " *Id.* (citation omitted).[2] Diversity also promotes cross-racial understanding, helps to break down stereotypes, and enables students to better understand those who are different. *Id.* To seek these benefits through diversity is properly understood to be at the core of institutions' academic mission. *Id.* at 329.

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[2] Research findings that support this conclusion have grown more robust since *Grutter* was decided. *See, e.g.*, A.L. Antonio *et al.*, *Approaching Diversity Work in the University: Lessons from an American Context*, in *As the World Turns: Implications of Global Shifts in Higher Education for Theory, Research and Practice* 371–401 (Walter R. Allen *et al.* eds. 2012); S. Hurtado & L. D'Angelo, *Linking Diversity and Civic-Minded Practices with Student Outcomes: New Evidence from National Surveys*, 98 Liberal Education 2 (2012); N. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Review of Educational Research 4 (2010); N. Denson & M.J. Chang, *Racial Diversity Matters: The Impact of Diversity-*

As the *Grutter* Court observed, the educational benefits of diversity are "not theoretical but real." *Id.* at 330. American businesses emphasized that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* Retired military leaders explained that national security depends on the ability to train a "highly qualified, racially diverse officer corps." *Id.* at 330-331. And "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332.

Although the *Grutter* Court canvassed the evidence demonstrating the benefits of diversity in higher education, it did not purport to weigh that evidence de novo. Such an exercise would have been misguided, for judges are ill-equipped to assess the merits of particular educational approaches. *See Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 (1985) (courts are not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public

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Related Student Engagement and Institutional Context, 46 American Educational Research Journal 322 (2008); N. Gottfredson *et al.*, *Does Diversity at Undergraduate Institutions Influence Student Outcomes?*, 1 Journal of Diversity in Higher Education 80 (2008).

educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking' " (citation omitted)). The universities themselves have the "experience and expertise" to make educational judgments. *Grutter*, 539 U.S. at 333. Accordingly, the Court deferred to the Law School's judgment that attaining student body diversity was essential to its educational mission. *Id.* at 328.

Judicial deference to institutions' educational judgments was particularly appropriate in light of the "special niche" universities occupy in the American constitutional tradition. *Id.* at 329. The constitution protects universities' freedom to define and pursue educational goals. *See, e.g.*, *Ewing*, 474 U.S. at 225; *Board of Curators of Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, 96 n.6 (1978); *Bakke*, 438 U.S. at 319 n.53 (opinion of Powell, J.). And academic freedom extends beyond scholarship to governance by the academies themselves, including control over the composition of the student body. *Grutter*, 539 U.S. at 329 (citing *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)); *see also Edwards* v. *California Univ. of Penn.*, 156 F.3d 488, 492 (3d Cir. 1998) (Alito, J.). Constitutionally informed principles of academic freedom "provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence." *Grutter*, 539 U.S. at 387-388 (Kennedy, J., dissenting). These time-honored principles buttress *Grutter*'s core holding: Obtaining the educational benefits that flow from student body diversity is a compelling interest that justifies the narrowly tailored use of race in college admissions decisions.

B. Student Diversity Is Acutely Needed Today.

1. Students Must Be Equipped To Navigate An Interconnected World.

Developments since this Court decided *Grutter* underscore the key role of diversity in American higher education. Today more than ever before, individuals and organizations are linked around the world. Trade, finance, and media are international in scope. The ever-thickening web of economic, political, and social ties between nations makes interaction among people of different backgrounds and cultures a common occurrence. *See* Axel Dreher, KOF Swiss Economic Institute, *KOF Index of Globalization* (Mar. 16, 2012).

The United States is more racially and ethnically diverse than ever. Mitra Toossi, *Labor Force Projections to 2020: A More Slowly Growing Workforce*, Monthly Labor Review 43 (Jan. 2012). The trend is likely to accelerate in coming years. Most American babies are non-white, and half the population will be racial and ethnic minority group members by mid-century. Press Release, United States Census Bureau, *Most Children Younger Than Age 1 Are Minorities* (May 17, 2012); Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 The Review of Higher Education 185, 187 (2007). As the Brookings Institution's senior demographer explained, these projections anticipated "the more globalized multiethnic country that we are becoming." Sabrina

Tavernise, *Whites Account for Under Half of Births in U.S.*, N.Y. Times, May 17, 2012, at A1.

In the last two decades, higher education itself has become profoundly more global. More foreign students seek to study at U.S. colleges and universities: the State Department issued over 400,000 student visas in 2010—up more than 70 percent since 1992. U.S. Dep't of State, *Report of the Visa Office, Classes of Nonimmigrants Issued Visas* (2010). American students increasingly desire to study abroad as well. "Study abroad by students enrolled in U.S. higher education has more than tripled over the past two decades," and interest in less traditional destinations like India and Brazil has dramatically increased in recent years. Press Release, U.S. Dep't of State & Institute of Int'l Educ., *Study Abroad by U.S. Students Rose in 2009/10 with More Students Going to Less Traditional Destinations* (Nov. 14, 2011). Universities increasingly are crossing borders—a much-noted development of the past decade. As of 2009, 78 U.S. colleges and universities had established branch campuses abroad, located from China and Singapore to the Middle East. Scott Jaschik, *International Campuses on the Rise*, Inside Higher Ed, Sept. 3, 2009; *see also* American Council on Educ., *U.S. Branch Campuses Abroad* (Sept. 2009).

To equip them to navigate today's and tomorrow's interconnected world, universities must stimulate students' thirst for the new and unfamiliar. Student body diversity catalyzes the exploratory spirit: "The experience of arriving on a campus to live and study with classmates from a diverse range of backgrounds is essential to students' training for this new world, nurturing in them an instinct to reach out instead of clinging to the comforts of what seems natural or familiar." Lee C. Bollinger, *Why Diversity Matters,* Chronicle of Higher Education (June 1, 2007).

This acquired affinity for the unfamiliar enables students to contribute to economic, scientific, and social progress, and to function in the global economy. A purpose of higher education is to equip professionals and business leaders to interact with diverse customers, clients, co-workers, and business partners. *See* Raymond V. Gilmartin, *Diversity and Competitive Advantage at Merck,* Harv. Bus. Rev. 146 (Jan. - Feb. 1999). Students who have had scant interaction with peers of different races and ethnicities are hampered when they graduate into a nation in which minorities generate more than $600 billion in purchasing power, and a world that is irreversibly interdependent. As one leading business executive has put it, "[o]ur success as a global community is as dependent on utilizing the wealth of backgrounds, skills and opinions that a diverse workforce offers, as it is on raw materials, technology and processes." William G. Bowen & Derek Bok, *The Shape of the River* 12 (1998) (quoting Robert J. Eaton, Chairman and CEO of Chrysler Corporation).

If the United States is to be the world's economic pace-setter, colleges cannot send students into that world wearing blinders. So, too, in fields such as law, the natural sciences, and medicine, where international collaboration increasingly is basic, students today must receive direct experience with people of different races and ethnicities. They cannot adequately acquire it from books, and they will sorely need it. *See* Arthur H. Compton, *Foreword to* Huston Smith, *The Purposes of Higher Education* xiv (1955).

2. The Educational Benefits Diversity Confers Remain Essential To Higher Education.

Diversity prepares students to engage with the modern world, but that is not its only benefit. Diversity serves time-honored, indispensable goals of higher education. It inspires students to lead "the examined life;" it prepares them to maintain the robust democracy that is their inheritance; and it enables them to overcome barriers that separate them from one another, divide them from the world they need to know, and block their intellectual development.

1. A venerable purpose of higher education is to foster "the examined life." That is the focus of educators who view higher learning as desirable for its own sake, apart from its economic utility. *See* Robert M. Hutchins, *The Higher Learning in America* (Transaction Publishers 1995) (1936); J.H.C. Newman, *The Idea of a University* (M.J. Svaglic ed., Univ. of Notre Dame Press 1982) (1873). These educators consider the crucial work of higher education to be challenging students' embedded preconceptions, including, often, their most deeply-held values; for only by critically examining them can students gauge rationally whether their preconceptions are worthy. Educators who hold this view emphasize thinking logically, exposing fallacy, and testing assumption through rigorous questioning and dialectic, all in order to develop students' powers of reason.

Diversity contributes vitally to the process of learning, on which the powers of reason depend. A precept of developmental psychology is that we learn by formulating, revising, and refining conceptions of the world each time we encounter new facts, beliefs, experiences, and viewpoints. Peter B. Pufall, *The Development of Thought: On Perceiving and Knowing, in* Robert Shaw & John Bransford, *Perceiving, Acting, and Knowing: Toward an Ecological Psychology* 173-174 (1977). Faced with new information, students either assimilate it to fit the existing conception, or revise the conception to accommodate the new information. This "disequilibration," as Jean Piaget called it, and the subsequent restoration of cognitive balance, force learners to refine their thinking. Piaget taught that "disequilibration" experiences have greatest impact when they come from "social interaction." Jean Piaget, *Piaget's Theory, in* 1 *Carmichael's Manual of Child Psychology* (P. H. Mussen ed., 3d ed. Wiley 1970). A student, confronted by a peer who has a new or unexpected way of looking at the world, meets that perspective as an equal, and can explore and absorb it more fully than if merely informed of it in, for example, a lecture. *See, e.g.*, Diane N. Ruble, *A Phase Model of Transitions: Cognitive and Motivational Consequences*, 26 Advances in Experimental Social Psych. 163, 171 (1994). Colleges and universities supply and catalyze "that collision which is obtained only in society and by which a knowledge of the world and its manners is best acquired." F.W. Garforth, *Educative Democracy: John Stuart Mill on Education in Society* 164 (1980) (citing David Ricardo).

These bedrock principles of developmental psychology, to which educators at all levels subscribe, teach that exposing students to an array of peer life experiences and perspectives is critical to learning. The familiar is less valuable; it tends merely to reinforce preconception. But the new and different are food for intellectual growth. Student diversity provides all learners opportunities to develop their intellects, by exposure to increasingly complex and nuanced models presented by peers. These new perspectives and experiences are especially educational when encountered in direct interaction with a peer, because peer encounters entail the give-and-take and the emotional processes that promote complex thinking.

A diverse campus thus awakens students from the sleepy "unexamined life" of which Socrates warned. Interaction among students from diverse backgrounds exposes each to a broader array of vantage points from which to view his or her own values than does interaction among like-minded students whose experiences are similar. Of course, students will not and should not always accept new perspectives and abandon their own. Higher education teaches students to employ reason to decide for themselves which of their beliefs to retain, and which to cast aside in favor of other discovered truths. And students in diverse institutions often learn that anticipated differences in perspectives or views do not exist, or do not correlate as expected with race or ethnicity. Preconception is thereby dispelled, and stereotype is thereby rebutted.

2. Another purpose of higher education is to prepare students for citizenship. An educated

citizenry is the predicate of a thriving democracy. *Mueller* v. *Allen*, 463 U.S. 388, 395 (1983); *DeRolph* v. *State*, 677 N.E.2d 733, 736 (Ohio), *clarified*, 678 N.E.2d 886 (Ohio 1997). Colleges and universities seek to develop students' capacity not only to comprehend and reach their own informed views on issues of public import, but also to engage in deliberative aspects of democracy—to interact and debate with other citizens, listen with an open mind, and persuade—so as to achieve collective solutions to public problems. *See* Nat'l Task Force on Civic Learning and Democratic Engagement, *A Crucible Moment: College Learning and Democracy's Future* (2012). The "Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring). Government has long conceived higher education as an engine to ready students for citizenship in "a common vessel." *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 543-544 (1999).

A diverse student body demonstrably prepares students for citizenship. Diversity of backgrounds tends to broaden and give more credibility to campus discussion and debate, by exposing students to perspectives borne of different life experiences. Such exposure makes students better-informed voters, jurors, school board and neighborhood association members, and engaged participants in consideration of public affairs. Effective civic participation depends on ability to work with those whose backgrounds are different; students educated in a diverse setting are better prepared to work with fellow citizens from all walks of life. "Learning is not merely the acquiring of mastery over intellectual subject matter * * *. [I]n our schools and colleges, every citizen of the world should become 'at home' in the human 'state.'" Alexander Meikeljohn, *Education Between Two Worlds* 277 (1942).

Student diversity in higher education thus takes students

> out of the narrow circle of personal and family selfishness * * * accustoming them to the comprehension of joint interests, the management of joint concerns—habituating them to act from public or semi-public motives and guide their conduct by aims which unite instead of isolating them from one another.

John Stuart Mill, *On Liberty, in Three Essays* 134 (Oxford Univ. Press 1975) (1859).

3. A third aim of higher education is to enable students to overcome barriers that separate them from one another, divide them from the world they need to know, and impede their intellectual growth. The developing theme of American higher education from the start has been to eradicate divisions and differences that limit students, and thereby to teach critical self-reflection and impart knowledge. That theme, perhaps more than any other, has defined the role and achievement of higher education in our society.

"The 'American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.'" *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982) (citation omitted). The Founders saw higher education as essential to train the nation's leaders who, John Adams held, should be recruited not from among "the rich or the poor, the high-born or the low-born, the industrious or the idle; but all those who have received a liberal education." Frank Donovan ed., *The John Adams Papers* 182 (1965). They believed that education institutions must build and reinforce bonds among citizens. Even in an era when college was accessible only to the well-placed few, they advocated common schools to bring together the nation's young and instill a sense of national community. Noah Webster, *On the Education of Youth in America* (1790), *in Essays on Education in the Early Republic* 66 (Frederick Rudolph ed., 1965); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860*, at 7 (Eric Foner ed. 1983) (quoting Benjamin Rush).

Removal of barriers is thus the essence of American higher education, necessary both for personal growth and the continued growth of the Nation. "A democracy is more than a form of government; it is primarily a mode of associated living" that depends on "communicated experience." John Dewey, *Democracy and Education* 101 (Free Press 1966) (1916). And we demand even more of graduates now, as the nation "break[s] down * * * barriers of class, race, and national territory," because such a society produces "more numerous and more varied points of contact" and "a greater diversity of stimuli to which an individual has to respond." *Id.* Inculcating not only "an ability" but also "an inclination" "to serve mankind, one's country, friends and family," wrote Franklin, is "the great Aim and End of all learning." Benjamin

Franklin, *Proposals Relating to the Education of Youth in Pennsylvania* 30 (1749, reprint 1931).

II. HIGHER EDUCATION INSTITUTIONS NEED FLEXIBILITY TO DEFINE AND ATTAIN DIVERSITY.

Diversity is thus inherent in achievement of basic purposes of higher education, and appropriate diversity for a particular institution is a matter of educational judgment. But Petitioner would have courts not only scrutinize the means institutions use to attain diversity—a familiar judicial role—but also second-guess a university's considered judgment about what type of diversity to pursue in light of its distinct educational mission.

This Court should not displace a university's educational judgment with a cramped prescription of what kind of diversity and how much diversity an institution needs. To do so would represent a sharp break from the longstanding and salutary tradition of governmental forbearance in higher education. Institutional pluralism, the hallmark of American higher education, is traceable to that forbearance and has allowed our colleges and universities to become the envy of the world. To impose a single definition of diversity on all of higher education would conflict with the Court's precedents and undermine those benefits.

A. American Higher Education Thrives On Pluralism.

1. American Higher Education Is Characterized By The Variety Of Institutional Missions.

American higher education is preeminent in the world and a beacon to other countries. Most of the world's leading universities are here. *See* Shanghai Jiao Tong University, *Academic Ranking of World Universities: 2011*; William G. Bowen *et al.*, *Equity and Excellence in American Higher Education* 54 (2005). Our universities "produce a very high proportion of the most important fundamental knowledge and practical research discoveries in the world"; the scholars and scientists they train are global leaders in their fields. Jonathan R. Cole, *The Great American University* 5 (2010). Our nation invests in higher education more resources per student than any other. Organization for Econ. Cooperation & Dev., *Education at a Glance: OECD Indicators* 209 (2011). Since World War II, "by a wide margin" professors at American universities have been awarded more Nobel prizes for physics, chemistry, medicine, and economics than any other country. Jon Bruner, *American Leadership in Science, Measured in Nobel Prizes*, Forbes.com (Oct. 5, 2011). Graduates of American colleges and universities serve in leadership roles in this and other countries to an extent unequalled by any nation in history. *E.g.*, Uri Friedman & Kedar Pavgi, *Head of the Class?*, Foreign Policy (Nov. 18, 2011); Menachem Wecker, *Where the Fortune 500 CEOs Went to School*, U.S. News & World Report (May 14, 2012).

The hallmark of American higher education is its unique pluralism. In contrast to most other countries, in the United States the path of higher education is not directed from a central ministry. Higher education here, allowed to evolve organically, is now characterized by a rich diversity of institutions: community colleges and four-year institutions, public and private universities, non-profit and for-profit colleges, religious-affiliated and secular institutions, vocational and liberal arts colleges. This diversity is matched by an equally broad array of institutional missions—from one university's commitment to religious leadership, to a small college's focus on the student's self-governance and manual labor, to a leading technology institute's engagement with the cutting edge of physical science.

The pluralism of American higher education fosters a healthy competition among institutions that is key to the success of the entire system. *See* Henry Rosovsky, *Highest Education,* 197 The New Republic 13 (1987). Colleges and universities in the United States compete for students, faculty, and resources. They strive to distinguish themselves and to offer advantages over their peer institutions, testing new educational strategies and learning from one another. When an institution identifies a successful strategy, others adapt it; when an institution stumbles, others draw lessons. Yet each institution ultimately forges its own path in light of its distinct mission. These efforts have led American colleges and universities to become, like the States themselves, "laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States* v. *Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Their innovation drives the rich variety within American higher education and is responsible for its unparalleled success.

2. The Government Has Repeatedly Endorsed The Value Of A Decentralized Higher Education System In Which Institutions Pursue Their Respective Missions In Their Respective Ways.

These features of American education did not arise by accident. A long tradition, nearly unique among nations, of government forbearance with respect to educators' judgment has figured prominently in this vibrant system. Since the founding of the Republic, this Court, the Executive and Congress in key judicial and policy decisions repeatedly have opted to grant colleges and universities more, not less, authority in implementing higher education practices and principles. *See* Martin Trow, *Federalism in American Higher Education, in Higher Learning in America 1980-2000* (Arthur Levine ed., 1993); John S. Brubacher & Willis Rudy, *Higher Education in Transition: A History of American Colleges and Universities* 9 (4th ed. 1997) (1958). American universities are accorded "greater freedom from government supervision than higher education enjoys in any other major country of the world." Derek Bok, *Higher Learning* 14 (1986).

The Court long has championed colleges' and universities' authority to make educational judgments. In *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518 (1819), for example, the Court confronted whether a state possessed power to alter a college charter, and held that a college's board of trustees was better suited than the government to govern it. Chief Justice Marshall's opinion acknowledged that a college would sometimes err, but, he explained, decisions in educational matters should be made by the educators, not the legislature. *See* 1 James Kent, *Commentaries on American Law* 416-417 (O.W. Holmes ed., 12th ed. 1873).

The Court has proceeded in the intervening two centuries to reinforce colleges' and universities' authority in the educational sphere. In the decades following the *Dartmouth College* decision, tensions arose between legislatures and higher education institutions over questions of taxation and contract. Could a state legislature lawfully tax a university whose charter exempted it from tax? More than the power to tax was at stake, as that power implicated broader government influence over higher education. *Cf. M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 431 (1819). The seemingly unassailable argument that a legislature should not be able to "bargain away forever the taxing power of the State" weighed in favor of governmental authority. *Washington Univ.* v. *Rouse*, 75 U.S. (8 Wall.) 439, 443 (1869) (Miller, J., dissenting). Yet the Court upheld the institutions' autonomy, *see, e.g., id.* at 440; *University* v. *People*, 99 U.S. 309, 310, 325 (1878), in the expectation that they would act in accordance with their educational purposes. *Washington Univ.*, 75 U.S. at 440-441.

In the early twentieth century, questions arose that ranged from administration of a private university's endowment, *Taylor* v. *Columbian Univ.*, 226 U.S.

126 (1912), to a public university's discretion to require military training, *Hamilton* v. *Regents of Univ. of Cal.*, 293 U.S. 245 (1934). In each circumstance the Court declined to substitute its judgment for that of the institution. In *Taylor*, for example, the Court upheld the university's administration of a scholarship where the charitable purpose was accomplished "in some degree, at least." *Id.* at 135.

The Court extended the principle in the 20th century to the interplay of constitutional due process and a university's autonomy over its students. In *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), the Court held that the Fourteenth Amendment Due Process Clause does not require a public university to provide a hearing before dismissing a student on academic grounds. *Id.* at 87. The Court weighed the interest in protecting students from arbitrary dismissal against "harm to the academic environment" that would result from "[j]udicial interposition" in university affairs. *Id.* at 90-91. Although the student's interest was "weighty" because she would be unable to continue her medical education, *id.* at 100 (Marshall, J., concurring in part and dissenting in part), the Court "decline[d] to ignore the historic judgment of educators" that a hearing should not be required. *Id.* at 90 (opinion for the Court). To "enlarge the judicial presence in the academic community," the Court said, would "risk deterioration." The Court thus determined not to intervene in the academic decision; doing so would "raise[ ] problems * * * requiring care and restraint." *Id.* at 90-91.

Forbearance with respect to educational judgment figured in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957), where a university lecturer declined to answer a state attorney general's questions about the content of his lectures. The inquiry, Chief Justice Warren said, "unquestionably was an invasion * * * of academic freedom and political expression—areas in which the government should be extremely reluctant to tread. * * * To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Id.* at 250. Justice Frankfurter in concurrence cited " 'four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " *See Bakke,* 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result)). "[W]ho may be admitted to study" is paradigmatic academic judgment. *See id.* at 312; *see also id.* at 405 (opinion of Blackmun, J.); *id.* at 366 n.42 (opinion of Brennan, J.) ("The Regents, not the legislature, have the general rule-making or policy-making power with regard to the University.").

The Court further extended the forbearance principle in *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214 (1985), upholding a public university's dismissal of a student who failed a key exam. The court of appeals had held the decision an arbitrary deprivation of property because plaintiff was the only student in seven years denied an opportunity to retake the exam, and a university pamphlet promised a retest. *Id.* at 221; *see Ewing* v. *Board of Regents of Univ. of Mich.*, 742 F.2d 913, 915-916 (6th Cir. 1984). On that record, application of standards for arbitrary government action in non-university contexts might well have produced a different result. But the Court held the dismissal an "academic decision" and cited "[c]onsiderations of profound importance [that] counsel restrained judicial review," *Ewing*, 474 U.S. at 225, including the right to decide "who may be admitted to study." *Id.* at 226 n. 12. The "narrow avenue for judicial review" the Court set focused solely on whether the decision "[was] such a substantial departure from accepted academic norms as to demonstrate that the [faculty] did not actually exercise professional judgment." *Id.* at 225, 227. The Court concluded that academic judgments "made daily by faculty members * * * require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.' " *Id.* at 226 (quoting *Horowitz*, 435 U.S. at 89-90).

The other branches of government, too, in decisions with profound consequence for American colleges and universities, have opted to leave the conduct of higher education to educators. Thus, in the Administration of George Washington, Congress rejected establishment of a national university that would set federal standards for all of the new nation's colleges. 1 Richard Hofstadter and Wilson Smith eds., *American Higher Education: A Documentary History* 157 (1961). (Congress greeted a similar proposal by John Quincy Adams "with a gale of laughter." Edward H. Reisner, *Antecedents to the Federal Act Concerning Education*, 11 Educational Record 196, 197 (July 1930).) Had the idea of a national university carried, the United

States likely would have developed the more centralized, governmental control of higher education characteristic of the European nations. The decision *not* to establish such an institution or a charter-granting federal ministry of education—a decision of which Chief Justice Marshall was aware when he addressed the *Dartmouth College* case—preserved the pluralism, adaptiveness, and will to innovate that remain American higher education hallmarks. Thus Thomas Jefferson founded a university in Virginia based on the "illimitable freedom of the human mind * * * to follow truth wherever it may lead." Roy J. Honeywell, *Educational Works of Thomas Jefferson* 99 (1931).

The design of federal support to higher education has reinforced institutional authority. In the Morrill Land-Grant Act, 12 Stat. 503 (1862), Congress granted 11,000 square miles of land to states for agricultural and mechanical arts colleges, "without excluding other scientific and classical studies." *Id.* at 504. By then the principle of federal government abstention from judgments about the conduct of higher education was so engrained that President Buchanan vetoed an earlier version of the Act as an unconstitutional exercise of federal power. *See* Carl Swisher, *American Constitutional Development* 374 (1943). Unquestionably the Morrill Act was a transformative assertion of federal interest in higher education. Yet the Act imposed virtually no requirements on the type of institution or curriculum that could benefit from this massive grant. *See* 12 Stat. 504; *Hamilton*, 293 U.S. at 258-259 (state accepting federal land-grants "remain[ed] untrammeled by federal enactment and [was] entirely free to determine for itself" the content and objectives of instruction). Instead of drawing a federal blueprint, Congress mandated flexibility that produced an extraordinary range of institutions and programs, prompting one educator to observe that "of all the good fortune which has attended the carrying out of the act of 1862, this variety of plans and methods in the various states was the best." Earle D. Ross, *Democracy's College: The Land-Grant Movement in the Formative Stage* 68-69 (1942) (quoting Andrew D. White).

In the most important 20th century higher education laws, the government similarly favored educators' authority. The first of these, the Servicemen's Readjustment Act of 1944 (known as the GI Bill)—at the time the most far-reaching financial boost to higher education in the nation's history—again provided aid in a manner that maximized institutional autonomy in the educational realm. *See* 58 Stat. 288. Congress rejected proposals that would have prescribed detailed standards for institutions to receive aid, and directed that "no department, agency, or officer of the United States * * * shall exercise any supervision or control, whatsoever, over * * * any educational or training institution." 58 Stat. 289. By structuring the aid with few prescriptions on the types of institutions or programs for which it could be used, the adopted approach reaffirmed the value of competition among institutions, each with its own educational model, as the best way to promote quality higher education. *See* H.R. Rep. No. 78-1418, at 3 (1944); Trow, *Federalism in Higher Education, in Higher Learning in America* at 58-59.

In the second major 20th century enactment of federal support for higher education, the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965), and in amendments to it since,[3] Congress again and again has rejected proposals to assert federal authority over colleges' and universities' educational judgment. In legislating the modern mechanisms of federal student aid, Congress rejected an emphasis on grants to institutions, close federal regulation of educational judgment, and centralized standard-setting. Instead, the Act preserves the institutions' independence and pluralism by directing aid to individual students who may choose among several thousand institutions. *See* 79 Stat. 1263 (requiring regulations "leaving opportunity and flexibility for the development of State plan standards and methods that will best accommodate the varied needs of institutions"); Chester E. Finn, Jr., *Scholars, Dollars and Bureaucrats* 61 (1978). The federal student aid program addresses institutional eligibility to receive and disburse aid in part through a highly decentralized, non-governmental accreditation system to the expert authority of which the institutions submit individually. *See* 20 U.S.C. §§ 1001-1002. And these structural protections are buttressed by the General Education Provisions Act, which forbids the federal government from "exercis[ing] any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution." 20 U.S.C. § 1232a.

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[3] Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235; Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143; Education Amendments of 1984, Pub. L. No. 98-511, 98 Stat. 2366; Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268; Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448; Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581; Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078.

The authority of colleges and universities in educational matters reaches not only " '[t]eachers and students [who] must always remain free to inquire, to study and to evaluate,' " *Keyishian* v. *Board of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy*, 354 U.S. at 250), but also "autonomous decisionmaking by the academy itself." *Ewing*, 474 U.S. at 226 n.12. The federal government has repeatedly assented to that proposition for two centuries, in reliance on the fiduciary duty of those charged with maintaining the institutions. If one lesson can be distilled from the historical relationship between the United States government and higher education, it is that when educators exercising professional judgment conclude that there is powerful educational basis for a practice, government should be loath to bar it.

B. Each Institution Must Define Diversity In A Manner Consistent With Its Mission.

Petitioner's arguments threaten to undermine the institutional pluralism this Court and the other Branches have been so careful to preserve. In Petitioner's view, the University of Texas has no justification for considering race in admissions because it has *already* achieved a racially diverse student body. The argument has two distinct parts. First, Petitioner contends that, under the Top 10% Law—which guarantees admission to all students in the top ten percent of their high school graduating class—UT has become "one of the most diverse public universities in the nation" and that additional diversity would be " 'gratuitous.' " Pet. Br. 35 (citing *Fisher* v. *Univ. of Tex.*, 644 F.3d 307, 307 (5th Cir. 2011) (Jones, C.J., dissenting from denial of reh'g en banc)). Relatedly, Petitioner suggests that UT's interest in a diverse student body must be limited to the pursuit of a "critical mass" of minority students, as the Court used that term in *Grutter*. Pet. Br. 29.

Both contentions are wrong, and both misconceive the Court's role. Determinations about what kind of diversity, and how much, a higher education institution needs entail quintessential academic judgment. *Grutter*, 539 U.S. at 328-329, 333. Because it is at the heart of "a university's definition of its educational objective," *id.* at 388 (Kennedy, J. dissenting), diversity is best defined by an institution for itself, in accordance with its mission and concept of education. The constitutionally protected freedom to assemble a diverse student body would amount to little if it did not include the freedom to define the diversity being sought.

Grutter endorsed deference to institutional judgment on such matters—not only to the abstract decision that "diversity is a compelling interest," but also to the more practical and institution-specific determinations about what diversity means for an institution. The University of Michigan Law School identified one particular conception of diversity—" 'enroll[ing] a "critical mass" of minority students' "—and determined that attaining critical mass was "necessary to further its compelling interest in securing the educational benefits of a diverse student body." 539 U.S. at 329, 333 (quoting Br. for Respondent in No. 02-241, at 13). The Court deferred to that judgment based in part on the Law School's "experience and expertise" within the educational realm. *Id.* But one law school's particular judgment about what type of diversity to pursue in light of its mission does not bind every other college and university in the nation. The First Amendment affords *each* institution "particular latitude in defining diversity." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring in part); *see also Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) (distinguishing permissible "deference to a university's definition of its educational objective" from impermissible "deference to the implementation of this goal"). What constitutes diversity sufficient for the educational objectives of one school might not suffice at another.

Deference is owed educators' educationally derived conceptions of diversity because such matters require evaluation of cumulative information for which those responsible for higher education are best qualified. *See Ewing*, 474 U.S. at 226. How, for example, the mix of students affects learning involves considerations educators are best equipped to gauge. Such judgments require knowledge of campus and classroom dynamics, cognitive processes, and ways to nurture students' capacity for moral reasoning, along with other specialized knowledge in which educators are trained. These "complex educational judgments" lie "primarily within the expertise of the university." *Grutter*, 539 U.S. at 328. Courts should therefore "resist substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2988 (2010) (internal quotations omitted).

Such judgments also depend on the institution's particular mission. The education a small liberal arts college aims to impart may call for a student body different than that a flagship state university needs; the student body a secular university seeks may ill-suit an institution committed to a delicate balance of Catholicism and denominational inclusiveness. In the admission process, the weight placed on academic metrics, such as standardized test scores and grade-point averages, varies from one institution to another. And institutions' needs evolve over time. For courts to override educators' reasoned judgment about how much diversity and what kind of diversity the institution needs would truncate American colleges' and universities' historic right to assemble students in a way that fits the institutions' educational philosophies—philosophies that with salutary effect are themselves extraordinarily varied. *See* Carnegie Comm'n on Higher Educ., *Reform on Campus: Changing Students, Changing Academic Programs* 35 (1972). The Fourteenth Amendment does not require this result. On the contrary, strict scrutiny "is designed to take relevant differences into account." *Johnson* v. *California*, 543 U.S. 499, 515 (2005).

C. Properly Conducted Holistic, Individualized Review Tailored To Institutional Mission Is A Lawful And Effective Means To Attain Diversity.

As the foregoing observations suggest, the Fifth Circuit was correct to focus its scrutiny on UT's "decisionmaking process" in admissions rather than the merits of UT's judgment as to whether it had achieved sufficient diversity. *Fisher* v. *Univ. of Tex.*, 631 F.3d 213, 231 (5th Cir. 2011). *Grutter* affords colleges and universities a substantial degree of deference in defining their educational goals, but it requires courts to ensure that any race-conscious *means* used to pursue those goals are narrowly tailored to the end.

Quotas and mechanical formulas are not narrowly tailored to achieve the benefits of student body diversity where they make "an applicant's race or ethnicity the defining feature of his or her application." 539 U.S. at 337. Diversity is a compelling educational interest because students benefit from exposure to peers from a broad variety of backgrounds; racial and ethnic diversity is one component of that variety, but it is hardly the only component. By failing to account for " 'all pertinent elements of diversity,' " *id.* at 334 (citation omitted), quotas and mechanical formulas are a poor fit for the goal of student body diversity. That is why they fail strict scrutiny.

A properly conducted holistic, individualized consideration of each applicant, on the other hand, is precisely tailored to achieve the goal of student body diversity. Such review "ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." *Id.* at 337. "The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance." *Parents Involved*, 551 U.S. at 723 (citation omitted); *see also id.* at 722 ("what was upheld in *Grutter* was consideration of 'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element' " (citation omitted)).

The Court's core holding on this point in *Grutter* thus remains valid: universities can "consider race or ethnicity * * * as a 'plus' factor in the context of individualized consideration of each and every applicant." 539 U.S. at 334. The University of Texas did so here, as part of its holistic, applicant-by-applicant review. Its educational judgment should be respected, and the educational benefits that flow from diversity reaffirmed.

CONCLUSION

This Court should affirm the Court of Appeals, reaffirm *Grutter*, and protect colleges' and universities' freedom to pursue their respective missions.

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ADDENDUM

ADDENDUM: *AMICI* ON THIS BRIEF

- The American Council on Education is described at page 2 of this brief.

- The American Anthropological Association (AAA) is the world's largest organization of individuals interested in anthropology. It represents more than 10,000 archaeologists and anthropologists in the academy and practice.

- The American Association of Colleges of Pharmacy (AACP) is a national organization representing the interests of pharmacy education and educators. Comprising 129 accredited colleges and schools of pharmacy including more than 6,400 faculty, 57,000 students enrolled in professional programs, and 5,700 individuals pursuing graduate study, AACP is committed to excellence in pharmacy education.

- The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges. It represents nearly 1,200 two-year, associate degree-granting institutions.

- The American Association of State Colleges and Universities (AASCU) is a higher education association of more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

- The American Association of University Professors (AAUP) represents some 48,000 faculty members and research scholars. It defends academic freedom and the free exchange of ideas in higher education.
- The American College Personnel Association (ACPA) is the largest comprehensive student affairs association that advances student affairs and engages students for a lifetime of learning and discovery. ACPA, with almost 8,000 members, supports and fosters college student learning through the generation and dissemination of knowledge, which informs policies, practices, and programs for student affairs professionals and the higher education community.
- The American Indian Higher Education Consortium (AIHEC) is the unifying voice of our nation's 37 Tribal Colleges and Universities—a community of federally recognized public institutions working to strengthen tribal nations and make a lasting difference in the lives of American Indians and Alaska Natives. AIHEC serves its network of member institutions through public policy, advocacy, research, and program initiatives to ensure strong tribal sovereignty through excellence in American Indian higher education.
- The American Speech-Language-Hearing Association (ASHA) is the professional, scientific, and credentialing association for more than 150,000 members and affiliates who are audiologists, speech-language pathologists, and

speech, language, and hearing scientists in the United States and internationally. Support personnel in audiology and speech-language pathology also affiliate with ASHA.

- The Association of American Colleges and Universities (AAC&U) is the leading national association concerned with the quality, vitality, and public standing of undergraduate liberal education. It has more than 1,250 member institutions, including accredited public and private colleges, community colleges, and universities of every type and size. Its mission is to reinforce the collective commitment to liberal education at both the national and local levels and to help individual institutions keep the quality of student learning at the core of their work as they evolve to meet new economic and social challenges.

- The Association of American Universities (AAU) is an association of 61 leading public and private research universities in the United States and Canada. Founded to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research-intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education.

- The Association of Catholic Colleges and Universities (ACCU) serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with

Catholic higher education can contribute to the greater good of the world and the Church.

- The Association of Community College Trustees (ACCT) represents over 6,000 board members who govern community, technical, and junior colleges.
- The Association of Governing Boards of Universities and Colleges (AGB) is the only national association that serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership. Its mission is to strengthen, protect, and advocate on behalf of citizen trusteeship that supports and advances higher education.
- The Association of Jesuit Colleges and Universities (AJCU) represents all 28 Jesuit institutions in the U.S. and is affiliated with over 100 Jesuit institutions worldwide. The first Jesuit institution opened in 1548 in Messina, Sicily, and since that time, Jesuit institutions remain committed to academic rigor, with a focus on quality teaching, learning, and research to educate the whole person. Jesuit teachings are inspired by many years of social justice priorities and providing access to all students from all socio-economic backgrounds.
- The Association of Public and Land-grant Universities (APLU) is a research and advocacy organization of public research universities, land-grant institutions, and state university

systems with member campuses in all 50 states, U.S. territories, and the District of Columbia.

- The Association of Research Libraries (ARL) is an organization of 126 research libraries at comprehensive, research-extensive institutions in the U.S. and Canada that share similar research missions, aspirations, and achievements.

- The Association to Advance Collegiate Schools of Business (AACSB) represents nearly 1,300 business schools worldwide in 84 countries. Its primary mission is to advance quality management education worldwide through accreditation, thought leadership, and value-added services.

- The College and University Professional Association for Human Resources (CUPA-HR) serves as the voice of human resources in higher education, representing more than 14,000 human-resources professionals at over 1,800 colleges and universities across the country. Its membership includes 92 percent of all United States doctoral institutions, 75 percent of all master's institutions, 60 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions.

- The Common Application is committed to providing reliable services that promote equity, access, and integrity in the college application process. It serves students, member institutions, and secondary schools by providing applications that students and school officials may submit to any of its nearly 500 member institutions.

Membership is open to colleges and universities that promote access by evaluating students using a holistic selection process.

- The Council for Advancement and Support of Education (CASE) is a professional association serving educational institutions and the advancement professionals who work on their behalf in alumni relations, communications, development, marketing, and allied areas. CASE helps its members build stronger relationships with their alumni and donors, raise funds for campus projects, produce recruitment materials, market their institutions to prospective students, diversify the profession, and foster public support of education.

- The Council for Christian Colleges & Universities (CCCU) is an international association of 170 fully accredited Christ-centered institutions of higher education committed to the integration of Christian faith and higher learning. Its member institutions transform lives by faithfully relating scholarship and service to biblical truth. CCCU member and affiliate campuses currently serve over 400,000 students.

- The Council for Higher Education Accreditation (CHEA) promotes academic quality through review and formal recognition of higher education accrediting bodies.

- The Council for Opportunity in Education (COE) expands educational opportunities for low-income students, first-generation students, students with disabilities, veterans, and adult learners.

- The Council of Graduate Schools (CGS) is an organization of institutions of higher education in the United States, Canada, and across the globe engaged in graduate education, research, scholarship, and the preparation of candidates for advanced degrees.

- The Council of Independent Colleges (CIC) represents 619 liberal arts colleges and universities and 90 state associations and other higher education organizations.

- The Council on Social Work Education (CSWE) strengthens the quality of social work education by providing national leadership and a forum for collective action. CSWE sets and maintains policy and program standards, accredits degree programs in social work, promotes research and faculty development, and advocates for social work education.

- EDUCAUSE is an association of over 2,000 colleges and universities. It promotes innovation and progress in higher education through the effective design and implementation of information technologies.

- The Graduate Management Admission Council (GMAC) is an organization of more than 200 leading graduate management school members located in the United States and worldwide. It owns and administers the GMAT® exam and provides research and market intelligence, marketing and recruiting tools and programs, worldwide professional development opportunities, and innovative grant initiatives designed to serve the graduate management community.

- The Group for the Advancement of Doctoral Education in Social Work (GADE) promotes excellence in doctoral education in social work and facilitates information exchange among its member doctoral programs.

- The National Action Council for Minorities in Engineering, Inc. (NACME) ensures American competitiveness in a flat world by leading and supporting the national effort to increase the number of successful African American, American Indian, and Latino women and men in science, technology, engineering and mathematics education and careers. It has supported over 24,000 students with more than $124 million in scholarships and other support.

- The National Association for Equal Opportunity in Higher Education (NAFEO) is the umbrella organization of the nation's Historically Black Colleges and Universities and Predominantly Black Institutions. It is the only membership association of its kind, representing the presidents and chancellors of the diverse black colleges and universities: public, private, and land-grant, two-year, four-year, graduate, and professional, historically and predominantly black colleges and universities.

- The National Association of College and University Business Officers (NACUBO) is a membership organization representing more than 2,500 colleges, universities, and higher education service providers across the country and around the world. It represents chief business and financial officers through advocacy efforts, community service, and professional development activities. NACUBO's mission is to advance the economic viability and business practices of higher education institutions in fulfillment of their academic missions.

- The National Association of Diversity Officers in Higher Education (NADOHE) is the leading voice of chief diversity officers in higher education. Its membership includes almost 200 colleges and universities, as well as individual members, affiliated professional organizations, and two formal state chapters.

- The National Association of Independent Colleges and Universities (NAICU) serves as the unified national voice of private, nonprofit higher education in the United States. It has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions. NAICU represents these institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation, and government regulation.

- The National Association of Student Financial Aid Administrators (NASFAA) represents more than 18,000 student financial assistance professionals at nearly 2,800 institutions of higher education, serving over 16 million students. It supports the training, diversity, and professional development of financial aid administrators; advocates for public policies and programs that increase student access to and success in postsecondary education; and serves as a forum for communication and collaboration on student financial aid issues.

- The National Collegiate Athletic Association (NCAA) serves as the organizing, regulating, and standard-setting body for 23 intercollegiate sports. The NCAA's active membership includes over 1,000 institutions of higher education that jointly create seasons of amateur intercollegiate competition across three Divisions.

- The Southern Association of Colleges and Schools Commission on Colleges (SACSCOC) is the regional body for the accreditation of degree-granting higher education institutions in the Southern states. Its mission is the enhancement of educational quality throughout the region, and it strives to improve the effectiveness of institutions by ensuring that institutions meet standards established by the higher education community that address the needs of society and students.

- Student Affairs Administrators in Higher Education (NASPA) is the leading association for the advancement, health, and sustainability of the student affairs profession. It serves a full range of professionals who provide programs, experiences, and services that cultivate student learning and success in concert with the mission of our colleges and universities. NASPA has more than 13,000 members in all 50 states, 29 countries, and 8 U.S. Territories.

- The Thurgood Marshall College Fund (TMCF) is the only national organization founded for the sole purpose of providing scholarships to students attending the nation's public Historically Black Colleges and Universities. In addition to scholarships, TMCF provides leadership development and training as well as programmatic and capacity building support to its member schools.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN ET AL.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN EDUCATIONAL RESEARCH ASSOCIATION ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the American Educational Research Association (AERA) et al. submit this brief as *amici curiae* in support of Respondents.[1] *Amici curiae* comprise several of the nation's leading research associations: the American Educational Research Association, the American Association for the Advancement of Science, the American Sociological Association, the American Statistical Association, the Association for the Study of Higher Education, the Law and Society Association, the Linguistic Society of America, and the National Academy of Engineering. Individual statements of interest are contained in Appendix A.

Amici curiae have a longstanding interest in the accurate presentation of research relevant to the important questions of law raised by this case. *Amici curiae* are also particularly concerned about the possible misapplication of research findings in this case and with the possibility that the Court might be influenced by the presentation of flawed research and unreliable findings, including potentially misleading analyses offered by Petitioner and her *amici curiae*.[2]

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[1] All parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs in this case. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] *Amicus curiae* briefs submitted on behalf of the Petitioner assert that student body diversity offers minimal positive effects and even causes harms. While unanimity may be rare in some bodies of scientific research, there is substantial agreement that the best available evidence, which is composed of studies em-

It is a well-accepted principle in science that the integrity of research relies not only on the validity and reliability of research but also on intellectual honesty in proposing, performing, and reporting research, and it is critical for the Court to have access to information that represents the best knowledge available at the time.

Accordingly, this brief provides summaries and citations to pertinent studies to assist the Court's understanding of the research evidence. (Copies and links to the cited articles and reports are available at http://www.aera.net.) This brief does not, however, attempt to provide a comprehensive review of the literature. Its focus is largely on the compelling interest prong of strict scrutiny. This brief should be read in conjunction with other *amicus curiae* briefs that summarize research findings addressing narrow tailoring and that support the constitutionality of the University of Texas at Austin's admissions policy.

SUMMARY OF ARGUMENT

Research on student body diversity has expanded since the Court's 2003 ruling in *Grutter v. Bollinger*. Building on a well-established body of literature, the new research underscores the University's compelling interest in diversity. First, research continues to show that student body diversity leads to important

---

ploying sound and reliable methodologies, solidly supports the University in this case. Appropriate sections and footnotes of this brief address weaknesses in the arguments of Petitioners' *amici*, which include incomplete analyses of the literature; critiques of well-established scientific methodologies; and reliance on studies that are outdated, inconsistent with more recent research, or unpublished (and not subject to rigorous peer review).

educational benefits. Among these benefits are improvements in intergroup contact and increased cross-racial interaction among students; reductions in prejudice; improvements in cognitive abilities, critical thinking skills, and self-confidence; greater civic engagement; and the enhancement of skills needed for professional development and leadership.

Second, research studies examining the harms associated with racial isolation and tokenism reinforce the University's interest in obtaining a diverse student body. Among the harms ameliorated by increased diversity are stereotyping, stereotype threat that compromises student achievement, microaggressions, and overt discrimination against minority students.

Third, research demonstrates that the purported harms to minority students associated with race-conscious admissions are inconsistent with the findings of sound research and lack a solid empirical basis. The claim that stigma increases under affirmative action programs and the claim that students suffer academic harms when their admissions credentials do not "match" their institutions find almost no support in the scientific literature. These claims are unsupported suppositions that numerous researchers have called into question, even though Petitioner and her *amici curiae* claim them to be fact.

Research also supports the conclusion that the University's race-conscious admissions policy is narrowly tailored to its diversity interest. As the *Grutter* Court made clear, critical mass is defined in relation to the educational benefits of diversity and not by a rigid numerical figure; consistent with the Court's prohibition on racial balancing, the research literature has not identified a fixed number or percentage to define critical mass. Race-conscious admissions remain essential because alternatives to holistic review, while helpful, do not provide adequate numbers of minority students necessary to attain a sufficiently diverse student body that can yield the educational benefits documented in the research literature.

ARGUMENT

I. EDUCATION RESEARCH REINFORCES THE COMPELLING GOVERNMENTAL INTEREST IN STUDENT BODY DIVERSITY

In *Grutter v. Bollinger,* this Court concluded that student body diversity is a compelling governmental interest that can justify the use of race-conscious admissions in higher education. 539 U.S. 306, 327-33 (2003). Recognizing that an institution's diversity interest exists "not simply 'to assure within its student body some specified percentage of a particular group,'" but "by reference to the educational benefits that diversity is designed to produce," the *Grutter* Court relied on research findings demonstrating the substantial benefits of diversity. *Id.* at 329-30. Post-*Grutter* studies across a variety of disciplines and methodologies—including many that rely on recent advances in mathematical and statistical techniques—reinforce prior findings and have expanded scientific understanding of the mechanisms underlying diversity's multiple benefits. Student body diversity, which is also known in the literature as "structural diversity" or "compositional diversity," has been identified as the key to improving campus racial climates and to advancing the types of positive cross-racial interactions that lead to reduced prejudice and improved academic learning.

The literature on student body diversity underscores the University's compelling interest in three ways: First, research findings continue to demonstrate that student body diversity has important educational benefits, and these benefits are "not theoretical but real." *Id.* at 330. Second, research studies examining the harms associated with racial isolation and tokenism reinforce the University's interest in obtaining a diverse student body in order to prevent these harms. Third, recent research demonstrates that the purported harms associated with diversity suggested by Petitioner and her *amici curiae* lack empirical support and do not undermine the University's compelling interest in diversity.

A. Research Studies Demonstrate That Student Body Diversity Leads to Significant Educational Benefits

Nearly a decade ago, the *Grutter* Court recognized a growing body of scientific research on diversity, concluding that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Id.* (quoting Brief for American Educational Research Association et al. as *Amici Curiae*, at 3). The literature has expanded considerably since *Grutter,* and many of these studies not only find positive effects among all groups of students as a result of diversity, they find positive effects on white students that are particularly strong or far-reaching.

1. Student Body Diversity Promotes Cross-Racial Understanding and Reduces Prejudice

The *Grutter* Court recognized that student body diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" 539 U.S. at 330. Research continues to show that racially diverse educational settings are effective in reducing prejudice by promoting greater intergroup contact—both informally and in classroom settings—and encouraging friendships across group lines. *See, e.g.*, Mitchell J. Chang, Alexander W. Astin & Dongbin Kim, *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns,* 45 Res. Higher Educ. 529 (2004); Gretchen E. Lopez, *Interethnic Contact, Curriculum, and Attitudes in the First Year of College,* 60 J. Soc. Issues 75 (2004); Victor B. Saenz, Hoi Ning Ngai & Sylvia Hurtado, *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students,* 48 Res. Higher Educ. 1 (2007).

For instance, a 2009 study by Denson and Chang found that cross-racial interactions had strong positive effects on racial and cultural engagement; thus students who attended institutions where students on the whole were more engaged with diversity from cross-racial interactions showed greater improvement in their knowledge of people of different races or cultures, as well as in their ability to get along with people of different races or cultures. Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student*

Engagement and Institutional Context, 46 Am. Educ. Res. J. 322, 336 (2009).

The scientific literature in the area of intergroup contact and cross-racial interaction has become sufficiently extensive that "meta-analyses"—statistical analyses that synthesize relevant research from many separate studies and that draw overall conclusions based on the cumulative data and findings—are commonplace.[3] A leading meta-analysis published in 2006 by Pettigrew and Tropp analyzed over 500 studies from a variety of educational, workplace, and informal settings, including college campuses, and reached the overarching conclusion that positive intergroup contact reduces prejudice and that greater intergroup contact is associated with lower levels of prejudice. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory,* 90 J. Personality & Soc. Psychol. 751, 766 (2006).

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[3] Contrary to suggestions by Petitioner and her *amici curiae*, the positive effects of intergroup contact are widely accepted in the research community. Several *amici curiae* erroneously conclude that the intergroup contact hypothesis is "no longer accepted by any reputable social scientist," and instead argue that intergroup contact increases stigma, conflict, and self-segregation on campuses. Brief of Abigail Thernstrom et al. as *Amici Curiae* in Support of Petitioner, at 10, 18-32. *Amici curiae* ignore the large body of literature inconsistent with their arguments and selectively cite findings—a number of which are outdated or isolated—or misinterpret other findings to reach unfounded conclusions. For instance, Thernstrom et al. rely heavily on a single essay, Robert D. Putnam, *E Pluribus Unum, Diversity and Community in the Twenty-first Century The 2006 Johan Skytte Prize Lecture,* 30 Scandinavian Pol. Stud. 144 (2007), in their attempt to contradict the large body of literature supporting intergroup contact theory. They stress Putnam's findings that residential diversity in many local communities, fueled by immigration, can lead to short-term problems of social mistrust, but they ignore methodological limits to the study (such as omitting variables dealing with intergroup contact and with racial segregation), and fail to mention that none of the data are drawn from higher education settings. *See* Thomas F. Pettigrew & Linda R. Tropp, *When Groups Meet: The Dynamics of Intergroup Contact,* ch. 11 (2011).

Pettigrew and Tropp's analysis also confirmed that the prejudice reduction associated with intergroup contact is further enhanced when one or more of Allport's optimal conditions for intergroup contact exist (equal status between groups in the situation, common goals, intergroup cooperation, and the support of authorities, law, or custom). *Id.* (citing conditions proposed in Gordon Allport, *The Nature of Prejudice* (1954), but also noting that Allport's optimal conditions are not required to produce reductions in prejudice). Pettigrew and Tropp also concluded that institutional support is "an especially important condition for facilitating positive contact effects"; the lesson here for colleges and universities is that they do more to reduce prejudice when they actively promote diversity and intergroup contact efforts in ways that are facilitated by race-conscious admissions. *Id.; see also* Thomas F. Pettigrew & Linda R. Tropp, *How Does Intergroup Contact Reduce Prejudice? Meta-analytic Test of Three Mediators,* 38 Eur. J. Soc. Psychol. 922 (2008) (subsequent meta-analyses showing that intergroup contact is especially effective in reducing prejudice because it diminishes anxiety and enhances empathy between groups).

Studies and meta-analyses focusing on friendships developed in diverse settings also reveal positive effects resulting from cross-racial interaction. In a 2008 study by Fischer examining how student body diversity fosters meaningful interactions and the development of relationships across racial lines, the data revealed that exposure to greater diversity results in more cross-group friendships by the end of the first year of college. Mary J. Fischer, *Does Campus Diversity Promote Friendship Diversity? A Look at Interracial Friendships in College,* 89 Soc. Sci. Q. 631 (2008). Moreover, the data suggest that campuses which create and maintain a high level of racial diversity in their student bodies will see an increased diversity of friendship networks for students from all racial backgrounds, with a particularly strong impact on the friendship networks of white students.

Similarly, a multi-year study with data from over 2,000 college students conducted by Levin et al. showed that greater cross-ethnic friendships early in college predicted lower intergroup anxiety and more positive interethnic attitudes by the end of college. Shana Levin, Colette van Laar & Jim Sidanius, *The Effects of Ingroup and Outgroup Friendship on Ethnic Attitudes in College: A Longitudinal Study,* 6 Group Processes & Intergroup Rel. 76 (2003). A subsequent meta-analysis by Davies et al. examined studies of friendships across groups and showed that cross-group friendships promote positive intergroup attitudes, and that time spent together and self-disclosure to individuals from other groups were strongly associated with improved attitudes. Kristin Davies, Linda R. Tropp, Arthur Aron, Thomas F. Pettigrew & Stephen C. Wright, *Cross-Group Friendships and Intergroup Attitudes: A Meta-Analytic Review,* 15 Personality & Soc. Psychol. Rev. 332 (2011). Accordingly, the authors recognized the strength of institutional strategies which "foster meaningful interactions with outgroup members over time . . . to nurture greater empathy and closeness between members of different groups." *Id.* at 342.

Cross-racial interaction also affects curricular and co-curricular diversity activities that lead to prejudice reduction. A 2009 meta-analysis testing whether participation in diversity-related activities during college reduces racial bias among undergraduate students found that they did, and that specific types of activities such as participating in a prejudice reduction workshop were even more effective when they also incorporated a cross-racial interaction component. Nida Denson, *Do Curricular and Cocurricular Diversity Activities Influence Racial Bias? A Meta-Analysis,* 79 Rev. Educ. Res. 805 (2009). Moreover, while diversity activities are effective in reducing racial bias for all groups of students, the study confirmed that white students benefit even more from diversity-related interventions. *Id.* at 824.

2. Student Body Diversity Leads to Educational Benefits such as Improvements in Cognitive Abilities, Critical Thinking, and Self-Confidence

As the *Grutter* Court recognized, a central benefit of student body diversity is that it "promotes learning outcomes." 539 U.S. at 330. Research continues to document that learning is enhanced by diversity on campus and in the classroom. "Because of the persistent power of race to shape life experiences, racial and ethnic compositional diversity can create a rich and complex social and learning environment that can subsequently be applied as an educational tool to promote students' learning and development." Mitchell J. Chang, Nida Denson, Victor Saenz & Kimberly Misa, *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates,* 77 J. Higher Educ. 430, 432 (2006).

A number of recent studies have shown that student body diversity fosters improvements in students' cognitive skills—such as critical thinking and problem-solving—because students' exposure to individuals different from themselves, as well as to the novel ideas and situations that such exposure brings, challenges their thinking and leads to cognitive growth. *See, e.g.,* Anthony Lising Antonio, Mitchell J. Chang, Kenji Hakuta, David A. Kenny, Shana Levin & Jeffrey F. Milem, *Effects of Racial Diversity on Complex Thinking in College Students,* 15 Psychol. Sci. 507 (2004); Chang, Denson, Saenz & Misa, *supra*; Jiali Luo & David Jamieson-Drake, *A Retrospective Assessment of the Educational Benefits of Interaction Across Racial Boundaries,* 50 J.C. Student Dev. 67 (2009).

For example, a 2005 longitudinal study reported by Hurtado analyzed data from over 4,400 students at nine public universities and concluded that student interaction with diverse peers contributed in positive ways to student education by a student's second year of college. Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research,* 61 J. Soc. Issues 595 (2005). Among the positive effects were improvements in cognitive abilities (e.g., analytical problem-solving skills and complex thinking skills), socio-cognitive skills (e.g., cultural awareness and leadership), and democratic sensibilities (e.g., pluralistic orientation and the importance of civic contribution). *Id.* at 600-06. The study specifically found that analytical problem-solving skills were positively related to the quality of the informal interactions with diverse peers, as were gains in students' "attributional complexity" (complex thinking skills). *Id.* Similarly, a 2005 study by Nelson Laird indicated that students with greater exposure to diversity are more likely to score higher on academic self-confidence, social agency (the belief in taking personal action to improve society), and dispositions toward critical thinking. Thomas F. Nelson Laird, *College Students' Experiences with Diversity and Their Effects on Academic Self-Confidence, Social Agency, and Disposition Toward Critical Thinking,* 46 Res. Higher Educ. 365 (2005).

These and similar findings are reinforced by a 2010 meta-analysis conducted by Bowman that analyzed twenty-three higher education studies focusing on diversity and cognitive skills, and concluded from this array of empirical evidence that college diversity experiences are significantly and positively related to cognitive development. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis,* 80 Rev. Educ. Res. 4, 20 (2010). Bowman's analysis concluded that interactions with racial diversity are more strongly linked with cognitive growth than are interactions with non-racial diversity, thus reinforcing the importance of fostering a student body that is racially diverse. *Id.* at 22.

3. Student Body Diversity Promotes Civic Engagement and Skills Needed for Professional Development and Leadership

This Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship." 539 U.S. at 331. The University shares this perspective, and central elements of its undergraduate educational mission are to prepare its students to be "leaders of the State of Texas" and to enable those students "to lead a multicultural workforce and to communicate policy to a diverse electorate." Supp. Joint App. at SJA24a (University's Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004). Several post-*Grutter* studies have documented the positive relationships between diversity and a range of benefits that have long-term implications for civic engagement, professsional growth, and the preparation of leaders for an increasingly diverse society. *See, e.g.*, Hurtado, *supra*; Mark E. Engberg, *Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students' Development of a Pluralistic Orientation,* 48 Res. Higher Educ. 283 (2007); Patricia Gurin, Biren (Ratnesh) A. Nagda & Gretchen E. Lopez, *The Benefits of Diversity in Education for Democratic Citizenship,* 60 J. Soc. Issues 17 (2004).

Improvements in measures of civic engagement, including (1) civic attitudes toward democratic participation, (2) civic behaviors such as participating in community activities, and (3) intentions to participate in civic activities, have been documented in multiple studies. A 2011 meta-analysis by Bowman synthesized twenty-seven studies examining the effects of diversity on civic engagement and reached the conclusion that college diversity experiences are positively related to increased civic engagement and that "this relationship is significant for several types of civic outcomes (attitudes or skills, behaviors, and behavioral intentions) and several types of diversity experiences." Nicholas A. Bowman, *Promoting Parti-*

cipation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement, 81 Rev. Educ. Res. 29, 46 (2011). Bowman's analysis specifically found that racially diverse interpersonal interactions are even more effective at promoting civic engagement than structured diversity experiences such as course work and intergroup dialogues; consequently, the study concluded that "the civic benefits of racial diversity cannot be replaced by teaching about diversity abstractly in courses or workshops," and highlighted the ongoing need for institutions to attain racially diverse student bodies and to facilitate meaningful interactions among students of different backgrounds. *Id.* at 49.

Among the other documented benefits of diversity are gains in "pluralistic orientation," a measurement that has been tied to capacities for the types of thinking and social interaction that enable students to "engage in cooperative behaviors, manage controversial issues, and develop a high regard for others' perspectives, beliefs, and backgrounds." Mark E. Engberg & Sylvia Hurtado, *Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences*, 82 J. Higher Educ. 416, 417 (2011). Building on earlier research, Engberg and Hurtado's 2011 study confirmed across multiple racial and ethnic groups that students' positive interactions with individuals of other races were associated with positive effects on their pluralistic orientation. *Id.* at 429. The authors also found that for white students in particular, higher levels of racial diversity in the student population led to increased interactions across race and ultimately to gains in pluralistic orientation. *Id.* at 435-36.

In addition to pluralistic orientation, leadership skills have long been recognized as key competencies for effective participation in a diverse workforce. For instance, a 2008 study by Jayakumar analyzed the relationship between white individuals' exposure to racial diversity during college and their post-college cross-cultural workforce competencies, including pluralistic orientation and leadership skills (as measured by leadership ability, public speaking, social self-confidence, and ability to discuss and negotiate controversial issues). Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society: Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615 (2008). The study concluded that for white students from both segregated and diverse pre-college neighborhoods, post-college leadership skills and the level of pluralistic orientation are significantly related to the degree of student body diversity and to the racial climate of institutions, as well as to the level of cross-racial interaction during college. *Id.* at 636-41. The study thus highlights the centrality of college exposure to diversity, suggesting that it can be more important than pre-college or post-college exposure in developing workplace competencies. Moreover, the results imply that positive cross-racial interaction in college has broad effects, since it stimulated positive outcomes for all white students, not only those from racially segregated neighborhoods. *Id.* at 641-42.

The long-term advantages of these types of benefits are underscored by recent literature showing that many of the benefits extend well beyond a student's undergraduate years. For instance, a 2011 study by Bowman et al. tracked students during college and for thirteen years after their graduation, and found that diversity experiences were positively related to personal growth, purpose in life, recognition of racism, and volunteering behavior among college graduates in their mid-30s. Nicholas A. Bowman, Jay W. Brandenberger, Patrick L. Hill & Daniel K. Lapsley, *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation,* 52 J.C. Student Dev. 729, 737 (2011).

4. Student Body Diversity Leads to Improved Classroom Environments

In addition to the educational benefits that accrue to students enrolled in colleges and universities with diverse student bodies, institutional benefits affecting the breadth of classroom discussions have been recognized by the Court and documented in post-*Grutter* research. *See Grutter,* 539 U.S. at 330 ("'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds'"). These findings align with the University's mission-driven goal that student experiences "must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds." Supp. Joint App. at SJA24a (University's Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004 (emphasis in original)).

For instance, a 2011 analysis of survey and focus group data from over 500 respondents at the University of Michigan documented how interactions among students in general—and in the classroom specifically—have contributed to the expected benefits of diversity in improving the overall educational experience. Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School,* 17 Mich. J. Race & L. 63 (2011). The Deo study found that most respondents were engaged in positive interactions with students from different racial backgrounds, and that the data revealed three central themes: "a) greater structural diversity [i.e., diversity in the student body] leads to increased classroom diversity and improved learning; b) classroom diversity results in open minds and engaging classroom conversations; and c) more structural diversity leads to greater participation [by minority students] and less tokenism." *Id.* at 97. The study concluded that more lively and engaging conversations occur when diversity discussions are included in the classroom, and improved learning occurs because abstract concepts are tied directly to concrete examples drawn from personal experience. *Id.* at 110-11; *see also* Richard Pitt & Josh Packard, *Activating Diversity: The Impact of Student Race on Contributions to Course Discussions,* 53 Soc. Q. 295, 312-13 (2012) (finding improved discussions and learning outcomes resulting from classroom diversity, where African American and white students added different personal experiences to discussion).[4]

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[4] Changes in the curriculum that are traceable directly to the student body diversity—and not simply to policies designed to fulfill institutional missions or goals—have also been documented in recent research. A 2012 study focusing on medical school education found that faculty, staff, and students at two state medical schools perceived that the individuals "driving the majority of the diversity discussion on campus are students themselves." Jeffrey F. Milem et al., Arizona Medical Education Research Institute, *The Important Role that Diverse Students Play in Shaping the Medical School Curriculum* 3 (2012),

B. Research Studies Demonstrate the Harms Associated with Tokenism, Racial Isolation, and Stereotyping

The University's compelling interest in student body diversity is grounded not only in the educational value of attaining the positive effects of diversity but also in avoiding the negative effects of racial isolation and tokenism, since "diminishing the force of . . . stereotypes is both a crucial part of [an institution's] mission, and one that it cannot accomplish with only token numbers of minority students." *Grutter*, 539 U.S. at 333. The University has a clearly articulated interest "not to have large numbers of classes in which there are no students—or only a single student—of a given underrepresented race or ethnicity." Supp. Joint App. at SJA25a (University's Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004). The University's holistic admissions policy was enacted in 2004 to address weaknesses in its race-neutral admissions policies, which had not alleviated the large number of classes and programs with only token numbers of minority students when race-conscious admissions were prohibited. Thus in 2002, when the University could not supplement its race-neutral admissions policy with race-conscious admissions, 90% of the small undergraduate classes (5 to 24 students) designed to encourage student participation contained either zero

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available at http://www.coe.arizona.edu/ameri. The study further found that student-led learning opportunities, which typically took the form of optional lectures or roundtable discussions, addressed weaknesses in the curriculum and highlighted the need to incorporate diversity discussions into the formal curriculum. *Id.* at 3-4.

or one African American student, while 43% had zero or one Latino student. *Id.* at SJA25a-SJA26a. Moreover, among its graduate programs outside of Law, 77% of the University's 127 programs had zero or one African American student in 2002, while 45% had zero or one Latino student. *Id.* at SJA12a. The research literature continues to demonstrate that minority students in racially isolated educational settings are at risk of significant harms, including negative stereotyping, discrimination, and "stereotype threat" that can undermine their academic achievement. Thus the University's interest in securing student diversity is compelling at multiple levels—within the overall student body, within schools and majors, and within classrooms.

Isolation, subordination, and negative stereotyping are common problems that arise in a wide range of settings when minority numbers are especially low and the norms and behaviors of majority groups dominate. *See* Mischa Thompson & Denise Sekaquaptewa, *When Being Different is Detrimental: Solo Status and the Performance of Women and Racial Minorities,* 2 Analyses Soc. Issues & Pub. Pol'y 183 (2002); Rosabeth Moss Kanter, *Men and Women of the Corporation* (1977) (describing tokenism effects when the proportion of minorities is very low within an institution). Recent research "consistently calls attention to the isolation, alienation, and stereotyping with which [minority] students are often forced to contend." Shaun R. Harper & Sylvia Hurtado, *Nine Themes in Campus Racial Climates and Implications for Institutional Transformation,* New Directions for Student Services, Winter 2007, at 7, 12.

Problems of stereotyping that arise from race- and gender-based isolation pose serious problems, including fostering "stereotype threat," a well-documented harm that occurs when individuals feel pressured because of the fear that their performance on a test or other task could confirm a negative stereotype about their group. The pressure manifests itself in anxiety and distraction that interfere with intellectual functioning. *See generally* Claude M. Steele, *Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us* (2010). Numerous post-*Grutter* studies have documented how stereotype threat contributes to diminished academic performance among racial and ethnic minorities, as well as women in mathematics and science fields. *See, e.g.*, Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions,* 47 Educ. Psychol. 42 (2012) (summarizing stereotype threat literature); Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students,* 20 Psychol. Sci. 1132 (2009) (meta-analyses of recent studies). *See generally* Brief of Experimental Psychologists as *Amici Curiae* in Support of Respondents (summarizing literature and its relationship to admissions policies).

Research on minority students in racially isolated settings has also identified problems of overt discrimination and multiple forms of "microaggression," including "the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative . . . slights and insults to the target person or group." Derald Wing Sue, *Micro-*

aggressions in Everyday Life: Race, Gender, and Sexual Orientation 5 (2010); *see, e.g.*, Janice McCabe, *Racial and Gender Microaggressions on a Predominantly-White Campus: Experiences of Black, Latina/o and White Undergraduates,* 16 Race, Gender & Class 133 (2009); William A. Smith, Man Hung & Jeremy D. Franklin, *Racial Battle Fatigue and the* Mis*Education of Black Men: Racial Microaggressions, Societal Problems, and Environmental Stress,* 80 J. Negro Educ. 63 (2011). For example, in a 2009 study drawing data from a large public university in the Midwest containing low percentages of minority students in the student body, McCabe found a variety of microaggressions in campus and classroom settings. African American men encountered stereotypes characterizing them as aggressive, threatening, and criminal, and they reported more frequent interactions with campus and local police compared to other students. McCabe, *supra,* at 139. African American women frequently reported problems within classroom settings, such as not being taken seriously in discussions or always being expected to represent their race, *id.* at 142-43, while Latino women commonly encountered stereotypes of foreignness and exoticism, often of a sexual nature, *id.* at 140-41. As a result, minority students consistently reported feeling isolated and not belonging to their campus community.

Recent data drawn from nearly 28,000 respondents at thirty-two higher education institutions from across the country, including Texas, show that, when campus diversity is low, the isolation of African American and Latino students exacerbates feelings of exclusion and reinforces stereotypes, microaggressions, and discrimination. Sylvia Hurtado &

Adriana Ruiz, UCLA Higher Educ. Research Inst., *The Climate for Underrepresented Groups and Diversity on Campus* (June 2012), *available at* http://heri.ucla.edu/briefs/urmbrief.php. Hurtado and Ruiz found that feelings of exclusion from campus events and activities, as well as offensive verbal comments and visual images, are more prevalent in low-diversity institutions among underrepresented minority students, with significant declines as the campus minority student enrollment increases. *Id.* at 2. For example, 55.4% of African American students in low-diversity institutions reported some level of exclusion from campus events and activities, while only 20.3% of African American students in high-diversity institutions reported feelings of exclusion. *Id.* at 2-3. Similarly, 67.2% of African American students in low-diversity institutions reported being the target of discriminatory verbal comments, compared to 37.5% in high-diversity institutions; 40.2% of African American students in low-diversity institutions had experiences with offensive visual images, compared to 16.4% in high-diversity institutions. *Id.*

Problems of tokenism, stereotyping, and microaggression have been shown to be commonplace in programs and fields that have low numbers of minorities or women (particularly women of color), especially in science, technology, engineering, and mathematics (STEM). *See, e.g.,* Mitchell J. Chang, M. Kevin Eagan, Monica H. Lin & Sylvia Hurtado, *Considering the Impact of Racial Stigmas and Science Identity: Persistence Among Biomedical and Behavioral Science Aspirants,* 82 J. Higher Educ. 564 (2011); Mitchell J. Chang, Oscar Cerna, June Han & Victor Saenz, *The Contradictory Roles of Institutional Status in Retaining Underrepresented Minori-*

ties in Biomedical and Behavioral Science Majors, 31 Rev. Higher Educ. 433 (2008); Sylvia Hurtado et al., *Predicting Transition and Adjustment to College: Biomedical and Behavioral Science Aspirants' and Minority Students' First Year Of College,* 48 Res. Higher Educ. 841 (2007).

Thus in a 2011 review of over 400 studies on racial and ethnic minorities in STEM fields, Museus et al. reported that researchers examining the role of campus climate in the experiences of minority students in STEM consistently found that those students report "chilly and hostile climates at both two- and four-year institutions and that those environments can be associated with feelings of discouragement." Samuel D. Museus, Robert T. Palmer, Ryan J. Davis & Dina C. Maramba, *Racial and Ethnic Minority Students' Success in STEM Education,* 36 ASHE Higher Educ. Rep., No. 6, at 1, 67 (2011). Moreover, several studies show that less supportive educational environments are tied to minority students' departure from STEM fields, *see id.,* while positive factors such as the racial and gender diversity of graduate students in STEM have been linked to persistence among women and minority students in STEM majors, *see* Amanda L. Griffith, *Persistence of Women and Minorities in STEM Field Majors: Is It School that Matters?,* 29 Econ. Educ. Rev. 911 (2010).

In a review of recent literature specifically focusing on minority women in the STEM fields, Ong et al. noted that many studies described the climate of undergraduate STEM programs as "chilly" to women of color and several studies "specifically demonstrated the gender *and* racial/ethnic bias that women of color experience on a day-to-day basis as STEM majors," placing them in a unique position of confronting multiple systems that they find oppressive. Maria Ong, Carol Wright, Lorelle L. Espinosa & Gary Orfield, *Inside the Double Bind: A Synthesis of Empirical Research on Undergraduate and Graduate Women of Color in Science, Technology, Engineering, and Mathematics,* 81 Harv. Educ. Rev. 172, 182 (2011) (emphasis in original). Numerous studies chronicle the problems of tokenism when a student is the lone woman of color in a science classroom or a laboratory, heightened by unwelcoming environments, *id.* at 183, and many of the problems become even more acute when students have entered graduate-level STEM programs that are even more isolating, *id.* at 192-93.

C. Claims that Minority Students are Harmed by Race-Conscious Admissions are Without a Strong Empirical Foundation

The University's interest in student body diversity remains compelling, notwithstanding the contentions of Petitioner and her *amici curiae* that race-conscious admissions policies harm minority students and engender such high costs that they cannot be constitutionally justified. *See* Pet'r's Br. at 41-42. These arguments receive the support of few researchers, and the bulk of the scant research supporting these claims has been published without peer review, has been widely criticized by peer scientists, and has been contradicted by better-designed and more recent research. Multiple studies confirm that purported problems of stigma due to race-conscious admissions and the educational harms resulting from the so-called "mismatch" of minority students at selective institutions have not been established by the studies said to prove them and indeed are regularly contradicted by sounder and more widely accepted research.

Recent studies undercut the largely speculative arguments contending that minority students feel more stigmatized because of race-conscious admissions policies. A 2010 study by Bowen compared students enrolled in universities with race-conscious admissions policies with students enrolled in universities in states that had barred race-conscious admissions, and posed several questions focusing on both "internal stigma" (minority students' own feelings of doubt or inferiority) and "external stigma" (non-minority students questioning of minority students' abilities and qualifications). Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action,* 85 Ind. L.J. 1197 (2010). Bowen found that approximately three-fourths of students in states that bar race-conscious admissions felt pressure to prove themselves because of their race, compared to fewer than half of the students who were in schools with race-conscious admissions; these results indicate that internal stigma was *lower* among students in schools with race-conscious admissions. *Id.* at 1223-24. Similarly, Bowen found that only about one-quarter of the students at schools with race-conscious admissions reported that non-minority students had questioned their qualifications, compared to nearly one-half of the students who were enrolled in states with bans. *Id.* at 1224-25. These findings indicate that external stigma, like internal stigma, was lower among those students in schools with race-conscious admissions.

Enhanced stigma also appears absent at the professional school level. A 2008 study focusing on elite law schools was conducted by Onwuachi-Willig, Houh, and Campbell, who examined stigma among students at seven public law schools, four of which employed race-conscious admissions and three of which did not. Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 Calif. L. Rev. 1299 (2008). The study found low levels of the "stigma of dependence" (internal stigma), and the little stigma that was reported was no more common in the four schools with race-conscious admissions than in the three schools without race-conscious admissions. *Id.* at 1332. Most students also reported no negative effects of external stigma, and there was no significant difference between student responses at the two groups of law schools. *Id.* at 1332-33.

Recent research also undermines the so-called mismatch hypothesis proposed by opponents of race-conscious admissions. This hypothesis predicts lower graduation rates for minority students who attend selective institutions because some of their admissions credentials, particularly standardized test scores, do not match their institution's average. The claim is that these students will underperform academically and will have lower educational outcomes than they would have had in less selective institutions. Notwithstanding these assertions, many studies not only show that the mismatch hypothesis lacks sufficient support, they reveal effects that run in the opposite direction of the effects predicted by the mismatch hypothesis.

For instance, in a 2005 study of undergraduates that relied on multiple data sets (including two national longitudinal surveys) and several analytical methods, Alon and Tienda found that Latino and black students' probabilities of graduation were higher, rather than lower, at selective institutions compared to non-selective ones, a finding that controverts the mismatch hypothesis. Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity,* 78 Soc. Educ. 294, 309 (2005).

A 2009 study conducted by Bowen et al. focusing on minority students who entered selective public institutions in 1999 yielded similar results, finding that "black male students who went to more selective institutions graduated at *higher*, not lower rates than black students in the same GPA interval who went to less selective institutions." William G. Bowen, Matthew W. Chingos & Michael S. McPherson, *Crossing the Finish Line: Completing College at America's Public Universities* 209 (2009) (emphasis in original). Bowen et al. obtained comparable results for Latino students: they found no evidence of mismatch and concluded that the positive relationship between graduation rates and institutional selectivity was even stronger for Latinos than for blacks. *Id.* at 214.

Similarly, a 2007 study by Fischer and Massey examining the educational outcomes of a 1999 cohort of college freshman attending twenty-eight selective colleges and universities found no evidence supporting the mismatch hypothesis with respect to first-year grades or dropout rates. Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action* *in Higher Education,* 36 Soc. Sci. Res. 531 (2007). Instead, the study found that the effect of diversity-based admissions on first-semester grades "was *positive,* precisely opposite the direction predicted by the mismatch hypothesis" *id.* at 539 (emphasis in original), and there were no effects linking race-conscious admissions to higher dropout rates, finding instead that "the degree of an individual's likely benefit from affirmative action is *negatively* related to the likelihood of leaving school," *id.* at 541 (emphasis in original).

A Texas-specific study focusing on racial and ethnic minority students enrolled in various public universities underscores the earlier findings that are based on national data. The 2010 study by Cortes compared undergraduate graduation rates at Texas universities that were expected to be "better matched" for minority students and found that minority graduation rates at these institutions were lower than the graduation rates at institutions where students supposedly would be poorly matched and expected to underperform, thus contradicting the predicted effects of the mismatch hypothesis. Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan,* 29 Econ. Educ. Rev. 1110 (2010).

Studies of purported mismatch in professional school settings also lack a solid empirical foundation. *Amici curiae* Sander and Taylor, relying largely on Sander's work on law school education and recent unpublished work,[5] have proposed that race-conscious admissions have harmed the academic performance of African American law students and have contributed to lower graduation rates and lower passage rates on bar examinations. *See* Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, at 8-10. Contemporaneous studies critiquing Professor Sander's 2004 article on law school mismatch, along with more recent analyses of the mismatch hypothesis, undermine these claims. *See, e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807 (2005); David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005); Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 Yale L.J. 2011 (2005); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?* 75 U. Chi. L. Rev. 649 (2008); *see also* Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?: A Correction, A Lesson, and an Update*, 105 Nw. U. L. Rev. 791 (2011) (use of corrected data from author's 2007 critique of Sander do not alter the lack of support for the mismatch hypothesis, contrary to the claim in the Sander & Taylor *amicus* brief)).

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[5] *Amici curiae* Sander and Taylor cite Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools,* 57 Stan. L. Rev. 367 (2004), subsequent replies by

Sander's statistical analyses and his prediction in 2004 that the elimination of race-conscious admissions would have resulted in a 7.9% increase in

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Sander to critiques of his article, and several unpublished working papers.

the number of new African American lawyers have been subject to extensive methodological criticism. Among the problems identified in Sander's work are his reliance on old data that do not reflect recent trends; overestimation of African American application, admission, and enrollment numbers; serious weaknesses in his statistical methods and inferences; unsupported assumptions that favor the results he seeks to find; and flaws in his analysis of graduation rates and bar passage. *See* Chambers et al., *supra*, at 1859-91. Analyses of Sander's data have instead projected major declines, not increases, in the number of new African American lawyers resulting from the hypothetical elimination of race-conscious admissions, *see id.* at 1857 (estimating declines as high as between 30-40%), while other analyses employing different methods found neither predicted mismatch effects nor compelling evidence that affirmative action reduced the number of African American lawyers, *see* Ayres & Brooks, *supra*.

A 2011 analysis by Camilli and Welner of the law school mismatch literature (as well as K-12 and undergraduate literature) concludes that the base of research on law schools "fails to document a consistent and substantial negative mismatch effect." Gregory Camilli & Kevin G. Welner, *Is There a Mismatch Effect in Law School, Why Might It Arise, and What Would It Mean?*, 37 J.C. & U.L. 491, 521 (2011). Research from K-12 and undergraduate education suggests instead that "any negative match effects observed in law school are more likely due to the practices of law schools or unobserved (unmeasured) characteristics of students rather than the [mismatched] credentials." *Id.*

The stigma and mismatch arguments offered by Petitioner and her *amici curiae* ignore the wealth of data showing that minority students gain significant educational and economic benefits through their attendance at selective institutions—including higher graduation rates and increased earnings and labor force participation following graduation. The Court recognized these basic findings nearly ten years ago, *see Grutter,* 539 U.S. at 330 (citing William G. Bowen & Derek Bok, *The Shape of the River* (2000)), and findings from education and economic research continue to support this point. *See, e.g.,* Bowen et al., *Crossing the River, supra,* at 209-15 (African American and Latino students who attend public flagship universities are more likely to graduate than comparable students who attend less selective institutions); Tatiana Melguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities,* 49 Res. Higher Educ. 214 (2008) (selectivity of an institution attended has a positive and significant impact on college completion rates of minorities); Mario L. Small & Christopher Winship, *Black Students' Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences,* 36 Soc. Sci. Res. 1257 (2007) (selectivity increases the probability of black students' graduation and helps black students more relative to white students); Mark C. Long, *Changes in the Returns to Education and College Quality,* 29 Econ. Educ. Rev. 338 (2010) (educational attainment and college quality raise earnings; larger increases in the effects of education on earnings and labor force participation for men, blacks, and Latinos); *see also* Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority*

Graduates in Practice: The River Runs Through Law School, 25 Law & Soc. Inquiry 395 (2000) (finding rates of bar passage and of career success for minority graduates to be close to or indistinguishable from those of white graduates). These findings underscore the Court's prior determination that "universities . . . represent the training ground for a large number of our Nation's leaders," as well as the importance of the University's ensuring that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter,* 539 U.S. at 332.

II. RESEARCH SUPPORTS UPHOLDING THE UNIVERSITY'S ADMISSIONS POLICY AS NARROWLY TAILORED

Education research further supports the University's argument that its holistic admissions policy is narrowly tailored to the compelling interest in student body diversity. Empirical findings addressing the narrow tailoring requirement are discussed in greater depth in other *amicus curiae* briefs, *see, e.g.,* Brief of American Social Science Researchers as *Amici Curiae* in Support of Respondents. In this brief the AERA et al. address only a few points of law and highlight just some of the relevant research, primarily in response to claims raised by Petitioner and her *amici curiae.* The literature cited here indicates that the University's admissions policy is essential to help achieve its diversity interest, since race-neutral alternatives such as the University's top-ten-percent admissions policy are insufficient to attain the critical mass of minority students necessary to fully realize the benefits of diversity.

A. "Critical Mass" is Not a Fixed Number or Percentage and Must Be Assessed by the University in Evaluating the Educational Benefits of Diversity

Petitioner and her *amici curiae* criticize the University's use of "critical mass" to justify its race-conscious admissions policy. As the *Grutter* Court made clear, critical mass does not correspond to a rigid numerical figure, but is "defined by reference to the educational benefits that diversity is designed to produce." 539 U.S. at 330. Consistent with the Court's prohibition on quotas and racial balancing, the research literature has not identified a fixed number or percentage to define critical mass, nor does the Court need such a figure in order to assess the constitutionality of the University's policy. The determination of critical mass ultimately must take into account the University's evaluation of the educational benefits that it seeks to achieve—consistent with an overall mission that includes training its graduates to be leaders of Texas's diverse population—as well as the context in which the benefits are sought. The research literature has provided insights into some of the optimal conditions under which cross-racial interaction and diversity-related activities can lead to the benefits of diversity, *see supra* Part I.A, but the University has made an assessment of the educational benefits it has so far achieved and has determined that it has fallen short of attaining critical mass. Indeed, in many classes and other settings, the University's minority numbers remain at token—or zero—levels.

Petitioner's *amici curiae* Scholars of Economics and Statistics attempt to undermine the critical mass concept by relying heavily on a single study, John R. Lott, J. Mark Ramseyer & Jeffrey Standen, *Peer Effects in Affirmative Action: Evidence from Law Student Performance,* 31 Int'l Rev. L. & Econ. 1 (2011). *Amici curiae* assert that increases in minority student numbers do not produce higher academic achievement by minority students. In addition to testing only a single, narrow educational outcome—law student grades—the reliability of the study's data and the representativeness of its samples are questionable. The Lott et al. study examines only two schools, both of which have atypically low African American and Latino enrollments, and their models do not incorporate other potential explanatory variables that could affect grades, such as the imposition of a mandatory grade curve or the skills tested on examinations. Remarkably, the authors attempt to draw conclusions on the effects of critical mass based on data from schools that lacked a critical mass of minority students and in which many classes had only token numbers of minority students. Notwithstanding these issues, *amici curiae* neglect to highlight the study's finding that increases at one school in the number of Asian Americans, who constituted a notably higher percentage of the population at the school (7% compared to 2% African American and 2% Latino), are associated with improvements in their grades. In any case, the study's findings do not negate the extensive body of evidence documenting the benefits that accrue as student bodies become more diverse.

B. Race-Conscious Admissions are Necessary to Complement the University's Percentage-Based Admissions Plan

Petitioner contends that the University's holistic admissions policy is unnecessary because sufficient minority student enrollments can be achieved through a race-neutral alternative: Texas's plan that guarantees admission to a state university to students finishing in the top ten percent of their high school graduating classes. This Court has already recognized several of the major limitations of percentage plans, having noted their inapplicability to graduate and professional school admissions and recognizing the barriers they impose to "conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340.

Recent research has also identified problems with percentage-based plans, which in Texas must rely on the state's demographic mix, including patterns of residential segregation in many areas of the state and their effects on secondary school enrollments.[6] The empirical evidence shows that the percent plan has yielded sizable but not sufficient numbers of racial and ethnic minority students. For example, a 2008 study by Long and Tienda examined administrative data to assess changes in admission and enrollment probabilities at state institutions and concluded that the percent plan is an ineffective proxy for race-conscious admissions. Mark C. Long & Marta Tienda, *Winners and Losers: Changes in Texas University Admissions Post*-Hopwood, 30 Educ. Eval. & Pol'y Analysis 255 (2008).

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[6] Research studies have also demonstrated the limits of other forms of race-neutral alternatives, such as relying on socioeconomic status or parental income to admit students, which are not as effective as race-conscious admissions and could lead to reductions in the numbers of minority students in selective colleges and universities. *See, e.g.*, Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 J. Pol'y Analysis & Mgmt. 463 (2006); Alan Krueger et al., *Race, Income and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 Am. L. & Econ. Rev. 282 (2006).

Similarly, a 2010 study analyzing both changes in the size of high school graduation cohorts and institutional carrying capacity showed that the ten-percent plan did not restore Latino and African American representation at the University of Texas at Austin or at Texas A&M University, even after four years. Angel Harris & Marta Tienda, *Minority Higher Education Pipeline: Consequences of Changes in College Admissions Policy in Texas,* 627 Annals Am. Acad. Pol. & Soc. Sci. 60 (2010). Harris and Tienda also found that black and Latino application rates to the University and to Texas A&M declined after race-conscious admissions were banned; although rates rebounded after the percent plan went into effect, they still fell below levels that existed prior to the ban. *Id.* at 65*; see also* Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. Labor Econ. 113, 116 (2010) (predictive models show declines in minority enrollments if percentage-based admissions were to be applied nationwide).

Nonetheless, the state has chosen to retain the top-ten-percent plan, and the University has chosen to implement its holistic admissions policy in tandem with the percent plan. The efficacy of University's race-conscious policy is borne out by the numbers, which are fully documented in the record. Since its implementation, the University's race-conscious plan, in conjunction with the percentage plan, has yielded increases in minority admissions and enrollments that significantly exceed the numbers attainable under the percentage plan alone.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals upholding the constitutionality of the University of Texas at Austin's race-conscious admissions policy should be affirmed.

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APPENDIX

APPENDIX A

STATEMENTS OF INTEREST AND ORGANIZATIONAL DESCRIPTIONS OF *AMICI CURIAE*

Founded in 1916, the **American Educational Research Association (AERA)** is the national scientific association for more than 25,000 members engaged in research on education. AERA aims to advance knowledge about education, encourage scholarly inquiry related to education, and promote the use of research to improve education and serve the public good. The scientists and scholars in this interdisciplinary field consider fundamental problems that relate to education across the life span and contexts of learning. Researchers consider all aspects of education from the processes of teaching and learning, curriculum development, and the social organization of schools and educational institutions to the effects of education on cognitive and social capacity, human development, workforce preparedness, and health and at-risk behaviors. AERA embraces the role of improving the nation's education research capacity by promoting application of scientific standards, and by providing training programs, research and mentoring fellowships, and seminars on advanced methodological and statistical techniques. AERA publishes six highly ranked, peer reviewed journals, issues Standards for Reporting on Empirical Social Science Research in AERA Publications, promotes the highest standards for research integrity through its Code of Ethics, and produces (in collaboration with the American Psychological Association and the National Council on Measurement in

Education) the *Standards for Educational and Psychological Testing*. AERA has 12 research divisions, including in Postsecondary Education and Measurement and Research Methodology.

The **American Association for the Advancement of Science (AAAS),** founded in 1848, is the world's largest general scientific society, representing 261 affiliated societies and academies of science, and serving 10 million individuals. AAAS fulfills its mission to "advance science and serve society" through initiatives in science policy; international programs; science education; and publication of the journal *Science*. AAAS is committed to promoting the highest quality standards for the conduct of science and engineering. AAAS supports accurately presenting valid and reliable science in all matters (see our amicus brief in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993)). Consonant with core scientific principles, AAAS maintains that any scientific claim should be regarded skeptically until it has been subject to rigorous peer scrutiny. AAAS also expects scientific studies to reflect intellectual honesty in reporting research. Furthermore, AAAS is strongly committed to broadening participation in science, technology, engineering, and mathematics (STEM); a board-appointed committee advises AAAS in working toward this goal.

The **American Sociological Association (ASA)** is the national professional and scholarly association of sociologists in the United States. Founded in 1905, the Association is dedicated to advancing sociology as a scientific discipline and profession serving the public good. With over 14,000 members, ASA encompasses sociologists who are faculty members at colleges and universities, researchers, practitioners, and students. Most sociologists holding doctoral degrees from accredited universities are ASA members. About 20 percent of ASA members pursue scientific careers in government, business, or non-profit organizations. ASA publishes nine leading peer-reviewed journals covering research in the discipline, including the *American Sociological Review, Sociology of Education, and Sociological Methodology*. Since 1967, ASA has had a dedicated scholarly section on sociology of education. In addition, since 1969, the Association has had a Code of Ethics adopted by the membership that specifies standards of scientific responsibility and integrity.

Headquartered in Alexandria, Virginia, the **American Statistical Association (ASA)** is the world's largest community of statisticians and the second oldest continuously operating professional society in the United States. For more than 170 years, the ASA has supported excellence in the development, application, and dissemination of statistical science through meetings, publications, membership services, education, accreditation, and advocacy. Its members serve in industry, government, and academia in more than 90 countries, advancing research and promoting sound statistical practice to inform public policy and improve human welfare.

Founded in 1976, the **Association for the Study of Higher Education (ASHE)** fosters scholarly inquiry of the highest standards of excellence for the purpose of increasing knowledge about and understanding of higher education. ASHE works to advance research and scholarly inquiry on all aspects of higher education, including teaching and learning, curriculum, students, faculty, organization, policy and social analysis, and finance. The Association's more than 2000 members include faculty actively involved in research and teaching; policymakers and institutional leaders who contribute to framing, dissemination, and use of research; and researchers in training. The Association promotes the development of the next generation of higher education scholars, policymakers, and leaders committed to excellence, relevance, and impact in research, teaching, educational programming, and provision of equity in opportunities to learn. Through its annual conference and its peer-reviewed journals and report series, the Association advances research into key higher education issues.

Founded in 1964, the **Law and Society Association (LSA)** is dedicated to advancing knowledge about law, legal processes, and the interrelationship of law and social, political, economic, and cultural life. The Association promotes rigorous interdisciplinary social scientific research regarding how legal policy and practice affect individuals and institutions as well as how social and political forces shape law. LSA also encourages humanistic inquiry so important for shaping research questions and for interpreting the significance of empirical findings. Committed to scholarship of the highest standards, since 1966, the Association has published the *Law & Society Review*—a peer reviewed journal highly ranked both among social science and law journals. LSA currently includes approximately 1,400 members with training in law, sociology, political science, psychology, anthropology, economics, history, linguistics, literature, communication, and related fields; many members have dual J.D. and Ph.D. degrees. Nearly all members are employed in university and research institute settings.

Founded in 1924, the **Linguistic Society of America (LSA)** is the major professional society in the U.S. that is exclusively dedicated to the advancement of the scientific study of language. Language is a defining characteristic of the human species and impacts virtually all aspects of human experience. For this reason, linguists seek not only to discover properties of language in general and of languages in particular, but also strive to understand the interface of the phenomenon of language with culture, cognition, history, literature, and other fields of scholarship. The LSA plays a critical role in supporting and disseminating linguistic scholarship, as well as facilitating the application of current research to scientific, educational, and social issues concerning language. With over 4,000 members, the LSA speaks on behalf of the field of linguistics and also serves as an advocate for sound educational and public policies that affect all segments of society.

The **National Academy of Engineering (NAE)** is a non-profit, private organization that was created in 1964 under the Congressional charter of the National Academy of Sciences. NAE has over 2,000 peer-elected members and foreign associates; election to membership is considered one of the highest professional honors that an engineer can achieve. The members of NAE are leaders in business, academia, and government. In 1999, NAE began a "Diversity in Engineering" initiative whose mission is to increase the diversity of the U.S. engineering workforce by developing a strong domestic talent pool. The NAE has influenced the nature and content of engineering education through its Center for the Advancement of Scholarship on Engineering Education, its Frontiers of Engineering Education programs, and major reports, including *The Engineer of 2020*. The NAE believes that encouraging and sustaining a diverse population of engineers is one of the major challenges facing the profession and the nation today, and that the scientific evidence supports the conclusion that diversity in higher education is critical to creating and maintaining a diverse engineering workforce and leadership

AMICUS
CURIAE
BRIEF

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF OF *AMICI CURIAE* THE AMERICAN JEWISH COMMITTEE, CENTRAL CONFERENCE OF AMERICAN RABBIS, AND UNION FOR REFORM JUDAISM IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The American Jewish Committee ("AJC") is a non-partisan, not-for-profit advocacy and human-relations organization. It was established in 1906 to protect the civil and religious rights of Jews. More than one-hundred years later, AJC now has roughly 170,000 members and supporters, and 26 regional offices, spread across the nation and throughout the world.

AJC recognizes that the best defense against anti-Semitism and other forms of bigotry is to promote mutual understanding and acceptance through interactions between peoples of diverse ethnic, national, racial, and religious backgrounds. Through its Arthur and Rochelle Belfer Center for American Pluralism, AJC draws on historical Jewish-American experiences to facilitate cross-cultural and cross-racial interactions that advance the principles of democracy, pluralism, diversity, and civic engagement. In practice, AJC has advanced these principles for decades by advocating on behalf of civil rights and civil liberties for people of all backgrounds. For example, AJC sponsored the study demonstrating the psychological impact of prejudice and discrimination on children cited by this Court in its landmark *Brown v. Board of Education* decision.[2]

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[1] No counsel for any party has written this brief in whole or in part. This brief was prepared entirely by AJC's counsel on a *pro bono* basis; no other person made any monetary contribution to this brief. *See* Sup. Ct. R. 37.6. All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk of the Court.

[2] *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 n. 11 (1954) (citing K. B. Clark, *Effect of Prejudice and Discrimination on*

In the context of admissions in higher education, AJC has long recognized the importance of evaluating each applicant holistically as an individual, rather than making prejudgments based solely on his or her race, religion, color, or creed. For this reason, AJC filed *amicus curiae* briefs in *DeFunis v. University of Washington Law School* and *Bakke v. University of California Board of Regents* opposing those institutions' separate admissions systems for minorities, which evoked the admission quotas used to restrict Jewish matriculation to colleges and universities in the earlier part of the Twentieth Century. Such quotas were born of bigotry, and AJC staunchly opposes any admissions system that similarly depends on predeterminations about the proper racial or ethnic composition of college and university campuses.

In 2003, AJC filed an *amicus curiae* brief in *Grutter v. Bollinger* in support of the University of Michigan Law School's efforts to achieve diversity in its student body, which did not discriminate against or grant a quantifiable preference to any race, but instead encouraged diversity through individualized, flexible analysis of each candidate. This Court sustained the University of Michigan Law School's policy and confirmed the importance of diversity in higher education in order to provide students with a richer educational experience and to better prepare them to participate as citizens in our pluralistic democracy. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

Personality Development (Mid-century White House Conference on Children and Youth, 1950)).

Central to AJC's organizational mission is building coalitions across diverse religious, ethnic, and racial groups. AJC's ability to fulfill its mission depends greatly on diversity in colleges and universities. Without diversity in higher education, which presents individuals with differing viewpoints and backgrounds at a still-impressionable stage in life, organizations like AJC would be limited in their ability to foster relationships and build broad-based coalitions among the diverse citizens of our great Nation. AJC thus believes that it is imperative to reaffirm the twin holdings announced in *Grutter* and reject the invitation of petitioner and certain other *amici* to abandon educational diversity as a compelling state interest or to invalidate holistic admissions programs.

The Union for Reform Judaism, whose 900 congregations across North America includes 1.5 million Reform Jews, and the Central Conference of American Rabbis ("CCAR"), whose membership includes more than 1,800 Reform rabbis, share a deep commitment to the prophetic imperatives of our tradition and the creation of justice for all the people of our country. We have held that affirmative action aimed at correcting historic injustice in our society is a significant and successful vehicle for achieving such a goal. We have held that race-conscious remedies that use goals and timetables as opposed to quotas, which led to our support for affirmative action programs ranging from those in the *DeFunis* and *Bakke* cases to those in the *Grutter* case, are moral and effective means of addressing the impact of historic discrimination. We are particularly sensitive to the dangers that we face in a society where inequity is allowed to persist. The long-range interests of all Americans are best served by the creation of a society that is truly just. Affirmative action fosters vibrant diversity and the full participation of minorities in all important aspects of society.

SUMMARY OF ARGUMENT

The diverse demographic composition of the United States makes it imperative for colleges and universities to create pluralistic campuses that will expose their students to an array of qualities and experiences, and differing viewpoints and values. Diversity in higher education is of vital importance not only to schools themselves, but also to our society, given the critical impact education has in shaping students to become involved citizens and leaders of our country.

Amici therefore request that this Court reaffirm the holding of *Grutter v. Bollinger*, which allows colleges and universities to achieve campus diversity through admissions policies that consider ***all*** qualities of each individual applicant. Such policies do not discriminate or provide preferential treatment based on race alone, but instead acknowledge the reality that race and culture inherently play some role in shaping an applicant's life experience and character. Indeed, overturning *Grutter* would force academic institutions to turn a blind eye to important qualities that are often central to a student's experiences and persona.

As this Court held in *Grutter*, there is nothing unconstitutional about a race-conscious admissions policy that seeks to attain educational diversity through individualized, case-by-case admissions decisions without resort to an inflexible quota system or racial balancing. The record makes clear that the University of Texas at Austin (the "University of Texas" or "UT") implements an individualized admissions policy that is not a quota, and is directly in line with the type of admissions policy that this Court sanctioned in *Grutter*.

As social science research and the previous thirty years of college admissions confirm, admissions policies such as the one at issue in this case provide important social and educational benefits. Further research has demonstrated that the Texas "Top Ten Percent" plan and other race-neutral affirmative action policies endorsed by petitioner simply do not effectively enroll a diverse group of underrepresented minorities because such policies fail to account for the unique and valuable experiences within minority groups. It is therefore reasonably clear that UT's plan is necessary to accomplish the compelling interest of educational diversity and is narrowly-tailored to advance that interest.

Amici request that the Court decline petitioner's and some of the other *amici*'s overtures intended to effect a reconsideration of *Grutter*. Revisiting *Grutter* would create unrest and confusion in the country's college and university admissions offices, which have relied on the principles first articulated by Justice Powell in *Bakke* more than three decades ago. It would deprive university administrators of their ability to provide their students with an enriching and diverse educational experience, and instead, force them to ignore essential qualities, challenges, and life experiences faced by their applicants. At the same time, invalidating this

Court's most recent guidance in *Grutter* ultimately will diminish the benefits to our pluralistic society arising from the full inclusion within the university community of students representing all of the qualities and values of our diverse citizenry.

ARGUMENT

I. This Court Should Reaffirm *Grutter*'s Holding That Obtaining The Benefits That Flow From Educational Diversity Is A Compelling State Interest.

Jewish leaders, institutions, and organizations have not always embraced race-conscious admissions policies. The first affirmative action programs were inflexible systems that allotted a set number of admissions slots to minority groups. Such programs were reminiscent of the bigoted numerical quota systems implemented by elite colleges and universities, including Harvard, Yale, Princeton, and Columbia, to curb Jewish enrollment during the first half of the Twentieth Century. *See, e.g.*, JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON, 88, 102, 130-31 (2005); DAN A. OREN, JOINING THE CLUB: A HISTORY OF JEWS AND YALE 46-47, 175-76 (1985); MARCIA GRAHAM SYNNOTT, THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970, 17-20 (1979).

While the Jewish quota systems were sometimes given paternalistic rationalizations, such as the supposed need to protect Jewish students on college campuses, *see* HENRY L. FEINGOLD, LEST MEMORY CEASE: FINDING MEANING IN THE AMERICAN JEWISH PAST 95 (1997), at bottom, they were rooted in anti-

Semitism and hatred. They sought to exclude Jews because of anti-Semitic prejudices about their character, and many promising Jewish students were deprived of important opportunities, despite their qualifications, simply because they were Jewish.

For this reason, among others, many members of the Jewish community, including AJC, have historically opposed any admissions system that resembles a quota. *See* Brief of the American Jewish Committee, et al. as Amici Curiae Supporting Respondent, *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188015, at *11-12 (Aug. 5, 1977). AJC believes that it was wrong for institutions to rigidly classify people based on race, gender, or ethnic origin. In this regard, AJC agrees with this Court's recognition over the last 35 years of the invidious nature of quotas and other racial balancing systems. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007); *Grutter*, 539 U.S. at 330; *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Bakke*, 438 U.S. at 307. These decisions have forced a salutary recasting of affirmative-action programs.

As college and university admissions policies have evolved, so too has Jewish support for race-conscious admissions. After Justice Powell's landmark opinion in *Bakke*, colleges and universities largely abandoned quota systems and began to implement more flexible, individualized admissions policies that considered race as only one among many aspects of an applicant's file. As a result, many Jewish organizations, including AJC, have come to support such admissions policies, which simply reflect the reality that, for some individuals, race is an essential component of their experience, personality, and character.

Indeed, AJC and other Jewish groups now recognize that flexible, race-conscious admissions policies like those at issue in this case and *Grutter* are beneficial to society because they ensure educational diversity and its attendant benefits. *See* Brief of the American Jewish Committee, et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) & *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 536749, at *2 (Feb. 14, 2003). Without educational diversity, many students would be ill-equipped to serve as culturally aware business and governmental leaders in our pluralistic society, and organizations such as AJC and other *amici* will be limited in their ability to reach people to advance cross-cultural understanding as a bulwark to bigotry.

A. Diversity In Academic Institutions Provides Important Educational And Societal Benefits.

Having students from a variety of backgrounds, cultures, and experiences enhances the learning within an undergraduate setting. Justice Powell stated it well in *Bakke*: "The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (citation and internal quotation marks omitted). Justice Powell also acknowledged the view that students with different racial backgrounds, religious experiences, extracurricular activities, and from different parts of the country and the world, will bring these varied experiences to campus. *Id.* at 313 (citation omitted). These students' experiences will inform the discussions inside and outside the classroom.

In fact, the positive benefits that racial diversity provides to the educational experience offered by colleges and universities, such as greater intellectual and social ability among students, have been verified by recent social science research. *See, e.g.*, Victor B. Saenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 RES. HIGHER EDUC. 1, 35-36 (February 2007) (cross-campus longitudinal research study concluding based on survey data that "the presence of diverse peers, along with opportunities for facilitated interactions that expand student knowledge about diverse others, perspectives and backgrounds, contributes to the development of important skills."); Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER EDUC. 529, 535-36 (August 2004) (noting correlation between campus diversity and higher intellectual ability, social ability, and civic interest among students); Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, *in* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 130-31 (Mitchell J. Chang et al. eds., 2003) (finding that campus diversity facilitated higher-order thinking skills, less racial stereotyping and more comfortable living, working, and socializing in integrated settings); Anthony Lising Antonio, et al., *Effects of Racial*

Diversity on Complex Thinking in College Students, 15 PSYCHOL. SCI. 507, 508-09 (2004) (finding that the presence of minority collaborators increased "integrative complexity," defined as "the degree to which cognitive style involves differentiation and integration of multiple perspectives and dimensions.").

This exposure to diverse cultures and experiences not only enriches the education of students, but also prepares them for a pluralistic democracy by creating cross-cultural understanding and an openness to new viewpoints. As this Court has recognized, the importance of diversity in education transcends the classroom and even the university campus. Justice Powell noted in *Bakke*, and this Court later reaffirmed in *Grutter*, that "nothing less than 'the nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)).

In AJC's experience, Justice Powell's words ring true. Through its partnerships with a diverse range of racial and ethnic groups, including the NAACP, La Raza, and many other similar organizations, AJC has encouraged cross-cultural engagement and understanding. These efforts have been successful in advancing AJC's goals of eliminating anti-Semitism and other bigotry. AJC's relationship with the African-American community has been particularly fruitful, resulting in nearly one-hundred years of coalitional initiatives to promote civil rights for African-Americans. *See* American Jewish Committee, AFRICAN-AMERICAN JEWISH RELATIONS:

AN AJC HISTORY, available at: http://www.ajc.org/site/apps/nlnet/content2.aspx?c=ijITI2PHKoG&b=838459&ct=6451259 (last visited July 28, 2012). And these relationships are mutually beneficial: since 1982, AJC's Project Interchange has brought nearly 6,000 diverse world leaders from over 68 countries to Israel for weeklong seminars in order to introduce them to Israeli society and the unique issues faced by Jews in Israel. Project Interchange Website, http://projectinterchange.org/ (last visited July 28, 2012).

Without individuals open to diverse viewpoints and willing to accept new cultures because of their continued exposure to racial, ethnic, national, and other differences, such initiatives are severely hampered. Diverse college and university campuses provide precisely the learning environment essential to instilling intellectual curiosity and cross-cultural acceptance. College and university campuses are a breeding ground for future local and national leaders, and depend upon "'a robust exchange of ideas'" "to achieve a goal that is of paramount importance in the fulfillment of [their] mission." *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)); *see also Grutter*, 539 U.S. at 329 ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is the very foundation of good citizenship.").

Social science research supports this point. For example, one longitudinal field study of two student groups, one group comprising students that had taken a course focusing on intergroup dialogue, and a second group that had not taken that course, demonstrated, among other findings, that students exposed to intergroup dialogue more frequently expressed democratic sentiments, showed greater motivation toward taking the perspective of others, became more mutually involved with other groups, and expressed a greater sense of commonality in values than the control group. Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOCIAL ISSUES 17, 21-24 (2004). These findings have been echoed in other academic research called for by the College Board following the *Grutter* decision. *See* EMILY J. SHAW, COLLEGE BOARD RESEARCH REPORT NO. 2005-4: RESEARCHING THE EDUCATIONAL BENEFITS OF DIVERSITY 21 (2005), available at http://ec2-184-73-88-202.compute-1.amazonaws.com/sites/default/files/publications/2012/7/researchreport-2005-4-researching-educational-benefits-diversity.pdf (last visited August 8, 2012) (summarizing research on the benefits of educational diversity and calling for new work in the area).

The undeniable implication of this research is that educational diversity serves an important function in our society. Many important social, governmental, and business initiatives, such as those undertaken by pluralistic organizations like AJC, involve building coalitions of a wide variety of individuals, groups, ideas and viewpoints. Without the foundation of a diverse college campus, these initiatives will suffer. *Amici* therefore request that this Court reiterate the holding of *Grutter* that diversity constitutes a compelling state interest that may justify carefully constructed race-conscious admissions policies.

B. Race Is An Important Factor In Evaluating How An Applicant Will Contribute To Educational Diversity.

Like many other characteristics of a college applicant, such as family composition, involvement in extracurricular activities, and the quality of his or her high school, race may help predict the contributions the applicant will make to the university community, and ultimately to the pluralistic society the student will enter after graduation. Among researchers, there is little doubt about "differences in culturally related experiences of students from different racial and ethnic groups, especially in family, community, and peer settings." THE COLLEGE BOARD, REACHING THE TOP: A REPORT OF THE NATIONAL TASK FORCE ON MINORITY HIGH ACHIEVEMENT 17 (1999), available at http://professionals.collegeboard.com/profdownload/pdf/reachingthe_3952.pdf (last visited July 28, 2012). A scholar previously at the Harvard Graduate School of Education has written that "[s]tructural and cultural forces combine in complex ways to influence the formation of individual and collective identities." Pedro A. Noguera, *The Trouble with Black Boys: the Role and Influence of Environmental and Cultural Factors on the Academic Performance of African-American Males*, HARV. J. AFR. AM. PUBLIC POL'Y 23, 31 (Summer 2001).

The race discrimination and race consciousness experienced by a minority student in our society can be a singularly formative experience for that applicant that will directly impact what insights he or she will bring to the classroom and the campus. This Court acknowledged as much in *Grutter*: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately matters." *Grutter*, 539 U.S. at 333. Justice O'Connor similarly reflected on the unique perspective that Justice Thurgood Marshall brought to this Court, particularly with respect to racial issues, by virtue of his own experiences. *See* Sandra Day O'Connor, *Thurgood Marshall: The Infuence of a Raconteur*, 44 STAN. L. REV. 1217, 1220 (1992).

Part of these experiences, for some students, includes overcoming racial discrimination. Judge Harry T. Edwards eloquently remarked:

> Because of the long history of racial discrimination and segregation in American society, it is safe to assume that a disproportionate number of blacks grow up with a heightened awareness of the problems that pertain to these areas of the law. Of course, not all blacks have the same exposure to these problems . . . . And not all blacks share the same views on the solutions to the problems. But, just as most of my Jewish colleagues have more than a fleeting understanding of anti-Semitism, the Holocaust, and issues surrounding Israel and Palestine, most blacks have more than a fleeting understanding of the effects of racial discrimination.

Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 328 (2002).[3]

Beyond invidious race discrimination, there are other "challenging cultural factors that influence the orientation students adopt toward school. . . . [Some black] students regard Blackness as being equated with playing basketball and listening to rap music but not with studying geometry and chemistry." Pedro A. Noguera, *Racial Politics and the Elusive Quest for Excellence and Equity in Education*, 34 EDUC. & URBAN SOCIETY 18 (Nov. 2001); *see also* Noguera, *The Trouble with Black Boys*, *supra* at 34 (noting that African-American males' "deviation from established patterns often places them under considerable scrutiny from their peers who are likely to regard their transgression of group norms as a sign of 'selling out'"). These negative influences come not only from the minority student's own peer group, but from whites as well: "Whites still harbor doubts about the educational potential of some minority groups" and these doubts "continue to take a toll on the academic performance of many minority students." REACHING THE TOP, *supra*, at 16.

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[3] Unfortunately, racial discrimination is not a thing of the past in this country. Researchers continue to find evidence of current discrimination against and stereotyping of minorities. *See, e.g.*, Ian Ayres & Peter Siegelman, ***Race and Gender Discrimination in Bargaining for a New Car***, 85 AM. ECON. REV. 304, 304 (June 1995) (finding "large and statistically significant differences in prices quoted to test buyers of different races and genders"), available at http://islandia.law.yale.edu/ayers/Ayres%20Siegelman%20Race%20and%20Gender%20Discrimination%20In%20Bargaining%20%20for%20a%20New%20Car.pdf (last visited August 8. 2012); National Bureau of Economic Research, *Employers' Replies to Racial Names*, available at http://www.nber.org/digest/sep03/w9873.html (last visited August 9, 2012) (finding job applicants with African American names had a more difficult time getting a callback); Eric Lichtblau, *Profiling Report Leads to Demotion*, N.Y. TIMES (Aug. 24, 2005), available at http://www.nytimes.com/2005/08/24/politics/24profiling.html?pagewanted=all (last visited August 9, 2012) (discussing a 2005 Bureau of Justice Statistics report that "uncovered evidence of black drivers having worse experiences—more likely to be arrested, more likely to be searched, more likely to have force used against them—during traffic stops than white drivers"); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANNU. REV. SOCIOL. 181, 181 (2008), available at http://www.princeton.edu/~pager/annualreview_discrimination.pdf (last visited August 9, 2012) (detailing the "[p]ersistent racial inequality in employment, housing, and a wide range of other social domains [that] has renewed interest in the possible role of discrimination").

Each minority student brings these experiences into the classrooms, cafeterias, and dormitories, adding vital and unique points of view that are translated to his or her peers. *See Bakke*, 438 U.S. at 312-13 n. 48 ("A great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds . . . who are able, directly or indirectly, to learn from their differences and stimulate one another to reexamine even their most deeply held assumptions about themselves and their world."). The other students learn and benefit from being exposed to and understanding these experiences, preparing them to be compassionate, understanding, tolerant, and successful professionals. The minority student excelling in geometry, or the sciences, for example, challenges in a direct and forceful manner the stereotypes referred to by Professor Noguera. *See Grutter*, 539 U.S. at

330 (noting the law school's race-conscious policy "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races" (internal quotations and alteration omitted)); *id.* (noting the "real" benefits of diversity, as "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints").

This is not to say that all African-Americans or members of other minority groups experience overt discrimination or will bring a uniform perspective, but that a student from another racial background inevitably will be unable to provide the same type of perspective. This Court has recognized precisely this fact in cases underscoring the need to include African-Americans and women in the jury pool. *See Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (explaining that the effect of excluding African-Americans from the jury "is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable"); *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (rejecting the argument that an all-male jury was representative because the reality was that neither men nor women act as a single class, and the two sexes are not fungible).

Simply put, race may be a critical component of a college applicant's experience and character that should not be completely ignored. Only by considering race in some circumstances can a university build the diverse campus that prepares its students for a pluralistic society and lessens bigotry.

II. This Court Should Also Reaffirm *Grutter*'s Holding That Individualized, Race-Conscious Admissions Are Narrowly Tailored To Achieve Educational Diversity.

As petitioner implicitly acknowledges by asking this Court to overturn *Grutter*, prohibiting the individualized consideration of race to attain educational diversity would constitute a radical departure from precedent that would greatly reshape American society through judicial fiat. (Pet'r Br. 53 (seeking to overturn *Grutter v. Bollinger*, 539 U.S. 306 (2003), and by implication *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), because they allow "'holistic' review coupled with avoidance of express quota or point systems"); Brief of Amicus Curiae The Louis D. Brandeis Center for Human Rights Under the Law et. al., ("Brandeis Br."), at 4 (advocating the invalidation of all admissions systems that are "based on 'diversity' and 'holistic' or 'comprehensive' review")).

This Court has frequently noted the importance of *stare decisis* for preserving the legitimate expectations of citizens and institutions in our country. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000). Overturning *Grutter* and *Bakke* would unsettle those expectations, which have yielded decades of admissions policies for a large swath of colleges and universities. *See* Akhil Amar Reed and Neal Kumar Katyal, *Bakke's Fate*, 43 U.C.L.A. L. REV. 1745, 1769 (1996) ("An entire generation of Americans has been schooled under *Bakke*-style affirmative action, with the explicit blessing of—indeed, following a how-to-do-it manual from—U.S. Reports."); *Bakke*, 438 U.S. at 287 (suggesting that any rule fashioned under the Equal Protection Clause will apply, through Title VI, to nearly every *private* school as well).

In *Bakke*, Justice Powell extolled the virtues of the individualized admissions systems used by highly selective colleges such as Harvard and Princeton. *Bakke*, 438 U.S. at 316-19. He explained that such a program "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant," so that a "black applicant may be examined for his potential contribution to diversity . . . with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism." *Id.* at 317. After *Bakke*, many admissions programs at colleges and universities implemented the holistic review encouraged by Justice Powell. In fact, "Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323. Given the continued need for and benefits reaped from educational diversity, there is no reason to depart from these considered precedents here.

UT's narrow consideration of race fits the constitutional purpose announced in *Grutter* of understanding what the applicant could contribute to the learning community. For some applicants, race inevitably will be an integral part of their experience and thus important to what they will contribute to the campus environment. As petitioner concedes, UT considers race for only a very small number of minority applicants. (Pet'r Br. 39-40).

This conforms to the University's claim, and the district court's factual finding, that race is used by UT to place an individual applicant's file in context. *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587, 597 (W.D. Tex. 2009). To require universities to ignore this significant aspect of some applicants' experiences when conducting a holistic review is unduly limiting. It severely encroaches on the University's core freedom to determine which applicants to admit based on complex educational judgments that lie outside the Court's expertise. *See Grutter*, 539 U.S. at 328.

A. The University Of Texas's Holistic *Grutter*-Modeled Admissions Policy Is Not A Quota.

As this Court explained in *Grutter*, "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups."' *Grutter*, 539 U.S. at 335 (quoting *J.A. Croson Co.*, 488 U.S. at 496); *see also Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) ("[Quotas] impose a fixed number or percentage which must be attained, or which cannot be exceeded.") (O'Connor, J. concurring in part and dissenting in part). Distinct from a quota is "a permissible goal . . . [which] require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself." *Grutter*, 539 U.S. at 335. The distinction between unconstitutional quotas and permissible goals is commonplace in this Court's affirmative-action jurisprudence. *See, e.g.*, *Grutter*, 539 U.S. at 324-25; *Bakke*, 438 U.S. at 314.

Unlike a quota or racial balancing plan, the UT approach of individualized review tracks almost exactly the Harvard plan cited approvingly by Justice Powell, as well as the University of Michigan plan upheld in *Grutter*. Within the individualized approach used for Texas residents, the University employs an academic index and a personal achievement index. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 227 (5th Cir. 2011). The personal achievement score is based on a thorough, holistic review by experienced members of the admissions staff. The review assesses "an applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service." *Id.* at 228. The staff also attempts to learn more about the individual as a person and place these achievements in context by looking at the applicant's special circumstances, including socioeconomic status, family status, family responsibilities, race, and test scores compared to the average of the applicant's high school. *Id.* (*See also* Resp't Br. 13-14.) These two goals of learning more about the applicant to understand his likely contribution to the educational environment and to place the applicant's achievements in context are commendable and can be achieved only through an individualized process that considers race where appropriate.

The University of Texas does not provide an automatic "plus" to any applicant because of the applicant's race. *See Fisher*, 645 F. Supp. 2d at 597. None of the elements evaluated in the University's holistic review is considered individually. Rather, they are considered together "to provide a better understanding of the student as a person and place her achievements in context." *Id.* at 597. The University acknowledges that its consideration of race can assist an applicant of any race, including Caucasian applicants, and a minority applicant's race may have no impact whatsoever. *Id.* The race of an applicant is used to reveal the applicant's "sense of cultural awareness" and what that applicant will contribute to the University community. *Id.* at 597, 609. In fact, UT's individualized race-conscious process is even narrower than the system approved in *Grutter*. Unlike in *Grutter*, the admissions officers do not monitor the ethnic or racial composition of the admitted students throughout the process. *Compare Fisher*, 645 F. Supp. 2d. at 598, *and Grutter*, 539 U.S. at 391-92. This buttresses the University's position that it looks at the race of each applicant only to understand his character and experiences.

B. The Evidence Does Not Establish Invidious Discrimination.

Petitioner suggests, despite the stated aims of UT's admissions policy, that its holistic review is a covert method of racial balancing that directly discriminates against Asian Americans. (Pet'r Br. 55.) One *amicus* brief even takes the argument a step further and compares the alleged effect of UT's race-conscious admissions policy on Asian Americans to the Jewish quotas of the 1920s. (Brandeis Br. 20-33.) The basis for petitioner and *amici*'s abhorrence for holistic review is the apparent belief that universities are filled with untrustworthy, racist administrators. According to *amici*, "school administrators, as a class, are clever and persistent people" who "will invoke any excuse, and employ any mechanism, to keep discriminating on the basis of race." (*Id.* at 34.)

Given the history of racial quotas in higher education, it is not irrational to worry that race-conscious admissions could harden into inflexible quota systems. But as this Court recognized in *Grutter*, it is insufficient merely to speculate that today's universities employ holistic review as a pretext for discrimination. "[G]ood faith on the part of a university is presumed absent a showing to the contrary." *See Grutter*, 539 U.S. at 329 (internal quotation marks and citation omitted); *see also Bakke*, 438 U.S. at 319 n.53 ("Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose.").

That presumption cannot be so strong as to in effect preclude judicial scrutiny of affirmative action plans, *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009), especially because, in some cases, relevant facts will be known only to school officials. But where, as here, a case is fully litigated, the presumption is sufficiently weighty to overcome petitioner's speculation that allowing consideration of race inevitably leads to abuse.

Petitioner has not made any showing of invidious discrimination here. To the contrary, UT's policy and the historical discrimination against Jews are entirely dissimilar. Unlike the quotas and anti-Semitic policies of the 1920s, which specifically targeted Jews in an effort to limit their placement in colleges and universities, there is no evidence that the University of Texas has used its race-conscious admissions policy, which is designed to achieve diversity, to exclude Asian Americans or any other group.

The University has never established any specific number or percentage of minority enrollment it seeks to attain or awarded a number of points to students from a particular racial background. As the Fifth Circuit explained:

> UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas. Its methods and efforts belie the charge. The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas's African-American population, while Asian-American enrollment is ***more than five times*** the percentage of Texas Asian-Americans.

Fischer, 631 F.3d at 235 (emphasis added).

Given the individualized manner in which race and national origin plays a role in the admissions process in highlighting students' potential contribution to diversity, there is no reason why an Asian American student could not benefit from the diversity policy in this case. Indeed, the lower court's factual findings suggest that they may have, and that this argument regarding harm to Asian Americans finds no support in the actual operation of this program. *Id.* at 224.

To be sure, if the UT policy on its face, or as applied, discriminated against or set a quota disadvantaging Asian-Americans, AJC would join in objecting to it. But the record does not permit that conclusion; to the contrary, the record reflects that UT both as a policy and in fact has narrowly crafted a holistic approach fully consistent with and approved by the precedents of this Court.

Universities, based on their experience and expertise, are best able to judge the impact of complex racial and cultural factors on the ability of a student to succeed at their institution. UT does precisely this because no student is rejected simply because of low academic scores. These students, regardless of race, are evaluated holistically to understand the context in which these scores were earned. Sometimes the context involves being a single parent, and sometimes it involves the race and culture of the applicant.

The University should be allowed to continue to use this holistic process that includes race as a factor to better understand the applicant and judge his or her likely success, and to build a class of students with a variety of characteristics. To Justice Powell, such individualized admissions processes were ideal because they allowed institutions to evaluate an applicant's "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." *Bakke*, 438 U.S. at 317.

C. The Top Ten Percent Plan And Other Race-Neutral Methods Of Achieving Diversity Are Inadequate Substitutes For Individualized, Race-Conscious Admissions.

Several social science studies have concluded that "percent plans are inferior alternatives to affirmative action as a strategy to diversify college campuses." MARTA TIENDA ET AL., AFFIRMATIVE ACTION AND THE TEXAS TOP 10 % ADMISSION LAW: BALANCING EQUITY AND ACCESS TO HIGHER EDUCATION, 18 (February 2008), available at http://theop.princeton.edu/reports/wp/AffirmativeAction_TopTen.pdf (last visited July 30, 2012); *see also* Angel L. Harris & Marta Tienda, *Hispanics in Higher Education & the Texas Top Ten % Law*, 4 RACE & SOC. PROBL. 57, 65-66 (2012) (finding that application and admission rates for Hispanic students fell when the Top Ten Percent Plan operated without race-conscious admissions); Mark C. Long, *College Applications and the Effect of Affirmative Action*, 121 J. OF ECONOMETRICS 319, 340-41 (2004) (concluding that minority students shifted SAT score reports to lower quality colleges after higher caliber schools eliminated affirmative action plans while white and Asian American students did the opposite). One study concludes that minority and low-income students who are admitted pursuant to the Top Ten Percent law often face difficulties enrolling at UT. *See* Tienda et al., AFFIRMATIVE ACTION, *supra*, at 18. Thus, the recent research and data compiled regarding percentage plans reflects that they often do not effectively increase minority enrollment and indeed, have just the opposite effect.

In addition, there are reasons to believe that, despite the matriculation of some minority students pursuant to the Top Ten Percent plan, such a plan is less effective than individualized determination in achieving educational diversity. The Top Ten Percent plan indiscriminately admits a number of minorities; it does not ascertain the unique ways in which an individual's race has affected his or her experiences. In arguing that race-conscious individualized review is unnecessary because there are already many African-Americans, Hispanics, and Native Americans at UT due to the Top Ten Percent plan, (Pet'r Br. 34-35), petitioner proposes that universities should only be concerned with racial diversity for its own sake. This proposition was soundly rejected by the Court in *Bakke* and *Grutter*. As Justice Powell explained, a university's interest in ethnic diversity "is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups." *Bakke*, 438 U.S. at 315.

Rather, the university has an interest in diversity that encompasses "a far broader array of qualifications and characteristics" of which race is an important element. *Id.* This broad array creates an atmosphere of "speculation, experiment and creation" that is essential to higher education. *Id.* at 312. Similarly, in *Grutter*, this Court explained that one benefit of a race-conscious policy that admits a variety of minorities is to break down stereotypes that all minorities are the same. *Grutter* 539 U.S. at 332-33. As this Court held in *Grutter*, percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 340. In some instances, race is inextricable from the applicant's experiences, such as in the instance of an applicant who has overcome significant racial discrimination. Thus, the Top Ten Percent plan, by itself, cannot provide the unique tailoring that has been praised repeatedly by the Court over the past thirty years.

More generally, there is, as yet, no race-neutral method that can replace race as a factor that provides insight into the applicant's experiences and potential contributions to diversity. Social scientists have learned that a variety of cultural factors have an impact on the educational experiences of minorities: "the way family members and friends interact with one another and the outside world"; "how much parents talk to their children, deal with their children's questions, how they react when their child learns or fails to learn something"; and "psychological and cultural differences." CHRISTOPHER JENCKS & MEREDITH PHILLIPS, EDS., THE BLACK-WHITE TEST SCORE GAP 43 (1998). According to this research, African-American children, regardless of socioeconomic status, receive less cognitive stimulation and emotional support. *See id.* at 126-27. Yet, "[a] great many students with lower test scores or high school grade-point-averages succeed in college." Brief of Amicus Curiae of the College Board as Amicus Curiae Supporting Respondents, *Gratz v. Bollinger*, 539 U.S. 244 2003) (No. 02-516), 2003 WL 402218, at *12. These successful minority students share their cultural experiences with their university peers, enriching the education of all.

The use of a system that requires admissions only "on the basis of objectively demonstrated academic merit" as advocated by some *amici* supporting petitioner (Brandeis Br. 37), ignores these important cultural issues and would mire federal courts in managing the intricacies of the college admissions process. These *amici*'s plan would involve perennially adjudicating disputes about "objective" factors for merit: Is the quality of an applicant's high school an objective, academic factor? Are factors such as socioeconomic status and geographic location truly objective and academic?[4] If not, do academic institutions have any ability to recognize the special achievements and qualities of those applicants who excelled despite these and other potential hurdles to academic achievement?

Only by considering race as a factor can school administrators evaluate the social and cultural factors that sometimes are profoundly important in placing a student's application within the necessary context. Similarly, race can provide useful context to a minority applicant's non-academic achievements. A passion for studying history, for example, may have arisen from introspection about the applicant's own race and its role in American society. The sustained commitment to community engagement inevitably may be flavored by role of race in that community. The extracurricular involvement may be more impressive if it is outside that applicant's comfort zone due to his or her race. In other words, taking race into account allows school officials to fully learn the experiences that these students will be able to share with their classmates.

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[4] To the extent that these factors have historically been labeled "race neutral," recent census data and academic research casts some doubt on this classification. *See, e.g.*, UNITED STATES CENSUS BUREAU, 2012 STATISTICAL ABSTRACT TABLE 711, available at http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth/poverty.html (last visited August 3, 2012) (socioeconomic status may be correlated with race because 32% of blacks but only 10% of whites are below the poverty line); JOHN ICELAND ET AL., RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980 - 2000: CENSUS 2000 SPECIAL REPORTS 4 (United States Census Bureau August 2002), available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf (last visited August 3, 2012) (geographic location may be correlated with race because African Americans experience the highest degree of residential segregation of any 12 racial or ethnic groups in the country).

Petitioner and her supporting *amici* have not pointed to any other race-neutral means that would allow the University to identify applicants who, for example, lived through the peer effects of being an academically successful minority. While it may be possible for the University to create a very lengthy application that asks detailed questions about the applicant's characteristics and experiences, and thus avoids explicitly any consideration of race, a university is not required to exhaust "every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. In addition, this Court historically has been adverse to directly managing the affairs of a university, which would be necessary if only an "objective" application process were allowed. *See Bakke*, 438 U.S. at 312 (noting who may be admitted to study is one of the "four essential freedoms" of a university and that safeguarding these freedoms is "[o]ur national commitment"); *Grutter*, 539 U.S. at 328 (explaining the Court's holding "is in keeping with our tradition of giving a degree of deference to a university's academic decisions" to take "into account complex educational judgments in an area that lies primarily within the expertise of the university").

UT has given "serious, good faith consideration" to workable race-neutral alternatives. *Fisher*, 645 F. Supp. 2d at 610. It uses race-neutral processes to admit the vast majority of its students, employing a race-conscious process for only the narrowest of circumstances in the narrowest possible manner: to evaluate the unique experiences of a specific applicant and place that applicant's achievements in context. Petitioner has no evidence of a race-neutral alternative that can similarly achieve this goal, much less achieve the goal in a superior manner. The University of Texas's narrow use of race in these circumstances is thus constitutional.

CONCLUSION

American colleges and universities have relied on this Court's guidance in formulating individualized admissions policies for nearly three and a half decades since Justice Powell's landmark opinion in *Bakke*. In *Grutter*, this Court reaffirmed the principles espoused by Justice Powell. Petitioner and her *amici* should bear a heavy burden before persuading this Court to undo the wisdom of those important precedents. *Amici* believe that the role of diversity in education continues to be critical to the Nation. So is the role of the courts in ensuring these programs remain benign. The program at issue in this case, however, comports with the narrowly-tailored programs already endorsed by this Court. For this reason *amici* respectfully requests that the Court affirm the decision of the Fifth Circuit and uphold UT's admissions policy.

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No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Psychological Association (APA) is a voluntary, nonprofit, scientific and professional organization founded in 1892. The APA is the largest association of psychologists in the United States, with more than 137,000 members and affiliates in 54 divisions representing every major focus within the field of psychology.

The APA aims to advance psychology as a means of promoting human welfare, to enhance psychological knowledge, and to encourage the application of research findings to the promotion of health and public welfare. The APA places a high priority on the amelioration of stereotypes, prejudice, and discrimination among individuals and institutions. *See APA Resolution on Prejudice, Stereotypes, and Discrimination* (Feb. 2006), *available at* http://www.apa.org/about/policy/prejudice.pdf. To this end, the APA has participated as *amicus curiae* in landmark cases on diversity in educational settings, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Members of the APA research psychological causes and consequences of racial prejudice and the development of such prejudice and stereotypes in children and young adults. Thus, the APA is uniquely positioned to describe the pertinent, peer-reviewed social science studies that examine the empirical claims at the heart of the debate on the use of race as a factor in student admissions by colleges and universities. This brief presents scientific evidence supporting the principle that institutions of higher education should be permitted to employ race-conscious admissions practices to promote the many educational benefits for all students associated with campus diversity.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or *amicus's* counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The ongoing need for sufficient diversity in higher education is real, substantial, and documented. Social science research confirms that the benefits of admissions policies like the one employed by the University of Texas extend far beyond admissions. As this Court long has recognized, diversity in higher education enhances the educational experience for all students.

Underrepresentation of minority groups poses significant obstacles to effective education of both minority and nonminority students. The social isolation and stereotyping experienced by underrepresented minority students inhibit those students' mental and emotional functioning, which leads to decreased academic performance and impaired emotional well-being. Members of majority groups, too, are hindered by persistent implicit biases that disrupt mental function.

Social science research demonstrates that increased campus diversity is a proven remedy for these problems. Increasing the representation of distinct racial groups improves intellectual and academic performance for both minority and nonminority students. Furthermore, campus diversity reduces prejudice, enhances leadership skills, and better prepares students to participate in modern civic society and the contemporary workplace. However, these benefits accrue only when a critical mass of different minority groups is present on campus.

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[2] The APA wishes to acknowledge the assistance in the preparation of this brief of Mitchell Chang, PhD, John Dovidio, PhD, Sylvia Hurtado, PhD, James Jones, PhD, Craig Lareau, PhD, Jeffrey Milem, PhD, Victoria Plaut, PhD, Toni Schmader, PhD, Nicole Shelton, PhD, and Gregory Walton, PhD.

Arguments against the continuing need for increased racial diversity in higher education do not withstand the crucible of empirical investigation. Especially dangerous are certain superficially plausible but empirically flawed theories that often reflect the same stereotypes and biases that diversity admissions policies serve to ameliorate. One example is the discredited "academic mismatch" theory, which hypothesizes that relatively lower graduation rates among minority students admitted under race-conscious admissions programs result from an academic curriculum too rigorous for such students. Numerous studies have debunked the "academic mismatch" myth and have proven that a university's consideration of race as a factor in admissions *narrows* retention rate gaps between different student groups.

The scientific conclusions set forth in this *amicus* brief are grounded in 79 peer-reviewed studies reflecting the contemporary social science research on campus diversity. Nearly all of these studies have been conducted or published since the Court's decision in *Grutter* in 2003. The studies that form the backbone of this brief, along with several other articles and books by prominent scholars, represent just a sample of the evidence collected by APA members and their colleagues that demonstrates the value of and continuing need for diversity in higher education.

ARGUMENT

I. THE COMPELLING GOVERNMENT INTEREST IN PROMOTING DIVERSITY IN HIGHER EDUCATION HAS NOT CHANGED SINCE *GRUTTER*

For more than 30 years, this Court has affirmed that student body diversity is a compelling government interest that "legitimately may be served" by the consideration of race in admissions to public universities. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978); *see Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). The Court explained in *Grutter* that the benefits of racial diversity in higher education are both "substantial" and "real," and that racial diversity in higher education "promotes cross-racial understanding, helps to break down racial stereotypes, . . . enables students to better understand persons of different races, . . . promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." 539 U.S. at 330 (quotations omitted). An ever-growing body of social science research confirms the Court's conclusions and reinforces the continuing need for increased diversity in higher education today.

A. Underrepresentation of Minority Groups Inhibits Academic Performance, Fosters Prejudice, and Hinders Cognitive Function

Social science research demonstrates that the government's interest in diversity goes far beyond simply reducing "societal discrimination." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989). Underrepresented minorities face critical psychological impediments to success that are tied to their distinctiveness and isolation. Furthermore, persistent implicit prejudices divide individuals and exact a measurable cost on cognitive (mental) function. Institutions of higher education have a compelling interest in overcoming these obstacles to effective education, and diversity is a proven tool for meeting this task and improving outcomes for all students.

1. The detrimental academic effects on underrepresented minority students are real and documented. Study after study shows that when campuses lack sufficient diversity, underrepresented minority students are especially susceptible to psychological influences that can impair academic performance.[3]

One of these psychological influences is a feeling of distinctiveness or unbelonging. A member of an underrepresented minority group is more conscious of her minority identity and the negative stereotypes that are associated with that status.[4] In the educational setting, this feeling of distinctiveness creates the risk that a student will conform to negative academic stereotypes.[5]

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[3] *See, e.g.*, Denise Sekaquaptewa et al., *Solo Status and Self-Construal: Being Distinctive Influences Racial Self-Construal and Performance Apprehension in African American Women*, 13 Cultural Diversity & Ethnic Minority Psychol. 321, 321 (2007).

[4] Michael Johns et al., *Stereotype Threat and Executive Resource Depletion: Examining the Influence of Emotion Regulation*, 137 J. Experimental Psychol.: Gen. 691, 692 (2008); *see* Toni Schmader et al., *A Metacognitive Perspective on the Cognitive Deficits Experienced in Intellectually Threatening Environments*, 35 Personality & Soc. Psychol. Bulletin 584, 586 (2009).

Research has shown the negative effects of "stereotype threat" on minority students. For example, Black and Latino students perform worse than their White peers on standardized tests when those tests are described as assessing verbal or intellectual ability. When the same tests are framed as simple exercises in problem solving, however, their performance is equivalent to that of White peers.[6] The stress of having to overcome a racial stereotype (whether warranted or not) inhibits performance.[7]

Social scientists have uncovered the cognitive dynamics underlying stereotype threat's effects on performance. On an affective level—i.e., how people experience emotions or feelings—stereotype threat activates negative thoughts,[8] which can decrease confidence, increase anxiety, and undermine an individual's performance expectations.[9] This phenomenon is, however, more complex than basic performance anxiety.[10]

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[5] *See, e.g.*, Harriet E.S. Rosenthal & Richard J. Crisp, *Reducing Stereotype Threat by Blurring Intergroup Boundaries*, 32 Personality & Soc. Psychol. Bulletin 501, 502 (2006).

[6] *See* Toni Schmader et al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 Psychol. Rev. 336, 336-37 (2008); *see also* Patricia M. Gonzales et al., *The Effects of Stereotype Threat and Double Minority Status on the Test Performance of Latino Women*, 28 Personality & Soc. Psychol. Bulletin 659, 665-66 (2002).

[7] *See* Schmader et al., *supra* note 4, at 586.

[8] Sian L. Beilock et al., *Stereotype Threat and Working Memory: Mechanisms, Alleviation, and Spillover*, 136 J. of Experimental Psychol.: Gen. 256, 257 (2007); Mara Cadinu et al., *Why do Women Underperform under Stereotype Threat? Evidence for the Role of Negative Thinking*, 16 Psychol. Sci. 572, 573 (2005).

Stereotype threat disrupts cognitive function.[11] Recent studies have explained that "activating negative stereotypes about a social identity one possesses motivates individuals to try to combat that stereotype."[12] This effect, in turn, generates increased mental effort in the form of heightened stress, increased monitoring of how one's behavior reflects the stereotypes at issue, and active efforts to push negative stereotypic thoughts and anxieties from the mind.[13] In combination, these coping mechanisms interfere with mental performance and leave an individual with a deficit of cognitive resources to complete the intellectual task at hand.[14]

The effects of stereotype threat can extend beyond discrete tasks. Ultimately, the threat may lead individuals to remove themselves from the classroom or campus altogether.[15]

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[9] *See* Mara Cadinu et al., *Stereotype Threat: The Effect of Expectancy on Performance*, 33 Euro. J. Soc. Psychol. 267, 269, 283 (2003).

[10] *See, e.g.*, Schmader et al., *supra* note 6, at 349.

[11] *See, e.g.*, Jean-Claude Croizet et al., *Stereotype Threat Undermines Intellectual Performance by Triggering a Disruptive Mental Load*, 30 Personality & Soc. Psychol. Bulletin 721, 728-29 (2004).

[12] Schmader et al., *supra* note 6, at 337; *see* Toni Schmader & Michael Johns, *Converging Evidence that Stereotype Threat Reduces Working Memory Capacity*, 85 J. of Personality & Soc. Psychol. 440, 450-51 (2003).

[13] Schmader et al., *supra* note 6, at 337-38.

[14] *Id.*

Increasing minority representation reduces stereotype threat. In general, stereotype threat is "less likely to occur if the categories that embody the stereotype become less salient."[16] Removing explicit reminders of distinctiveness has been proven to diminish stereotype threat. As one study revealed, marking one's gender after (as compared to before) a calculus test led to a 33 percent reduction in gender gap performance.[17]

Removing circumstantial reminders—by bringing different groups together and emphasizing overlapping characteristics—can also reduce the salience of racial group identity and, thus, diminish stereotype threat.[18] Coordinated efforts to encourage students to confront diversity issues with diverse peers and to reappraise the basis for stereotypes can remove the inhibitory effects of stereotype threat.[19]

2. Social isolation also makes underrepresented minorities especially vulnerable to psychological impediments to performance. Empirical studies demonstrate the dangers of "solo status," or "being the only member of one's social category present in a

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[15] Rosenthal & Crisp, *supra* note 5, at 502; *see* Mary C. Murphy et al., *Signaling Threat: How Situational Cues Affect Women in Math, Science, and Engineering Settings*, 18 Psychol. Sci. 879, 883-84 (2007).

[16] Rosenthal & Crisp, *supra* note 5, at 509.

[17] *See* Kelly Danaher & Christian S. Crandall, *Stereotype Threat in Applied Settings Re-Examined*, 38 J. Applied Soc. Psychol. 1639, 1645 (2008).

[18] Rosenthal & Crisp, *supra* note 5, at 509.

[19] Schmader et al., *supra* note 6, at 351-52.

group."[20] For example, Blacks in otherwise all-White groups and women in otherwise all-male groups underperform as compared to when they are in groups with increased representation of their race or gender.[21] Solo status "lead[s] racial minorities to construe the self in terms of race and to perceive being seen as a race representative," which can hinder intellectual performance.[22]

Isolated members of minority groups also "experience relatively greater uncertainty about their belonging in school."[23] This uncertainty can be detrimental to "well-being and performance,"[24] and it can ultimately discourage students from persisting in an academic setting.[25] However, when minority students experience a greater sense of belonging and less sensitivity to racial rejection, their interpersonal relationships improve and they achieve higher grade point averages throughout college.[26]

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[20] Sekaquaptewa et al., *supra* note 3, at 321.

[21] *See id.*; *see also* Denise Sekaquaptewa & Mischa Thompson, *Solo Status, Stereotype Threat, and Performance Expectancies: Their Effects on Women's Performance*, 39 J. Experimental Soc. Psychol. 68, 68-69 (2003).

[22] Sekaquaptewa et al., *supra* note 3, at 326.

[23] Gregory M. Walton & Geoffrey L. Cohen, *A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students*, 331 Sci. 1447, 1448 (2011).

[24] *Id.*; *see* Elizabeth Page-Gould et al., *Understanding the Impact of Cross-Group on Interactions with Novel Outgroup Members*, 98 J. Personality & Soc. Psychol. 775, 788-89 (2010).

[25] Angela M. Locks et al., *Extending Notions of Campus Climate and Diversity to Students' Transition to College*, 31 Rev. Higher Educ. 257, 260 (2008).

[26] Rodolfo Mendoza-Denton et al., *Sensitivity to Status-Based Rejection: Implications for African American Students' College*

Isolation also increases the likelihood that underrepresented students will be viewed as "tokens."[27] Tokenism heightens the undue attention paid to minorities, fosters stereotyping, and reduces perceptions of individuality.[28] Further, tokenism can foment social stigma and inhibit student achievement.[29]

Thus, the University of Texas's goal of increasing the number of Black and Latino students on campus in order to minimize the number of classes with a single member of a minority group properly recognizes the negative effects associated with stereotype threat and social isolation.

B. Subconscious Racial Bias Continues to Interfere with the Effective Education of Nonminority Students

The negative effects associated with insufficient racial diversity extend to members of nonminority groups. The most notable effect is the persistence of implicit bias that interferes with the educational process.

Experience, 83 J. Personality & Soc. Psychol. 896, 913-14 (2002); *see* Walton & Cohen, *supra* note 23, at 1448.

[27] Jeffrey F. Milem et al., *Making Diversity Work on Campus: A Research-Based Perspective*, at 4, 6 (2005), *available at* siher.stanford.edu/AntonioMilemChang_makingdiversitywork.pdf (last accessed Aug. 7, 2012).

[28] *See id.*

[29] *Id.*; *see* Sharon Fries-Britt & Bridget Turner, *Uneven Stories: Successful Black Collegians at a Black and a White Campus*, 25 Rev. Higher Educ. 315, 322 (2002); *see also* Shelly Taylor et al., *Categorical and Contextual Bases of Person Memory and Stereotyping*, 36 J. Personality & Soc. Psychol. 778, 791 (1978).

Behavior toward members of other races, whether positive or negative, flows from both explicit and implicit racial attitudes.[30] Over the past several decades, the United States has seen a "dramatic decrease" in explicit bias in the form of "overtly hostile feelings or overtly derogatory thoughts about people of color."[31] Despite this laudable development, research overwhelmingly indicates that subtler forms of prejudice persist. These implicit biases may produce discriminatory behavior, and they can disrupt cognitive function for members of both the majority and minority. Proactive efforts to increase campus diversity can significantly reduce implicit bias and its detrimental effects.

The most prominent test social scientists use to measure the magnitude of unconscious stereotyping is the Implicit Association Test (IAT). The IAT measures the time it takes to pair a given subject, such as a person's face in the case of a race-focused test, with an evaluative concept, such as "awful" or "joyful".[32] The test maps reaction time in milliseconds, thus measuring an automatic associative process that is likely beyond conscious control or awareness.[33] Since this test was devised in 1998, it has been used in over 200 studies, and over 5 million individual study sessions have been completed.[34] The collective data made available by these studies have enabled social scientists to verify that the IAT is a valid predictor of social behavior and judgment.[35]

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[30] *See* Louis A. Penner et al., *Aversive Racism and Medical Interactions with Black Patients: A Field Study*, 46 J. Experimental Soc. Psychol. 436, 437 (2010); Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-analysis of Predictive Validity*, 97 J. Personality & Soc. Psychol. 17, 18 (2009).

[31] Faye Crosby, Affirmative Action is Dead; Long Live Affirmative Action 202 (2004).

[32] *See* Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 10 Soc. & Personality Psychol. Compass 3, 6 (2009).

The results of IAT studies show that most test takers hold implicit preferences for White individuals relative to Black individuals.[36] These results are by no means exclusive to Whites. Asian Americans, Latinos, and Native Americans exhibit similar automatic responses favoring Whites over Blacks.[37] Indeed, even many Blacks display the same reactions, with roughly half favoring Whites while the remaining half shows pro-Black implicit bias.[38]

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[33] *See id.*; Greenwald et al., *supra* note 30, at 22.

[34] Alexander R. Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. Gen. Internal Med. 1231, 1231-32 (2007).

[35] *See* Greenwald et al., *supra* note 30, at 32; Allen R. McConnell & Jill M. Liebold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. Experimental Soc. Psychol. 435, 440 (2001).

[36] *See* Janice A. Sabin et al., *Physician Implicit Attitudes and Stereotypes About Race and Quality of Medical Care*, 46 Med. Care 678, 682 (2008).

[37] *See* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 Euro. Rev. Soc. Psychol. 38, 55 (2007).

[38] Anthony G. Greenwald & Linda H. Kreiger, *Implicit Bias: Scientific Foundations*, 94 Cal. L. Rev. 945, 956 (2006); *see also* Nosek et al., *supra* note 37, at 55.

A growing consensus has emerged as to the basic cognitive processes that underlie implicit bias as it relates to such social assessments. In addition to making explicit judgments about the surrounding world, we categorize knowledge actively on an implicit level.[39] This is cognitively beneficial because it enables us to process knowledge and make judgments efficiently.[40] A natural by-product of this cognitive process, however, is the formation of stereotypes and biases based on categories ranging from age to weight.[41] These assessments form independent of conscious attitudes, beliefs, and perceptions.[42]

When we process information relating to race or ethnic status, such social categorization activates more positive feelings about members of the same racial group ("ingroup") and more negative feelings and stereotypes about outgroup members.[43] Certainly, some individuals' implicit racial attitudes are consistent with their explicit attitudes about race, either positive or negative.[44] Nonetheless, there are many who "sympathize with victims of past injustice, support principles of racial equality, and genuinely regard themselves as non-prejudiced, but at the same time possess conflicting, often non-conscious, negative feelings and beliefs about Blacks that are rooted in basic psychological processes."[45]

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[39] *See* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 Personality & Soc. Psychol. Rev. 242, 242 (2002).

[40] *See id.*

[41] *See, e.g.*, Nosek et al., *supra* note 37, at 65, 70.

[42] *See* Green et al., *supra* note 34, at 1236; *see also* Pearson et al., *supra* note 32, at 6.

[43] Pearson et al., *supra* note 32, at 5.

[44] *See* Penner et al., *supra* note 30, at 441.

Implicit bias can have detrimental practical effects on attitudes. Individuals with high levels of implicit bias are often uncomfortable around and unfriendly toward Blacks.[46] Furthermore, implicit prejudices lead to the formation of negative and stereotypical impressions of minorities[47] and can engender tense interactions between individuals of different races.[48]

Implicit bias also leads to concrete discriminatory behaviors, which can extend long past college.[49] For example, a recent study tested whether racial bias affected physicians' treatment of patients with symptoms of a myocardial infarction.[50] The study revealed that physicians higher in implicit bias were clearly less likely to recommend appropriate treatment for minority patients.[51]

Whereas traditional forms of racial prejudice can produce "a direct and overt pattern of discrimination," implicit bias often generates inconsistent effects, depending upon whether an individual manifests implicitly felt negative attitudes or explicitly held egalitarian beliefs.[52] Typically, where "right and wrong are clearly defined," discrimination is minimal.[53] By contrast, where "the guidelines for appropriate behavior are unclear, the basis for social judgment is vague, or when one's actions can be justified or rationalized on the basis of some factor other than race," discriminatory behavior may be present.[54]

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[45] Pearson et al., *supra* note 32, at 5.

[46] *See* McConnell & Liebold, *supra* note 35, at 440-41.

[47] *See* John F. Dovidio et al., *Implicit and Explicit Prejudice and Interractial Interaction*, 82 J. Personality & Soc. Psychol. 62, 66-67 (2002); *see also* Arnd Florack et al., *When Do Associations Matter? The Use of Automatic Associations Toward Ethnic Groups in Person Judgments*, 37 J. Experimental Soc. Psychol. 518, 518, 523 (2001).

[48] Penner et al., *supra* note 30, at 441.

[49] Greenwald & Kreiger, *supra* note 37, at 961.

[50] Green et al., *supra* note 34, at 1237.

[51] *Id.*

In a seminal study of this phenomenon, White college students were asked to provide hiring recommendations for selective campus positions. "[W]hen the candidates' credentials clearly qualified or disqualified them for the position," no discrimination occurred.[55] But "when candidates' qualifications for the position were less obvious . . . White participants recommended the Black candidate significantly less often than the White candidate with exactly the same credentials."[56] Social scientists have observed similar behavioral effects in various circumstances.[57]

Implicit bias is also associated with interference of cognitive function. When faced with interracial interaction, explicitly well-intentioned individuals often exert significant mental effort "in order to combat the expression of stereotypes and negative attitudes that are often activated automatically and unintentionally."[58]

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[52] Pearson et al., *supra* note 32, at 7.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 9-10; *see* Samuel L. Gaertner & John F. Dovidio, Reducing Intergroup Bias: The Common Ingroup Identity Model (2000).

[56] Pearson et al., *supra* note 32, at 10.

[57] *See, e.g.*, Donald A. Saucier et al., *Differences in Helping Whites and Blacks: A Meta-Analysis*, 9 Personality & Soc. Psychol. Rev. 2 (2005); Dovidio et al., *supra* note 47, at 66-67.

The effort to manage negative thoughts inhibits mental capacity by occupying the brain's executive function.[59] An examination of the neurological activity generated by implicit bias suggests further that this phenomenon depletes cognitive resources relating to attention and control.[60] Although implicit bias admittedly affects members of majority *and* minority groups and its effects vary depending upon an individual's level of bias, the psychological impairment is more pronounced among members of majority groups.[61]

Exposure to diversity can reduce implicit racial bias, along with the discriminatory behavior and cognitive impairment it causes.[62] Although "[p]eople are remarkably adept at dividing up the world into *us* and *them*,"[63] individuals are not rigidly predisposed to draw these lines based on race. The lines are malleable: "by changing the basis of categorization from race to an alternative, inclusive dimension, one can alter who 'we' is and who 'they' are," in a way that undermines the mental processes that engender bias.[64]

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[58] Jennifer A. Richeson et al., *African Americans' Implicit Racial Attitudes and the Depletion of Executive Function After Interracial Interactions*, 23 Soc. Cognition 336, 337 (2005).

[59] *Id.* at 337-38.

[60] Jennifer A. Richeson et al., *An fMRI Investigation of the Impact of Interracial Contact on Executive Function*, 6 Nature Neurosci. 1323, 1326 (2003).

[61] Richeson et al., *supra* note 58, at 338-40, 349.

[62] Jay J. Van Bavel & William A. Cunningham, *Self-Categorization with a Novel Mixed-Race Group Moderates Automatic Social and Racial Biases*, 35 Personality & Soc. Psychol. Bulletin 321, 322 (2009).

[63] *Id.*

A diverse campus provides an environment in which group membership is unrelated to racial categories. For example, students of all races at the University of Texas might feel a closer affiliation with UT students of another race than, say, a student of the same race at the University of Oklahoma. This shared affiliation can help shift automatic evaluations away from implicit racial biases and toward the inclusive attitudes associated with the college ingroup.[65]

A recent case study demonstrated the strength of ingroup affiliation by measuring students' abilities to recognize the faces of peers.[66] When the faces were grouped simply by race, participants had superior recall for faces of those in their own race group.[67] However, when the faces were grouped by university, students had superior recall for faces of those in their university group *and race had no effect.*[68] Expanding the ingroup to include members of different races thus diminished automatic social categorization based on race.[69]

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[64] Pearson et al., *supra* note 32, at 14.

[65] Van Bavel & Cunningham, *supra* note 62, at 333.

[66] Eric Hehman et al., *Where the Division Lies: Common Ingroup Identity Moderates the Cross-Race Facial-Recognition Effect*, 46 J. Experimental Soc. Psychol. 445, 447 (2010).

[67] *Id.*; *see also* Daniel B. Wright et al., *Inter-racial Contact and the Own-race Bias for Face Recognition in South Africa and England*, 17 Applied Cognition Psychol. 365, 371 (2003).

[68] Hehman et al., *supra* note 66, at 447.

Forming personal connections with members of an outgroup may reduce implicit bias even more.[70] Studies show that individuals who have dated a member of another race or whose children have married a member of another race may replace negative implicit bias with favorable implicit attitudes.[71] Furthermore, prolonged contact between members of different racial groups frequently reduces implicit negative attitudes and stereotyping.[72] As these and other studies show, the creation of a more inclusive campus reduces both the likelihood and effects of implicit bias.[73]

Underrepresentation of minority students leads to well-documented academic impediments for all students. Colleges and universities thus have a compelling interest in increasing campus diversity that leads to corresponding academic benefits described below.

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[69] *See id.* at 448; *see also* Van Bavel & Cunningham, *supra* note 62, at 333.

[70] Andreas Olsson et al., *The Role of Social Groups in the Persistence of Learned Fear*, 309 Sci. 785, 785 (2005).

[71] *See id.*; Greenwald & Kreiger, *supra* note 38, at 964-65.

[72] *See* Christopher L. Aberson & Sarah C. Haag, *Contact, Perspective Taking, and Anxiety as Predictors of Stereotype Endorsement, Explicit Attitudes, and Implicit Attitudes*, 10 Group Processes & Intergroup Relations 179, 195 (2007).

[73] *See* Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751, 766-67 (2006); David W. Johnson & Roger T. Johnson, *The Three Cs of Reducing Prejudice and Discrimination*, *in* Reducing Prejudice and Discrimination 239, 247 (Stuart Oskamp ed., 2000).

II. THE CURATIVE BENEFITS OF DIVERSITY IN HIGHER EDUCATION REQUIRE A CRITICAL MASS OF STUDENTS FROM DIFFERENT BACKGROUNDS

1. Students typically enter college at a "time[] when a sense of personal and social identity is formed."[74] They "begin to think for themselves . . . and take ownership of their ideas," and they "possess the developmental maturity to gain a greater understanding of themselves and how they fit into the world around them."[75] For these reasons, college students of all races and backgrounds "are ideally situated to benefit from racial diversity."[76]

To achieve the benefits of diversity, however, colleges and universities must enroll a critical mass of minority students. Increased diversity is a well-established method for removing psychological obstacles and improving minority student development.[77] "Diversity enables students to perceive differences both within groups and between groups."[78] "[W]hen the minority group is not too small relative to the majority group," students who interact with diverse peers develop more sensitive, complex views of minority individuals.[79] Such interaction leads to a reduction in negative treatment toward minorities as well as an increase in openness for members of the majority.[80]

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[74] Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 334 (2002).

[75] Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615, 621 (2008).

[76] *Id.*; *see* Ernest T. Pascarella & Patrick T. Terenzini, How College Affects Students: A Third Decade of Research 60-61 (2d ed. 2005).

[77] *See, e.g.*, Rosenthal & Crisp, *supra* note 5, at 502-03, 509.

[78] Gurin et al., *supra* note 74, at 360.

Nonminority students are equally primed to reap the benefits of diversity. Social scientists widely agree that "students' interpersonal interaction with peers is one of the most powerful educational resources in higher education."[81] Both formal, classroom-based interaction and informal, everyday interaction contribute to achieving various academic benefits, in particular where interactions are positive.[82] Even small increases in diversity may have significant effects on certain aspects of the educational experience, such as promoting gains in creativity and civic engagement for all students.[83]

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[79] *Id.* at 360-61.

[80] *See id.*

[81] Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 Research Higher Educ. 529, 530 (2004).

[82] *See* Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. Educ. Research 4, 6 (2010); Gary R. Pike et al., *Evaluating the Rationale for Affirmative Action in College Admissions: Direct and Indirect Relationships Between Campus Diversity and Gains in Understanding Diverse Groups*, 48 J. College Student Dev. 166, 167 (2007).

[83] *See* Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 Rev. Educ. Research 29, 48 (2011).

In order for these "crucial encounters" to occur, a sufficiently diverse body of students must be present.[84] Social science evidence indicates that student-body diversity leads to increased interracial interaction, thus firmly establishing the "relationship between numbers and achieving the benefits to be derived from a diverse student body." *Bakke*, 438 U.S. at 323.[85]

Empirical evidence also shows that increased contact fosters greater positive interactions over time, which serves to ensure that the benefits of diversity accrue.[86] Institutional efforts to improve racial climate on campus by exposing students to content about race also provide a critical resource for maximizing the potential of interracial interaction.[87] Nonetheless, because meaningful interaction "cannot be replaced by teaching about diversity abstractly in courses or workshops,"[88] colleges must be permitted to attain the critical mass of students necessary to foster diverse interactions.[89]

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[84] Chang et al., *supra* note 81, at 545.

[85] *See, e.g.*, Pike et al., *supra* note 82, at 177; Mark E. Engberg, *Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students' Development of a Pluralistic Orientation*, 48 Research Higher Educ. 283, 286-87 (2007).

[86] *See* Thomas F. Pettigrew & Linda R. Tropp, *How Does Intergroup Contact Reduce Prejudice? Meta-Analytic Tests of Three Mediators*, 38 Euro. J. Soc. Psychol. 922, 922, 929 (2008); Aberson & Haag, *supra* note 72, at 195.

[87] Bowman, *supra* note 82, at 6, 20; Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 Am. Educ. Research J. 322, 327 (2009).

[88] Bowman, *supra* note 83, at 49; *see* Bowman, *supra* note 82, at 21-22.

A flexible definition of critical mass best serves the university's interest. Although colleges have compelling concerns about diversity levels that are too low, it is unreasonable and speculative to claim that colleges will purposely engage in excessive affirmative admissions in contravention of the interests of the students and public they serve.

It is not appropriate to reduce critical mass to a simple target number. The optimal level of student body diversity depends upon numerous considerations and varies by institution. Colleges and universities should be given breathing space to determine and to tailor, based on their relevant expertise, the appropriate critical mass of students for their campuses in order to guard against the dangers of underrepresentation and to secure the many benefits that flow from diversity.

2. In order to maximize the educational benefits of diversity, colleges must enroll a heterogeneous student body in which racial minority groups are independently and sufficiently represented. Petitioner nevertheless conflates independent racial groups no fewer than 13 times in her opening brief. *See* Pet'r Br. 3-5, 9-10, 35, 39-40.

Petitioner's approach wrongly assumes that certain "non-White" groups are interchangeable for purposes of diversity. This assumption ignores a central aspect of the government's interest in diversity: "a diverse student population creates a richer learning environment because students learn most from those who have very different life experiences from theirs"—even *among* distinct minority groups.[90]

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[89] *See* Jayakumar, *supra* note 75, at 632, 637; *see also* Jiali Luo & David Jamieson-Drake, *A Retrospective Assessment of the Educational Benefits of Interaction Across Racial Boundaries*, 50 J. College Student Dev. 67, 80-81 (2009).

Social scientists carefully employ methodologies that disaggregate students by race, recognizing that "[d]ifferences in peoples' experiences require closer focus on racial or ethnic groups."[91] Numerous studies have contrasted the educational outcomes and experiences of White, Black, Hispanic, and Asian American students.[92] Researchers have found that certain groups experience more discrimination in college than do their peers[93] and that students of different races perceive the supportiveness of campus environments in different ways.[94] It follows that critical mass is a variable concept among different racial groups. Indeed, the University of Texas has recognized as much by tailoring a critical mass for each group to the university's unique educational environment.

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[90] Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population*, 40 J. College Student Dev. 377, 383, 385 (1999).

[91] Frances K. Stage, *Moving from Probabilities to Possibilities: Tasks for Quantitative Criticalists*, 133 New Dir. Institutional Research 95, 99 (2007).

[92] *See, e.g.*, Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 Sociol. Educ. 294, 299 (2005); Mark E. Engberg & Sylvia Hurtado, *Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences*, 82 J. Higher Educ. 416, 417, 422 (2011).

[93] Julie R. Ancis et al., *Student Perceptions of Campus Cultural Climate by Race*, 78 J. Counseling & Dev. 180, 184 (2000); *see* Yolanda Suarez-Balcazar et al., *Experiences of Differential Treatment Among College Students of Color*, 74 J. Higher Educ. 428, 438 (2003).

[94] Thomas F. Nelson Laird & Amanda Suniti Niskodé-Dossett, *How Gender and Race Moderate the Effect of Interactions Across Difference on Student Perceptions of the Campus Environment*, 33 Rev. Higher Educ. 333, 347 (2010).

Independent and sufficient representation of each group broadens the range of perspectives on campus and in the classroom.[95] The differing viewpoints offered by students of different races have positive effects in the classroom setting, and sufficient representation of each set of views is necessary to realize the full potential of diversity.[96]

Conversely, a lack of independent and sufficient representation of each group can negatively affect the campus environment and individual students by increasing stereotyping and inhibiting academic performance.[97] Whereas increasing the representation of the individual's group can ameliorate those outcomes, the presence of minority students of a *different* race does nothing to temper these effects.[98]

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[95] Mitchell J. Chang, *Racial Differences in Viewpoints About Contemporary Issues Among Entering College Students: Fact or Fiction?*, 40 NASPA J. 55, 67 (2003).

[96] *See id.* at 66; *see also* Richard N. Pitt & Josh Packard, *Activating Diversity: The Impact of Student Race on Contributions to Course Discussions*, 53 Sociol. Q. 295, 312-13 (2012).

[97] *See* Milem et al., *supra* note 27, at 6; *see also* Gurin et al., *supra* note 74, at 360.

[98] *See supra* Part I.A.2; *see also* Sekaquaptewa et al., *supra* note 3, at 321.

III. ADMISSIONS POLICIES THAT INCREASE CAMPUS DIVERSITY CONTINUE TO ADVANCE THE GOVERNMENT'S INTERESTS

A. Increased Racial Diversity Improves Intellectual and Academic Performance for Minority and Nonminority Students

1. Social science literature at the time of the *Grutter* decision demonstrated "that student body diversity promotes learning outcomes." *Grutter*, 539 U.S. at 330. Since *Grutter*, social scientists have rigorously put these precepts to the test on campus and in the classroom, and the evidence supporting the academic benefits of college diversity is stronger than ever.[99]

Research clearly demonstrates that exposure to diversity enhances critical thinking and problem-solving ability.[100] Campus diversity also improves several other attributes related to academic success, including student satisfaction and motivation,[101] general knowledge,[102] and intellectual self-confidence.[103]

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[99] *See* Bowman, *supra* note 82, at 22-23.

[100] *See* Nida Denson & Shirley Zhang, *The Impact of Student Experiences with Diversity on Developing Graduate Attributes*, 35 Studies Higher Educ. 529, 540 (2010).

[101] Biren A. Nagda et al., *Learning about Difference, Learning with Others, Learning to Transgress*, 60 J. Soc. Issues 195, 208 (2004).

[102] *See* Denson & Chang, *supra* note 87, at 325; *see also* Luo & Jamieson-Drake, *supra* note 89, at 70.

[103] Thomas F. Nelson Laird, *College Students' Experiences with Diversity and Their Effects on Academic Self-Confidence, Social Agency, and Disposition toward Critical Thinking*, 46

Moreover, these benefits are not exclusive to students who engage actively in diversity programs. Students on diverse and diversity-promoting campuses share in these benefits even where their own level of engagement in diversity measures is less than that of their peers.[104] In other words, *everyone* benefits.

These academic benefits flow largely from interaction with the "broader collection of thoughts, ideas, and opinions held by" more diverse student bodies.[105] According to recent empirical research, individuals differ to a great degree, by race, on experiences, values, and viewpoints.[106] "Not only are their actual experiences different, but their perceptions of those experiences differ as well."[107] Accordingly, contributions to formal and informal discussion on many issues "are significantly correlated with student race."[108]

Research Higher Educ. 365, 382-83 (2005); *see* Anthony L. Antonio, *The Influence of Friendship Groups on Intellectual Self-Confidence and Educational Aspirations in College*, 75 J. Higher Educ. 446, 455 (2004).

[104] Denson & Chang, *supra* note 87, at 343; Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Educ. 430, 447 (2006).

[105] Milem et al., *supra* note 27, at 7.

[106] Pitt & Packard, *supra* note 96, at 299, 312-13; *see, e.g.*, Marino A. Bruce & Michael C. Thornton, *It's My World? Exploring Black and White Perceptions of Personal Control*, 45 Sociol. Q. 597, 607-08 (2004).

[107] Pitt & Packard, *supra* note 96, at 299.

[108] *Id.* at 313; Shouping Hu & George D. Kuh, *Diversity Experiences and College Student Learning and Personal Development*, 44 J. College Student Dev. 320, 321, 331 (2003).

Diverse perspectives create "an atmosphere of speculation, experiment and creation, [which is] essential to the quality of higher education." ***Bakke***, 438 U.S. at 312 (quotation omitted). Comparing homogeneous and heterogeneous discussion groups, one study showed that the presence of minority individuals stimulates an increase in the complexity with which students—especially members of the majority—approach a given issue.[109] Members of homogeneous groups in this study exhibited no such cognitive stimulation.[110]

As this research shows, "the mere inclusion of different perspectives, and especially divergent ones, in *any* course of discussion leads to the kind of learning outcomes (e.g., critical thinking, perspective-taking) that educators, regardless of field, are interested in."[111] Furthermore, while informal interactions produce important gains, "the formal interactions that take place in a course discussion offer the most potential for educators to extract the benefits of structural diversity on college campuses."[112] Thus, the University of Texas properly seeks to ensure these educational benefits for all students by achieving maximal diversity in every classroom as well as at the university-wide level.

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[109] Anthony L. Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 Psychol. Sci. 507, 509 (2004).

[110] *See id.*; *see also* Samuel R. Sommers et al., *Cognitive Effects of Racial Diversity: White Individuals' Information Processing in Heterogeneous Groups*, 44 J. Experimental Soc. Psychol. 1129, 1134-35 (2008).

[111] Pitt & Packard, *supra* note 96, at 298.

[112] *Id.* at 315.

Social scientists have gone beyond simply documenting enhancements to critical thinking skills, to study how such academic benefits result from increased diversity. "[W]hen a student is exposed to thoughts and ideas different from his or her own, it tends to produce cognitive disequilibrium, dissonance, or incongruity."[113] Resetting cognitive equilibrium requires complex processing and gathering of data, as well as consideration of revised viewpoints.[114] This process often causes students to develop a preference for "effortful" thinking and to seek nuanced explanations for human behavior.[115]

Interactions with diverse peers inspire deeper information processing "not just because of what [those peers] are saying but because of how they are categorized and because that categorization presents them as inconsistent with the norm."[116] In other words, members of different races often confront each other with surprising attributes or opinions that challenge stereotypes.[117] Processing such "surprising category combinations" requires more generative or creative thinking than simply relying on preconceived stereotypes.[118] Over time, individuals adapt to this generative process, which leads to enhanced cognitive flexibility and intellectual self-confidence.[119]

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[113] Chang et al., *supra* note 81, at 545.

[114] *See id.*

[115] Bowman, *supra* note 82, at 6; *see* Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. Issues 595, 598-599 (2005).

[116] Richard J. Crisp & Rhiannon N. Turner, *Cognitive Adaptation to the Experience of Social and Cultural Diversity*, 137 Psychol. Bulletin 242, 248 (2011).

[117] *Id.*

[118] *Id.* at 249, 250, 259.

2. Attending selective universities generally prepares minority students, like all students, for success. Nonetheless, opponents of race-conscious admissions policies, including several *amici* supporting petitioner,[120] continue to advance a debunked "academic mismatch" hypothesis. According to this theory, "lower average graduation rates of 'affirmative admits' result from a mismatch between their academic preparation . . . and the scholastic requirements of the schools that admitted them by taking race into account."[121] Numerous empirical studies have effectively discredited the validity of the "academic mismatch" hypothesis.

Over a decade ago, two seminal studies demonstrated that graduation rates of all students, including minority students, rise as the selectivity of the institution increases.[122] More recently, rigorous research has reaffirmed that "the mismatch hypothesis . . . is empirically groundless for black and Hispanic (as well as for white and Asian) students."[123] A recent national study found that "[i]n no case did . . . having an SAT score below the institutional average undermine[] the performance or well being of individual minority students. If anything minority students who benefited from affirmative action earned higher grades and left school at lower rates than others."[124]

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[119] *Id.* at 244, 257-58, 261.

[120] *See, e.g.*, Br. of Richard Sander & Stuart Taylor, Jr. at 2-13.

[121] Alon & Tienda, *supra* note 92, at 295; *see* Terrance J. Pell, *Racial Preferences and Formal Equality*, 34 J. Soc. Phil. 309, 310 (2003).

[122] *See* William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions 53, 59 (1998); *see also* Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, *in* Chilling Admissions: The Affirmative Crisis and the Search for Alternatives 17, 17-18 (Gary Orfield & Edward Miller eds., 1998).

In fact, race-conscious admissions programs narrow retention rate gaps between different student groups and "broaden educational opportunities for minority students and enable minority students to realize their full potential."[125] Research shows that minority students who attend selective colleges show an increase in "the completion of advanced degrees, earnings, and overall satisfaction with college experiences."[126]

Careful studies of student performance in law school and specific undergraduate majors further illustrate that lower rates of academic success for minorities are not the product of race-conscious admissions policies.[127] Studies supporting the academic mismatch hypothesis suffer from tunnel vision, treating affirmative admits' entering credentials as the sole determinant of school choice, academic success, and, in the case of law school, likelihood of passing the bar exam.[128]

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[123] Alon & Tienda, *supra* note 92, at 309.

[124] Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 Soc. Sci. Research 531, 544 (2007).

[125] Alon & Tienda, *supra* note 92, at 309.

[126] *Id.* at 296.

[127] *See* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1809 (2005); *see also* Mitchell J. Chang et al., *Considering the Impact of Racial Stigmas and Science Identity: Persistence Among Biomedical and Behavioral Science Aspirants*, 82 J. Higher Educ. 564, 586 (2011).

As a result of this singular focus on entering credentials, the academic mismatch hypothesis ignores other considerations, such as legacy preferences and financial considerations, that factor into school choice. Furthermore, the analysis assumes a direct relationship between academic credentials and success that is not supported by the evidence.[129] Evaluating the same data without these flawed assumptions results in an entirely different outcome: "instead of increasing the number of black attorneys by 7.9%, the elimination of affirmative action would decrease the number of black lawyers by 12.7%."[130] Properly viewed, the evidence indicates that the best way to increase the number of successful black law students is to expand diversity admissions programs.[131]

The academic mismatch hypothesis also ignores alternative explanations for minority underperformance in certain academic settings, such as stereotype threat and uncertainty about belonging.[132] Phenomena such as stereotype threat may explain not only minority students' lower retention rates in college and graduate school generally but also in specific academic majors.[133]

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[128] Ayres & Brooks, *supra* note 127, at 1813-14.

[129] *Id.* at 1813.

[130] *Id.* at 1814.

[131] *Id.* at 1809.

[132] *Id.* at 1838-39; *see supra* Part I.A.

A large and growing body of social science research supports the proposition that increased campus diversity improves academic outcomes for all types of students. Increased student body diversity contributes to specific, meaningful gains in academic skills for both majority and minority students. For minorities, diversity admissions programs further improve the overall likelihood that they will achieve academic success.

B. Diversity in Higher Education Improves Civic Engagement and Professional Competency

1. In addition to obvious academic pursuits, colleges and universities also prepare students to be effective economic and political leaders on local, national, and global levels.[134] Campus diversity has been shown to help schools achieve this practical aspect of their mission.[135] Effective leadership begins with prejudice reduction.

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[133] Chang et al., *supra* note 127, at 586.

[134] Daria Witt et al., *Introduction*, *in* Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities 1, 10-11 (Mitchell J. Chang et al. eds., 2003); *see* APA, *Dual Pathways to a Better America: Preventing Discrimination and Promoting Diversity* (Final Report), at 70, 72 (Jan. 2012), *available at* http://www.apa.org/pubs/info/reports/promoting-diversity.aspx.

[135] *See* Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 Rev. Higher Educ. 185, 186 (2007).

Some *amici* supporting petitioner suggest that campus diversity generally feeds discord and the reinforcement of stereotypes.[136] That contention is alarming for two reasons. First, the hefty weight of empirical evidence shows that campus diversity *reduces* racial discord. Second, the practical import of *amici*'s contention favors the reinstatement of academic segregation long since abandoned by this Court.

The "basic contention that intergroup contact typically diminishes intergroup prejudice" is "firmly established."[137] Indeed, interactions with select members of a different racial group can improve attitudes toward the entire group and even toward members of entirely separate racial groups.[138] Prejudice reduction in this context results largely from diminished anxiety and enhanced exposure to diverse perspectives.[139]

Prejudice reduction naturally correlates to a greater degree with positive intergroup interactions.[140] As relevant studies show, regular intergroup contact on campus over time leads to an increase in positive interactions.[141] In cases of prolonged positive contact and intergroup friendship, members of separate groups develop more complex views of each other, which can lead to increases in empathetic ideas and attitudes.[142] Moreover, coordinated institutional efforts to engage students in dialogue about diversity increase students' confidence in taking action to reduce societal prejudice.[143]

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[136] *See, e.g.*, Br. of Abigail Thernstrom et al. at 18, 23.

[137] Pettigrew & Tropp, *supra* note 86, at 922.

[138] Pettigrew & Tropp, *supra* note 73, at 766.

[139] Aberson & Haag, *supra* note 72, at 195; *see* Hermann Swart et al., *Affective Mediators of Intergroup Contact: A Three-Wave Longitudinal Study in South Africa*, 101 J. Personality & Soc. Psychol. 1221, 1222 (2011).

[140] Swart et al., *supra* note 139, at 1223.

[141] *See* Aberson & Haag, *supra* note 72, at 195; Anthony L. Antonio, *Diversity and the Influence of Friendship Groups in College*, 25 Rev. Higher Educ. 63, 83 (2001).

2. Prejudice reduction is only the beginning of the impact diversity has on student preparation for contemporary political and economic life. A critical mass of diverse student groups promotes "the attitudes, knowledge, and skills that prepare college students for meaningful participation in a pluralistic and diverse democracy."[144] This stems from the development of a student's cultural competence and "pluralistic orientation: the ability to see multiple perspectives; the ability to work cooperatively with diverse people; the ability to discuss and negotiate controversial issues; openness to having one's views challenged; and tolerance of others with different beliefs."[145]

Intergroup contact, which is possible only in diverse settings, generally improves cross-group interacting skills, motivates civic engagement, and promotes "greater openness to and understanding of diverse people."[146] In addition to documenting improved attitudes, research in this area demonstrates "consistent, positive effects of diversity experiences on behaviors and intentions" relating to civic engagement, such as time spent volunteering.[147]

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[142] *See* Pettigrew & Tropp, *supra* note 86, at 923; *see also* Swart et al., *supra* note 139, at 1223.

[143] Nagda et al., *supra* note 101, at 200.

[144] Ximena Zúñiga et al., *Action-Oriented Democratic Outcomes: The Impact of Student Involvement with Campus Diversity*, 46 J. College Student Dev. 660, 661 (2005); *see* Bowman, *supra* note 83, at 31, 49.

[145] Engberg, *supra* note 85, at 285; *see* Engberg & Hurtado, *supra* note 92, at 436; Hu & Kuh, *supra* note 108, at 324-25, 330.

A study conducted over the course of four years at the University of Michigan evaluated the impact of diversity on democratic attributes in the student body at large as well as a subset of Michigan students enrolled in a class on diversity.[148] This study found that the novel experiences students have with diverse peers in college cause them to build a "sense of commonality" with those peers and to become "more motivated and better able to participate in a heterogeneous and complex society."[149]

Students who enrolled in the diversity curriculum exhibited even "greater motivation to take the perspective of others" and were "more interested in politics."[150] As many studies have found, institutional efforts to promote cooperation and awareness greatly enhance students' personal commitment "to promote inclusion and social justice in their communities."[151]

3. The American workforce is rapidly becoming more diverse, and businesses operate on an increas-

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[146] Pike et al., *supra* note 82, at 167.

[147] Bowman, *supra* note 83, at 31.

[148] Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. Issues 17, 20-22 (2004).

[149] *Id.* at 19, 28; *see* Bowman, *supra* note 83, at 49.

[150] Gurin, *supra* note 148, at 24.

[151] Zuñiga, *supra* note 144, at 676; *see* Gurin, *supra* note 148, at 32.

ingly global scale.[152] For these reasons, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330. In response to these demands, colleges and universities strive to produce "empowered, informed, and responsible student[s] capable of negotiating the inevitable differences in a diverse society."[153]

Campus diversity is a proven vehicle for preparing students for the diversity they will encounter in the modern workforce. Prior to enrolling in college, most students have limited experience with racial diversity, leaving them underprepared for the marketplace.[154] Because college presents a critical stage in moral and intellectual development, students are positioned to build the "cross-cultural workforce competencies" that are enhanced by diversity.[155]

Cross-racial interaction during college correlates to enduring benefits.[156] Those interactions correspond to an increase in "honest, personal, and intellectual exchanges" with peers.[157] Furthermore, students exposed to diverse peers build enhanced leadership skills, such as the ability to negotiate conflict.[158]

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[152] Engberg, *supra* note 85, at 285.

[153] *Id.*; *see* Jayakumar, *supra* note 75, at 617, 642.

[154] Jayakumar, *supra* note 75, at 642.

[155] *Id.* at 640.

[156] *Id.* at 639; *see* Luo & Jamieson-Drake, *supra* note 89, at 80-81.

[157] Engberg, *supra* note 85, at 309.

[158] Jayakumar, *supra* note 75, at 636-37.

Students unaccustomed to racial diversity especially benefit from such interactions.[159] Finally, the critical thinking and problem solving skills that research has documented in the classroom further prepare students for the marketplace.[160] Institutions that actively promote positive racial climates on campus are more likely to secure these benefits.[161]

Campus diversity also provides students with opportunities to experience working in diverse teams. Research demonstrates that "cognitively diverse societies, cities, and teams perform better than more homogeneous ones."[162] Furthermore, studies show that businesses benefit from diverse workforces, including seeing higher revenues.[163] This occurs in large part because diverse perspectives, which correlate with race, improve group predictive and problem-solving abilities.[164] Experience working in diverse teams also holds the potential to ease tensions sometimes seen in heterogeneous groups.[165]

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[159] Anthony L. Antonio, *The Role of Interracial Interaction in the Development of Leadership Skills and Cultural Knowledge and Understanding*, 42 Research Higher Educ. 593, 607 (2001).

[160] *See supra* Part II.A.

[161] Nagda, *supra* note 101, at 209.

[162] Scott E. Page, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies 299, 323 (2007).

[163] *Id.* at 325-26.

[164] *Id.* at 320-27; *see also supra* Part II.A.

[165] Page, *supra* note 162, at 326-28; *see* Pettigrew & Tropp, *supra* note 86, at 922.

"The ability to adapt to different perspectives" has become "an absolute necessity for success in an increasingly diverse and global workplace."[166] Social science research shows "the compelling interest of diversity to promote a range of pluralistic abilities and dispositions that will undoubtedly help future graduates navigate a workforce and society characterized by increasing diversity and complexity."[167]

Colleges and universities are justified in taking steps necessary to prepare their students—all of them—to meet these challenges and achieve success.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

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[166] Jayakumar, *supra* note 75, at 636.

[167] Engberg, *supra* note 85, at 312.

AMICUS CURIAE BRIEF

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AND
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v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

BRIEF OF AMERICAN SOCIAL SCIENCE RESEARCHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

◆

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the undersigned social scientists submit this brief as *amici curiae* in support of Respondents.[1]

Amici curiae are social scientists and scholars who have extensively studied issues related to diversity, affirmative action, desegregation, and race relations in higher education institutions and in society. Collectively, *amici curiae* include 444 researchers from 42 states and from 172 educational institutions and research centers throughout the United States. Their work extends across numerous disciplines, including education, psychology, sociology, demography, economics, political science, and history.[2]

Amici curiae have an interest in presenting to the Court research findings relevant to the educational judgments of The University of Texas at Austin ("the University"), and to the possible implications of the Court's decision for other institutions and programs. The brief draws from the *amici*'s original research and their review of the literature, including the most extensive and up-to-date body of knowledge about the Texas Top Ten Percent Law ("the percent plan").

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[1] All parties have filed with the Court their blanket consent for the filing of *amicus curiae* briefs in these cases. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] A list of *amici* is included in the Appendix. *See infra* App. 6-23. Institutional affiliation is provided for identification purposes only and does not reflect the views of the institutions.

We believe it is vital that the Court have the newest and most rigorous peer-reviewed research and statistical analyses when considering an issue that is so critical for all of the nation's selective colleges and universities. The evidence in this brief bears directly on whether the University's admissions policy withstands strict scrutiny.

This brief focuses primarily on the means the University uses to leverage the educational benefits of diversity and to serve its institutional mission. A substantial body of research and the extensive experience of educational experts at other postsecondary institutions support the conclusion that the University's holistic admissions policy is narrowly tailored to further a compelling interest in the educational benefits of diversity – benefits that extend to all students at the University.

◆

SUMMARY OF ARGUMENT

To create the level of diversity that fosters educational excellence and adequately prepares students for engaged citizenship and successful careers in a multiracial society, the University needs a meaningful level of inclusion of students from different racial groups, both in its classrooms and across campus.

The consideration of race as one among many factors in admissions is a supplement to the percent plan that has led to an important increase in the enrollment of African American and Latino students, which has enabled the University to create a more stimulating and productive educational environment for all of its students. Although the percent plan is a useful tool, it limits the University's ability to consider the unique experiences and qualities of individual students who are not among the top 10% but who could nevertheless contribute to a truly diverse learning environment for all students.

The long-term experience of other selective colleges and universities with race-neutral policies underscores the need for the University's holistic policy. Despite myriad race-neutral efforts to increase racial diversity at public institutions in states with laws or regulations that have banned the consideration of race as a factor in admissions, a number of important education programs have experienced a substantial decline in racial diversity. These declines have occurred in graduate studies and professional programs related to science, business, medicine, and law, and at selective undergraduate colleges, which limits the preparation and prospects of a multiracial group of potential future leaders and damages the quality of education and educational opportunities for all students. These institutional experiences highlight the harm the University is seeking to avoid.

Without the complement of a *Grutter*-like policy the percent plan has not achieved the desired results at the University, and the plan has worked far less well at the other flagship campus in Texas. Thus, it is apparent that percent plans alone will not yield the level of diversity needed to leverage the educational benefits of diversity at public education institutions in other states, or at the nation's great private universities.

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ARGUMENT

I. The University's Holistic Admissions Policy Achieves a Compelling Educational Objective That the Court Has Endorsed in *Grutter* v. *Bollinger*.

By supplementing the percent plan with the consideration of race as a factor in admissions, the University seeks to address the severe isolation or absence of African American and Latino students in many undergraduate classrooms, majors, and graduate programs. Pet. App. at 21a-24a. The large body of diversity research conducted before and since the Court's ruling in *Grutter* v. *Bollinger,* 539 U.S. 306 (2003), demonstrates that the University needs to continue to consider race in admissions in order to leverage diversity to provide educational excellence, and to prepare all students to meet the challenges of citizenship and to fill leadership roles in an increasingly diverse society. The University's *amici*, including the Brief of the American Educational Research Association et al., summarize the extensive research supporting this conclusion. In this brief, we focus on research supporting the University's asserted need for diversity within its classrooms.

Classroom diversity is essential to providing the educational and citizenship benefits of diversity endorsed in *Grutter*. As the Court recognized in *Grutter*, a diverse student body promotes learning outcomes, and "[t]hese benefits are 'important and laudable,' because '*classroom* discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" 539 U.S. at 330 (emphasis added). Furthermore, research published since *Grutter* supports the Court's conclusion. The presence and participation in the classroom of racially diverse students enhances the content of the curriculum, class discussions, and students' motivation to work with peers from other racial groups.[3] Racial

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[3] *See* Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Educ. 430, 432 (2006) (finding that interactions with diverse peers in classrooms is an important aspect of cross-racial interaction on campus). *See also* Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 Mich. J. Race & L. 63, 97-103 (2011) (studying the benefits of diversity in the University of Michigan's law school classrooms); Patricia Gurin et al., *Engaging Race and Gender: Intergroup Dialogues in Higher Education* (forthcoming 2013) (finding improved inter-ethnic relationships and reduction of stereotypes in diverse undergraduate classes); Jeffrey F. Milem et al., *The Important Role that Diverse Students Play in Shaping the Medical School Curriculum*, Ariz. Med. Educ. Res. Inst. (AMERI), 2-4 (2012), *available at* http://www.coe.arizona.edu/ameri/publications (explaining that medical students guide

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diversity not only increases the breadth and scope of ideas produced in a collaborative learning environment like the classroom, it also significantly improves the quality of solutions envisioned collectively for solving real-life problems.[4]

Petitioner and her *amici* criticize the University's asserted need to attain a "critical mass" of students in the classroom to leverage the educational benefits of diversity. As the Court noted in *Grutter,* critical mass must be "defined by reference to the educational benefits that diversity is designed to produce." 539 U.S. at 330. This determination must consider the context in which learning takes place and does not correspond to a fixed number or percentage, which is neither practical nor desirable in a greatly varied and changing nation. The dynamics of diversity are contextual, interdependent, participatory, and cross-racial. Therefore, an institution can know when there is interactive diversity – i.e., opportunities for both

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diversity education in the medical school curriculum); Victor B. Sáenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 Res. Higher Educ. 1, 35 (2007) (stating that the college classroom is a critical context for increasing positive cross-racial interactions); Ximena Zúñiga et al., *Action-Oriented Democratic Outcomes: The Impact of Student Involvement with Campus Diversity,* 46 J. C. Student Dev. 660, 673 (2005) (explaining that engagement with diverse peers informally and in college classrooms is vital to reducing racial bias).

[4] *See, e.g.*, Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 327-28 (2007).

students of color and white students to reap the educational benefits of diversity – only by assessing students' experiences of classroom participation or of racial isolation in the classroom and other learning environments on campus. These judgments should be left to the University, as it has the best understanding of the context in which it seeks to fulfill its educational mission.

Including a meaningful number of students from different racial and ethnic groups is especially important in the classroom, where the "interplay of ideas and exchange of views" occurs. *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 314 (1978) (citing *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950)). As the Court recognized in *Grutter*, "diminishing the force of racial stereotypes is both a crucial part of [an institution's] mission, and one that it cannot accomplish with only token numbers of minority students." 539 U.S. at 333. Moreover, having more than a token presence of students from racial minority groups in the classroom reduces racial isolation and increases student integration, which creates a more beneficial classroom environment and more successful campus experience.[5] Students who report having had negative

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[5] *See, e.g.*, Janice McCabe, *Racial and Gender Microaggressions on a Predominantly-White Campus: Experiences of Black, Latina/o and White Undergraduates*, 16 Race, Gender & Class 133, 141-43 (2009) (stating that the classroom is particularly a site for microaggressions and feelings of isolation); Samuel D. Museus et al., *Modeling Racial Differences in the Effects of Racial Representation on 2-year College Student*

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racial experiences in the college classroom or elsewhere on campus are more likely to express overall dissatisfaction with their college experience.[6] In fact, having a meaningful level of diversity on campus helps institutions retain minority students and improves graduation rates.[7]

Racially integrated classrooms also help to reduce stereotype threat, which is a physiological response that limits the performance of racial minorities and

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Success, 13 J. C. Student Retention 549, 551 (2012) (explaining that greater inclusion of one's own racial group on campus improves classroom environments for students and increases the likelihood of success); Richard N. Pitt & Josh Packard, *Activating Diversity: The Impact of Student Race on Contributions to Course Discussions*, 53 Soc. Q. 295, 312-13 (2012) (concluding that the presence of African American students with diverse perspectives in a classroom improves class content discussion and helps avoid over-generalization across groups).

[6] *See, e.g.*, Shaun R. Harper & Sylvia Hurtado, *Nine Themes in Campus Racial Climates and Implications for Institutional Transformation*, New Directions for Student Services, Winter 2007, at 7, 18; Sylvia Hurtado et al., *Predicting Transition and Adjustment to College: Biomedical and Behavioral Science Aspirants and Minority Students' First Year of College*, 48 Res. Higher Educ. 841, 881 (2007); Berkeley Miller & Sutee Sujitparapitaya, *Campus Climate in the Twenty-First Century: Estimating Perceptions of Discrimination at a Racially Mixed Institution, 1994-2006*, New Directions for Institutional Res., Spring 2010, at 29, 29-30.

[7] *See, e.g.*, Sylvia Hurtado et al., *A Model for Diverse Learning Environments: The Scholarship on Creating and Assessing Conditions for Student Success, in* 27 *Higher Education: Handbook of Theory and Research* 41, 57, 102 (John C. Smart & Michael B. Paulsen eds., 2012) (synthesizing research linking campus climate and retention).

non-minorities alike in situations where they are at risk of confirming a negative stereotype about their racial group's capacity.[8] In other words, students' performance in an academic context is adversely affected by the awareness that their behavior "might be viewed through the lens of racial [or gender] stereotypes."[9] An African American or Latino student who is the only member of his race in a classroom can face a situation of intense discomfort that undermines his performance. However, when the same student is made to feel that he belongs from situational cues such as the presence of other African American or Latino students in the classroom, his academic performance improves.[10]

Experiencing diverse classrooms and a healthy racial climate is as important for white students as for minority students. If there are no Latino or African American students in their classrooms or fields of study, white students have little opportunity for cross-racial interactions. Therefore, a healthy racial climate is critical to creating a learning environment that improves white students' ability to gain the educational benefits of diversity.[11]

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[8] *See, e.g.*, Claude M. Steele, *Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us* 134-90 (2010); Mitchell J. Chang et al., *Considering the Impact of Racial Stigmas and Science Identity: Persistence Among Biomedical and Behavioral Science Aspirants*, 82 J. Higher Educ. 564, 569 (2011).

[9] *What Is Stereotype Threat?*, ReducingStereotypeThreat.org, http://reducingstereotypethreat.org/definition.html (last visited July 22, 2012).

[10] *Id.* This is also true, for example, when women are tested on math skills in a setting where negative stereotypes about women's math ability are activated. *Id. See also* Steele, *supra* note 8, at 134-51.

II. The University's Holistic View of Applicants Is Narrowly Tailored to Further a Compelling Interest in the Educational Benefits of Diversity.

A. The University's Policy Has Increased the Enrollment of Well-Qualified African American and Latino Students Who Help the University Leverage the Benefits of Diversity in Its Classrooms and on Campus.

The University's admissions policy has led to important increases in the enrollment of African American and Latino students. As the Fifth Circuit opinion noted, after the University's *Grutter*-like plan began, "in an entering class that was roughly the same size in 1998 as in 2008, the enrollment of African American students doubled from 165 students to 335 students. Hispanic enrollment increased approximately 1.5 times." Pet. App. at 24a.

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[11] Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615, 634 (2008).

Data from the state's higher education coordinating board show similar increases.[12] Comparing the six years (1998 to 2004) when the University was prohibited from considering race as a factor in admissions and was using all race-neutral means at its disposal with the three years (2005 to 2008) challenged by Petitioner when the University supplemented these efforts with its *Grutter*-like policy, the average percentage of African American students enrolled at the University increased by 46%[13] and the average percentage of Latino students enrolled increased by 35%.[14]

These increases under the University's holistic admissions policy are significant, as they allowed the University to leverage the benefits of diversity on its campus and in its classrooms, and thus to contribute to the education of a multiracial cadre of leaders who will understand more fully how to serve a changing nation and state. These increases are also important, as African American and Latino students who attend selective public flagship universities like the University are more likely to graduate than comparable students who attend less selective institutions.[15] Moreover, flagship universities are the fast track to professional schools: in the past five years, the University's graduates included 5,000 applicants to U.S. law schools (the third highest number in the nation), which exceeded the combined total for five other Texas public universities, including the state's other flagship institution.[16]

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[12] *See* Tex. Higher Educ. Coordinating Bd. (THECB), *First-Time Undergraduate Applicant, Acceptance, and Enrollment Information*, Tex. Higher Educ. Data (1998-2010), http://www.txhighereddata.org/Interactive/AppAccEnr.cfm.

[13] *Id.* This gain reflects an increase from 3.7% (or 267 African American freshmen from a total of 7,146 freshmen) to 5.4% (385 African American freshmen from a total of 7,094 freshmen). *Id.*

[14] *Id.* This gain represents an increase from 14.6% (1,042 Latino students from a total of 7,146 freshmen) to 19.7% (1,396 Latino freshmen from a total of 7,094 freshmen). *Id.*

In graduate and professional degree programs, the holistic consideration of race in admissions has led to important increases in the enrollment of African American and Latino students. The results of a study that isolated the impact of *Grutter* in Texas showed that by 2006, the percentage of African American, Latino, and Native American students who enrolled in public graduate and professional schools in the state increased by 3.4%.[17]

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[15] William G. Bowen et al., *Crossing the Finish Line: Completing College at America's Public Universities* 209-15 (2009) (including the University in the set of flagship universities). *See also* William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 257, 376-77 (1998).

[16] *Top 240 ABA Applicant Feeder Schools*, Law Sch. Admission Council (LSAC) (2006-2007 to 2010-2011), http://www.lsac.org/LSACresources/default.asp (follow "Data" hyperlink; then follow "Top 240 Feeder Schools" hyperlink).

[17] This reflects an increase from 29% to 30%. Liliana M. Garces, *Necessary But Not Sufficient: The Impact of* Grutter v. Bollinger *on Student of Color Enrollment in Graduate and Professional Schools in Texas*, 83 J. Higher Educ. 497, 499

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B. The Top Ten Percent Plan, Even with Extensive Outreach and Recruitment Programs, Has Not Produced Sufficiently Diverse Learning Environments.

Petitioner's claim that the percent plan has produced "substantial" diversity at the University (21.4%) is based on lumping together Latino and African American student enrollment numbers. Pet'r's Br. at 5. The effectiveness of the percent plan, however, needs to be assessed in terms of the impact it has had on various racial groups. *See Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (noting the importance of not aggregating racial groups with distinctive histories and experiences).

1. The Percent Plan Restricts the University's Freedom to Shape Its Entering Class and Consider the Individual Experiences of Students Who Would Contribute to a Diverse Learning Environment.

The Court recognized in *Grutter* that percent plans are not workable substitutes for the flexible

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(2012) (noting the importance of these increases in the context of graduate schools). *See also* Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 J. of Pol'y Analysis & Mgmt. 463, 483 (2006) (noting the important, even if modest, increases in Latino and African American graduate student enrollment when race is considered as a factor in admissions).

consideration of race, noting in particular the obstacles they create in "conducting the individualized assessments necessary to assemble a student body that is . . . diverse along all the qualities valued by the University." 539 U.S. at 340. America's great universities invest heavily in the individual consideration of student applications because they believe that the construction of the most diverse and interesting class possible is a vital component of both fairness to all individuals and educational excellence. They do not admit students based on a single dimension, and they are concerned with creating the most educationally powerful class possible.[18]

Without the supplement of a holistic admissions policy that can consider race, the percent plan prevents the University from considering certain individuals with special talents and qualities who may be essential to improving the educational experiences of all students. For instance, African American and Latino applicants from educationally demanding integrated or largely white schools may not be in the top 10% of their class, due to factors beyond their control, such as tracking.[19] And yet, these students'

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[18] Neil L. Rudenstine, *Student Diversity and Higher Learning, in Diversity Challenged: Evidence on the Impact of Affirmative Action* 31, 43 (Gary Orfield ed., with Michal Kurlaender, 2001).

[19] *See, e.g.*, Andrea Venezia & Michael W. Kirst, *Inequitable Opportunities: How Current Education Systems and Policies Undermine the Chances for Student Persistence and Success in College*, 19 Educ. Pol'y 283, 287, 289 (2005) (finding inequitable

(Continued on following page)

previous experience in integrated schools gives them skills and understanding that could greatly help the University to leverage the benefits of diversity. For example, these students' presence could help to dismantle stereotypes and to bridge the gaps between white and non-white students that exist in racially isolated schools. Their experiences crossing racial lines could help students of all races feel comfortable with, and to benefit from, campus diversity.

Thus, as a complement to the percent plan, the consideration of race during the holistic review process, which relies on the skills of its faculty and admissions experts, allows the University to consider each applicant's personal, family, community, and academic histories and thus to build a truly diverse learning environment that contributes to its mission.

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tracking in Texas along racial and class lines); *see also* David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, 91 J. of Pub. Econ. 2158, 2160 (2007) (explaining that data on enrollment in honors courses suggest that within-school segregation increases when schools are more highly integrated); William H. Schmidt, *At the Precipice: The Story of Mathematics Education in the United States*, 87 Peabody J. Educ. 133, 140-41 (2012) (finding that in 13 states, including Texas, a student's opportunity to learn mathematics is greatly influenced by race and family income); Jeannie Oakes, *Keeping Track: Structuring Equality and Inequality in an Era of Accountability*, 110 Teachers C. Rec. 700, 705-07 (2008) (providing a national overview of tracking based on race and class).

2. The Racial Isolation School Attendance Patterns upon Which the Percent Plan Is Premised Have Not Yielded Broad-Ranging Racial Diversity at the University.

The percent plan is premised on the assumption that the large number of racially isolated schools in Texas will increase racial diversity at flagship campuses by guaranteeing admission to the top-performing students at those schools. Despite these assumptions, the plan has not yielded sufficient beneficial results for African American and Latino students. The level of racial isolation differs for each group, and the mechanistic admissions process excludes equally talented students at less racially isolated schools.

There are very few education regions in Texas where African American students are so isolated that a percent plan would mean they are automatically admitted to college. None of the education regions in Texas has a majority of African American students, and only one of the state's 73 school districts with more than 15,000 students (Beaumont) has a majority of African American students.[20] On average,

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[20] Spring W. Lee et al., Tex. Educ. Agency, *Enrollment in Texas Public Schools 2010-2011*, 37-40 (2011); Nat'l Ctr. for Educ. Stats. (NCES), U.S. Dep't of Educ., *Selected Statistics on Enrollment, Teachers, Dropouts, and Graduates in Public School Districts Enrolling More Than 15,000 Students: 1994, 2000, 2006-07, & 2008*, Dig. of Educ. Stat. (Oct. 2010), http://nces.ed.gov/programs/digest/d10/tables/dt10_094.asp.

African American students in Texas attend schools with half as many members of their own race as Latino students. *See infra* Appendix Table 1. Thus, it is not surprising that African American students constituted only an average of 3.7% of the University's entering class during the period the percent plan was in place without an accompanying holistic policy that allowed the consideration of race.[21]

The majority of all public school students in Texas are Latino (50.3% in 2010-2011); Latino students are also the majority in 8 of the 20 education regions in Texas, with four regions enrolling over 70% Latinos.[22] Yet, the Latino student presence at the University under the percent plan, an average of 15% from 1998 to 2004, did not reflect the significant population of Latino high school graduates, 31% in 1997-1998.[23] Moreover, much of the growth in Latino enrollment at the University reflects demographic changes, not the policy changes of the percent plan.[24]

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[21] *See* THECB, *supra* note 12.

[22] *See* Lee et al., *supra* note 20, at 7, 36-40.

[23] Nat'l Ctr. for Educ. Stats. (NCES), U.S. Dep't of Educ., *High School Graduates and Dropouts in Public Elementary and Secondary Schools, by Race/Ethnicity and State: 1997-98*, Dig. of Educ. Stat. (Sept. 2000), http://nces.ed.gov/programs/digest/d00/dt103.asp. *See also* Mark C. Long & Marta Tienda, *Winners and Losers: Changes in Texas University Admissions Post-*Hopwood, 30 Educ. Eval. & Pol'y Analysis 255, 266-67, 278 n.46 (2008) (noting that under the percent plan the University was "unable to maintain the share of Black and Hispanic students that would have been admitted under a regime that allowed . . . consideration of race").

3. Outreach and Recruitment Efforts Alone Have Not Been Sufficient Complements to the Percent Plan.

The percent plan's potential to yield racial diversity is dependent on extensive outreach and recruitment efforts, which the University has implemented.[25] Despite these efforts, from 1998 to 2004, fewer than 50% of the Latino students eligible for admission under the percent plan and approximately 30% of eligible African American students enrolled each year at the state's elite institutions.[26] These are substantially lower percentages than that for the white students eligible for the percent plan, 60% of whom enrolled at either the University or at Texas A&M each year during that period.[27]

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[24] Angel L. Harris & Marta Tienda, *Hispanics in Higher Education and the Texas Top 10% Law*, 4 Race & Soc. Probs. 57, 59 (2012).

[25] Catherine L. Horn & Stella M. Flores, The Civ. Rts. Project, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 52-53 (2003), *available at* http://civilrightsproject.ucla.edu/research/college-access/admissions/percent-plans-in-college-admissions-a-comparative-analysis-of-three-states2019-experiences.

[26] *Id.* at 42-50. *See also* Catherine L. Horn & Stella M. Flores, *When Policy Opportunity Is Not Enough: The Complexity of College Access and Enrollment*, 3 J. Applied Res. on Child. (forthcoming 2012) (on file with authors).

The University's efforts to boost these numbers through outreach and recruitment programs have not relieved the concerns that prevent students from applying to or enrolling at the University, such as the perception that students of color are not valued or welcome at the institution. Studies have shown that policies banning the consideration of race in admissions can have a "discouragement effect" on minority students.[28] By contrast, policies that permit the consideration of race in admissions can serve as a "symbolic beacon of a welcoming environment" that helps students to overcome their reluctance to apply or enroll at a selective institution.[29] Thus, the

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[27] *See* THECB, *supra* note 12. The differences in enrollment patterns are not explained by students' decision to attend college out of state. From 1998 to 2008 not more than 3% of white students, 4% of African American students, and 1% of Latino students who were eligible for admissions under the percent plan chose to attend college out of state. *Id.*

[28] *See* Susan K. Brown & Charles Hirschman, *The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College*, 79 Soc. of Educ. 106, 108, 119 (2006). *See also* Kimberly A. Griffin et al., *The Influence of Campus Racial Climate on Diversity in Graduate Education*, 35 Rev. Higher Educ. 535, 561 (2012) (finding that "[b]road efforts to increase the presence of people of color across campus appear to influence favorably prospective students' perceptions of the institution's commitment to diversity and signal an appreciation of the voices, needs, and experiences of individuals from a variety of backgrounds.")

[29] Brown & Hirschman, *supra* note 28, at 108.

University's holistic policy can serve as a signal to African American and Latino students that the University is a welcoming institution that values diversity. This message is critically important, given the University's long struggle to overcome its ignoble history of *de jure* segregation, discrimination, and a brazenly hostile campus climate for African American and Latino students.[30]

C. The University's *Grutter*-Like Policy Benefits All Students and Does Not Operate as a Quota.

Petitioner's claim that the University's holistic policy unduly harms white students is factually wrong. The holistic consideration of race in admissions helps the University increase racial diversity, which benefits all students. *See infra* Point III.C. Furthermore, given the wide variety of factors that can be considered in a selective admissions process, no individual can be assured of admission, regardless of whether a policy is race-conscious or race-neutral. The *amicus curiae* briefs filed by Asian American and Pacific Islander organizations in support of the University compellingly demonstrate why the Court should also reject the claim by Petitioner and her *amici* that the University's *Grutter*-like policy harms Asian American students.

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[30] *See* Resp. Br. at 3-4 & n.1 (summarizing the long history of *de jure* and de facto discrimination against African Americans and Latinos at Texas' public schools and at the University). *See also* Brief of The Advancement Project et al. as *Amici Curiae* in Support of Respondents (discussing the University's chilly racial climate in recent years).

Year after year, fluctuations exist in the racial and ethnic distribution of students enrolled through holistic review separate from the percent plan. Data from the state's higher education coordinating board demonstrate that, since the University's *Grutter*-like policy was reinstated, the percentage of Latino students enrolled at the University who were not part of the percent plan ranged from 12% to 15% between 2005 and 2008, and the percentage of African American students ranged from 4% to 6%.[31] These figures demonstrate that the University's *Grutter*-like policy does not operate as a quota. *See also* JA 131a.

III. Despite Race-Neutral Efforts to Maintain Diversity, Racial Diversity Has Declined at Institutions That Can No Longer Consider Race in Admissions, Which Is Harming the Nation's Future and the Quality of Education for All Students.

When not allowed to consider race as a factor in admissions, selective U.S. universities have dedicated substantial financial resources and tried myriad alternative strategies to achieve the racially and ethnically diverse student bodies needed to prepare all students for success in an increasingly diverse and global marketplace. On their own, however, these efforts have failed to produce sufficiently diverse campuses. These institutions have instead experienced substantial declines in racial diversity, making it especially difficult for them to live up to the declaration in *Grutter* that, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 332. The nation's future and the quality of education for all students also have been compromised, as the skills acquired through interaction with racially diverse peers have a lasting effect on individuals' preparation for employment in an increasingly diverse and global workforce.

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[31] *See* THECB, *supra* note 12.

A. Race-Neutral Strategies Such as the Consideration of Socioeconomic Status and Outreach and Recruitment Programs Have Not Been Effective Substitutes for the Holistic Consideration of Race.

The University's comprehensive admissions review process considers race and low-income status, both of which can and should be considered. However, attending to family income without also considering race does not produce the wide-ranging diversity needed to further the University's mission. This experience is supported by numerous studies, which find that considering parental income or social background without also considering race would lead to the enrollment of substantially fewer students of color in selective schools than the holistic approach the University takes.[32]

Lessons learned at the University of California further underscore the limited effect of other race-neutral efforts, such as additional outreach and recruitment. Immediately after the University of California was prohibited from considering race in admissions, the university instituted a major expansion of outreach, doubling its expenditures from $60 million to $120 million annually, the objective being to work directly with high schools that served a high percentage of minority students.[33] However, this outreach effort had a more limited impact on diversifying the student body than the prior admissions policy, which did consider race, among other factors.

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[32] *See, e.g.*, Holzer & Neumark, *supra* note 17, at 476 ("[T]he presence of minorities among all low-income students in the United States, and especially among those graduating from high school with sufficient grades and test scores to be admitted to college, would be too small to generate a level of minority representation anywhere close to its current level."); Alan Krueger et al., *Race, Income and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 Am. Law & Econ. Rev. 282, 309 (2006) ("The correlation between race and family income, while strong, is not strong enough to permit the latter to function as a useful proxy for race in the pursuit of diversity.").

[33] Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California, in Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives* 33, 39 (Gary Orfield & Edward Miller eds., 1998).

The results of California's experience are supported by statistical analyses that simulate the impact of replacing holistic admissions policies that consider race with race-neutral efforts, such as increased minority student recruitment and support programs geared toward minority students (e.g., college preparatory programs and campus organizations).[34] The findings show that these policies fail to restore the number of students of color at the most selective four-year institutions to the level that would be achieved with the holistic consideration of race in admissions.

Forgoing the consideration of race in admissions would further exacerbate the racial and socioeconomic gaps among those attending college. A 2012 report by Stanford University researchers shows that gaps in enrollment in terms of both race and income have become substantially larger since the 1980s, despite a narrowing academic achievement gap.[35] The report also states that the growing racial disparities in U.S. college enrollment cannot be explained by differences in income according to race and ethnicity. At any income level, white students are twice as likely as

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[34] Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. of Lab. Econ. 113, 152-54 (2010).

[35] Sean F. Reardon et al., Ctr. for Educ. Policy Analysis, *Race, Income, and Enrollment Patterns in Highly Selective Colleges, 1982-2004*, 14 (2012), *available at* http://cepa.stanford.edu/content/race-income-and-enrollment-patterns-highly-selective-colleges-1982-2004.

African American students to attend a highly selective college.[36] In the upper half of the income distribution, white students are twice as likely as Latinos to attend a highly selective college.[37]

B. Despite Race-Neutral Efforts to Maintain Diversity, Public Institutions That Cannot Implement a *Grutter*-Like Policy Have Experienced Substantial Declines in Racial Diversity.

1. Racial Diversity Has Dropped Significantly in Science Fields Critical to Industry and Defense, and in the Areas of Business, Law, and Medicine That Train Future Leaders and Serve the Health Needs of the Nation.

The drop in racial diversity in graduate programs has been greatest in the science fields that are critical for continued scientific and technological advancement and to national security. This drop causes a lack of the diverse perspectives needed in these fields to foster the innovation necessary to tackle complex research problems and advance scientific inquiry.[38] The nation also has an urgent need to produce one million more students with science, technology, engineering, and mathematics degrees to meet workforce projections and keep America internationally competitive.[39] In fact, California's world leadership in high-tech industries has depended on hundreds of thousands of special visas being issued to foreign workers because the state has been unable to educate its overwhelming number of non-white students to the level needed.

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[36] *Id.* at 8.

[37] *Id.* at 14.

[38] *See, e.g.*, Page, *supra* note 4, at 327.

Bans on *Grutter*-like policies in admissions at public institutions across four states have led to a 26% drop[40] in the percentage of engineering graduate students who are Latino, African American, or Native American, and a 19% decline[41] in the natural sciences.[42] These declines show that postsecondary

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[39] President's Council of Advisors on Sci. & Tech., Exec. Office of the President, *Engage to Excel: Producing One Million More College Graduates with Degrees in Science, Technology, Engineering, and Mathematics*, 1 (2012), *available at* http://www.whitehouse.gov/administration/eop/ostp/pcast/docsreports; Comm. on Sci., Eng'g, & Pub. Policy, *Expanding Underrepresented Minority Participation: America's Science and Technology Talent at the Crossroads*, 34 (2011), *available at* http://www.nap.edu/openbook.php?record_id=12984&page=1.

[40] A decline from 6.2% to 4.6%. Liliana M. Garces, The Civ. Rts. Project, *The Impact of Affirmative Action Bans in Graduate Education*, 4 (2012), *available at* http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-impact-of-affirmative-action-bans-in-graduate-education.

[41] A drop from 7.8% to 6.3%. *Id.*

[42] *Id. See also* Liliana M. Garces, *Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment*, 36 Rev. of Higher Educ. 93, 122

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institutions need to be able to consider race in their admissions policies if the U.S., with a 46% non-white student population, is to remain a world leader in industry, defense, and basic science.

Racial diversity also has dropped significantly at schools of business, law, and medicine. Comparing two years (1995-1996) when the six public business schools in the University of California system could consider race in admissions to the post-Proposition 209 years (2000-2011) when they have been prohibited from considering race, the average percentage of entering African American students dropped by 58%.[43] Moreover, between 2000 and 2011, many of the University of California business schools had not one single African American or American Indian student in their entering classes.

In the period during which it has been without a *Grutter*-like policy in admissions (1997-2011), the UC Berkeley Law School enrolled an average of 12.5 African American students annually, only half of what the annual enrollment had been (25.7) when the law school was able to consider race in its holistic

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(2012) (finding a 12.2% decline in student of color enrollment across all graduate programs).

[43] This drop represents a decline from 3.6% to 1.5%. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case* (Aug. 2012), *available at* http://ssrn.com/abstract=2123653.

admissions plan (1970-1996).[44] A similar drop occurred at UCLA Law School, despite a remarkable increase in the numbers and strength of the applicant pool over the decades and intense recruitment efforts.

At California's medical schools, the percentage of entering underrepresented minorities also dropped, from 23.1% in 1993 to 14.3% in 1997 – the figures before and after the consideration of race as a factor in medical school admissions was challenged.[45] The average in the decade since (16.4%) is still considerably below pre-Proposition 209 levels, even as the state's non-white population soars. Myriad race-neutral efforts in California have not reversed these trends.[46] Similar declines were seen in Texas after *Hopwood* v. *Texas* prohibited institutions from considering race as a factor in admissions. 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter* v. *Bollinger*, 539 U.S. 306 (2003). In 1995, underrepresented minorities were 21.4% of first-year medical school enrollees in

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[44] *Id.*

[45] Ann Steinecke & Charles Terrell, Ass'n of Am. Med. Colleges, *After Affirmative Action: Diversity at California Medical Schools*, 8 Analysis in Brief, Sept. 2008, at 1, *available at* https://www.aamc.org/download/102358/data/aibvol8no6.pdf; *see also* Jordan J. Cohen, *The Consequences of Premature Abandonment of Affirmative Action in Medical School Admissions*, 289 J. Am. Med. Ass'n 1143, 1146-47 (2003).

[46] Steinecke & Terrell, *supra* note 45, at 2 (explaining that efforts included "automatic admissions for top high school students, outreach, academic enrichment, and financial aid ").

Texas, but this percentage dropped by one-fifth from 1997 to 2002, to an average of 17.2%.[47]

2. Racial Diversity Has Dropped Significantly at Selective Undergraduate Institutions That Can No Longer Consider Race as a Factor in Admissions.

Racial diversity also has dropped at selective colleges that can no longer consider race as a factor in admissions, undermining these institutions' ability to fulfill their educational missions.[48] After Michigan's Proposal 2 prohibited the consideration of race as a factor in admissions, the University of Michigan experienced a substantial drop in racial diversity. From 2006 (the year before Proposal 2 could have affected enrollment) to 2010, the percentage of African American students enrolled decreased by over

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[47] MALDEF et al., *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After* Grutter *and* Gratz, 8 Harv. Latino L. Rev. 33, 36 (2005).

[48] *See, e.g.*, Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, Rev. of Econ. & Stat. (forthcoming 2012) (manuscript at 13) (finding that bans on race-conscious admissions policies in multiple states have led to a 1.74 percentage-point decline in African American enrollment and a 2.03 percentage-point decline in Latino enrollment at the most selective institutions); Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. Hum. Resources 435, 440-47 (2012) (finding similar declines in multiple states).

25%, while that for Latino students fell by nearly 20%.[49]

Similarly striking declines in racial diversity have been documented at the University of California flagship campuses of Los Angeles and Berkeley since Proposition 209 was passed. Between 1997 and 1998, enrollments of African American freshman at UC Berkeley declined by 53%, while Latino enrollees fell by 45%.[50] In the same period, African American enrollments at UCLA dropped by 38%, while Latino enrollments declined by 30%.[51] Although there has been a modest recovery in absolute numbers since that time, neither campus has regained the diversity it had in 1995, and admissions and enrollments for African American and Latino students continue to decline at both campuses, relative to their changing percentages in the high school graduate population. Prohibitions on the holistic consideration of race in admissions have also shifted Latino and African American students from more selective to less selective colleges, which, as we note below, limits these students' educational opportunities.[52]

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[49] African American enrollment dropped from 6% to just over 4% and Latino student enrollment declined from over 5% to just over 4%. John T. Yun et al., Presentation at the University of Michigan National Center for Educational Diversity Symposium: Impact of Anti-Affirmative Action Policies in Higher Education (Mar. 28, 2012) (authors' tabulation based on IPEDS data). *See also* Michele S. Moses et al., *Affirmative Action's Fate: Are 20 More Years Enough?*, 17 Educ. Pol'y Analysis Archives, Sept. 10, 2009, at 1, 21-22, *available at* http://epaa.asu.edu/epaa/v17n17/.

[50] African American enrollment dropped from 7% (or 252 in a class of 3,215 students) to 3.7% (122 African American students in a class of 3,333 students). Latino and Chicano student enrollment dropped from 14.6% (or 469 in a class of 3,215 students) to 7.9% (266 in a student body of 3,333 students). Univ. of Cal. Office of the President, *University of California Application, Admissions and Enrollment of California Resident Freshman For Fall 1989 Through 2010*, 1, 2, 5 (2011), *available at* http://www.ucop.edu/news/factsheets/flowfrc_10.pdf.

[51] A decline of enrolled African American students from 5.6% to 3.5% and of enrolled Latino and Chicano students from 15.8% to 11%. *Id.*

C. Declines in Racial Diversity Undermine the Quality of Education and Opportunities for All Students.

Declines in racial diversity reduce the quality of education for all students. Leveraging diversity is not a process through which one group loses and another gains, but one through which all groups learn more and prepare more fully for the future. For instance, many white students in selective universities and graduate programs have grown up having little contact with people of other races, although nonwhites will constitute the large majority of the population in many parts of the U.S. as these students' careers unfold. By cooperating with, understanding better, and networking with people whose backgrounds and experiences are similar to their future coworkers, clients, neighbors, and fellow citizens, white students gain something of tangible value. The gains they enjoy from having a diverse student body is one of the reasons why white students on selective campuses strongly support the consideration of race as a factor in admissions decisions.[53]

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[52] Eric Grodsky & Michal Kurlaender, *The Demography of Higher Education in the Wake of Affirmative Action*, *in Equal Opportunity in Higher Education: The Past and Future of California's Proposition 209*, 33, 33 (Eric Grodsky & Michal Kurlaender eds., 2010).

Given that selective universities are the training ground for the nation's most influential jobs and leadership positions, it is critical that students attending these institutions have the opportunity to engage with diverse peers in meaningful ways. Racially diverse learning environments prepare all students more fully to become leaders and workers in a diverse society, nationally and globally. They also help break patterns of racial segregation, which in the long term benefits the entire nation. People who grow up in segregated environments tend to choose segregated environments as adults;[54] however, white

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[53] *See, e.g.*, Deo, *supra* note 3, at 95-97 (finding white students support diversity efforts at the University of Michigan Law School); Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in Diversity Challenged: Evidence on the Impact of Affirmative Action* 143, 151, 154-69 (Gary Orfield ed., with Michal Kurlaender, 2001) (finding white student support at several elite law schools).

[54] *See, e.g.*, Jomills Henry Braddock & James M. McPartland, *Social-Psychological Processes that Perpetuate*

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students who experience diversity at college are more likely to choose an integrated post-college work environment and live in more integrated neighborhoods.[55]

The shifting of minority students from more selective to less selective institutions, as occurred in California after Proposition 209, also harms students' educational opportunities. Contrary to claims by some of Petitioner's *amici*, it matters greatly where students enroll in college. Attending a more selective institution is associated – for all students but for African American and Latino students in particular – with a host of benefits, including higher rates of degree completion,[56] increased attendance at graduate or professional schools,[57] higher earnings,[58] and more

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Racial Segregation: The Relationship Between School and Employment Desegregation, 19 J. Black Stud. 267, 269 (1989).

[55] Jayakumar, *supra* note 11, at 615; *see also* Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 Am. Educ. Res. J. 322, 324 (2009).

[56] *See, e.g.*, Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 Soc. of Educ. 294, 296 (2005) (demonstrating persistence to degree and graduation rates); Mark C. Long, *College Quality and Early Adult Outcomes*, 27 Econ. of Educ. Rev. 588, 597-98 (2008) (reporting increases in bachelor's degree attainment).

[57] Ann L. Mullen et al., *Who Goes to Graduate School? Social and Academic Correlates of Educational Continuation After College*, 76 Soc. of Educ. 143, 158 (2003).

[58] Stacy Dale & Alan B. Krueger, *Estimating the Return to College Selectivity over the Career Using Administrative*

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leadership positions.[59] Given that leadership positions go disproportionately to those who attend selective institutions, it is critical to foster racial diversity at these schools. Addressing the value of attending the state's leading law school in *Sweatt* v. *Painter*, the Court unanimously stated that the impact on applicants was unquestionable:

> [T]he University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.

339 U.S. 629, 634 (1950).

An extensive body of social science research repudiates the so-called "mismatch hypothesis" (i.e., that minority students attending selective colleges who had test scores below those of their mainstream peers have lower rates of persistence to graduation).[60]

Earnings Data, 26, (Nat'l Bureau of Econ. Research, Working Paper No. 17159, 2011), *available at* http://www.nber.org/papers/w17159; Mark Hoekstra, *The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach*, 91 Rev. of Econ. & Stat. 717, 718 (2009).

[59] Bowen & Bok, *supra* note 15, at 160-75.

[60] *See, e.g.*, Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas 10 Percent Plan*, 29 Econ. of Educ. Rev. 1110, 1119-20 (2010)

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For example, former Princeton University president William Bowen and his colleagues show that Latino students with the same high school grade point averages who attend more selective colleges graduate at significantly higher rates than those who attend less selective colleges.[61] In fact, Latinos tend to "under-match" and enroll in less selective schools than they are eligible to attend.[62] This contributes to their exceptionally low rates of college completion, which directly threatens the educational and economic future of the states in which they live.[63]

D. The Inability to Consider Race in Admissions Leads to Low Levels of Racial Diversity and Harms the Racial Climate.

A campus's racial climate is part of the institutional context, which includes community members' perceptions of "issues of race, ethnicity, and

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(finding *lower* rather than *higher* graduation rates for students in Texas who, according to the mismatch hypothesis, would be "better matched" and thereby experience higher graduation rates instead).

[61] Bowen et al., *supra* note 15, at 106-08, 210, 215.

[62] *Id.* at 106-08, 208-16.

[63] Richard Fry, Pew Hispanic Ctr., *The Role of Selective Pathways: Latino Youth Finishing College*, 3-4 (2004), *available at* http://www.pewhispanic.org/2004/06/23/latino-youth-finishing-college/.

diversity."[64] Contrary to claims by Petitioner's *amici* that the consideration of race as a factor in admissions stigmatizes students or harms the racial climate, it is the prohibition of the practice that leads to lower levels of racial diversity and a poor racial climate, which prevents institutions from leveraging the benefits of diversity for all students.

Survey data from 31 institutions across the country, including campuses in California and Texas, show that having lower levels of diversity at colleges reinforces stereotypes and discrimination.[65] Minority students are more likely to feel excluded from campus events and activities at institutions with low levels of racial diversity than at those with higher levels. *See infra* Appendix Figure A. Although African American students are not the predominant minority on any of these campuses, the data indicate that they feel more included where there is a diverse campus environment. Higher levels of diversity on campus are also significant in reducing Latino students' feelings of isolation.[66]

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[64] Sylvia Hurtado et al., *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. Diversity in Higher Educ. 204, 205 (2008).

[65] *See* Sylvia Hurtado & Adriana Ruiz, UCLA Higher Educ. Research Inst., *The Climate for Underrepresented Groups and Diversity on Campus* (2012), *available at* http://heri.ucla.edu/briefs/urmbriefreport.pdf (studying climate data on 490 African American students and 3,488 Latino students).

Institutions that are not able to consider race in their admissions policies also experience a more difficult racial climate. National survey data show that the racial climate for underrepresented minority students at the University of California – which has not been able to consider race as a factor in admissions for 16 years – is worse than at the University. Only 62.2% of African American students on eight of the University of California campuses reported feeling that students of their race are respected on campus, compared to 72.3% of African American students at the University. *See infra* Appendix Figure B. The comparison for Latino students also reveals a more difficult racial climate when institutions are prohibited from considering race as a factor in admissions (77.2% for Latinos at the University of California, compared to 89.9% at the University).

These data underscore the need for the University to supplement the percent plan with the flexible consideration of race if it is to create the conditions necessary on campus to leverage the educational benefits of diversity for all students.

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[66] *Id.* Intergroup relations at highly diverse institutions, such as those where underrepresented minority students are 36% or more, also require attention, as increasing numbers of Latino students transform campuses with previously predominantly white environments. *Id.*

IV. A Percent Plan Is Not a Workable Alternative to the Holistic Admissions Practices Endorsed in *Grutter*.

The Court recognized in *Grutter* that percent plans are unsuitable for graduate and professional school admissions, which cannot rely on high school rankings. *See Grutter*, 539 U.S. at 340. Studies conducted since *Grutter* confirm that – in undergraduate admissions – percent plans alone are not effective substitutes for a holistic policy that may consider race. These studies show that replacing a holistic admissions policy with a top ten percent plan nationwide would not successfully restore the number of students of color that would be achieved under a holistic policy that considers race at the most selective four-year campuses.[67] These findings hold true for a number of situations, including those in which high schools are assumed to be completely racially isolated,[68] where admission under the percent plan is extended to students from out of state and guaranteed at any institution of choice,[69] and where percent plan admissions are in place at private colleges and universities.[70]

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[67] *See, e.g.*, Howell, *supra* note 34, at 116 (finding that a percent plan rule alone would lead to a 10% decrease in the proportion of African American and Latino students enrolled in highly selective colleges and universities); Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 361-64 (2009); Mark C. Long, *Race and College Admissions: An Alternative to Affirmative Action?*, 86 Rev. of Econ. & Stat. 1020, 1031-32 (2004); Reardon et al., *supra* note 35, at 12-15.

[68] Long, *supra* note 67, at 1032.

In the real world, a percent plan alone would be even less effective than the research simulations in achieving the level of diversity that can be attained with a holistic admissions policy that considers race. This is because patterns of racial isolation in high school differ greatly across states, students face multiple practical barriers to college access, and the guarantees of automatic admissions policies are more restricted than those used in the simulations. The most recent federal data from the National Center for Education Statistics show that the demography of states and their levels of residential and educational segregation differ on many dimensions, making it impossible to create one mechanistic admissions policy for achieving racial diversity that would work across all states. *See infra* Appendix Table 1.

Thus, the consideration of race as one of many factors in college admissions is necessary to maintain the current level of racial diversity at many selective undergraduate institutions and programs in a society where almost half of students are non-white. Graduate and professional institutions also need a workable tool for achieving the compelling benefits of diversity, and for training future leaders to deal with the challenges of an increasingly multiracial society.

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[69] Espenshade, *supra* note 67, at 362-64.

[70] Long, *supra* note 67, at 1031.

◆

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals judgment upholding the constitutionality of The University of Texas at Austin's holistic admissions policy.

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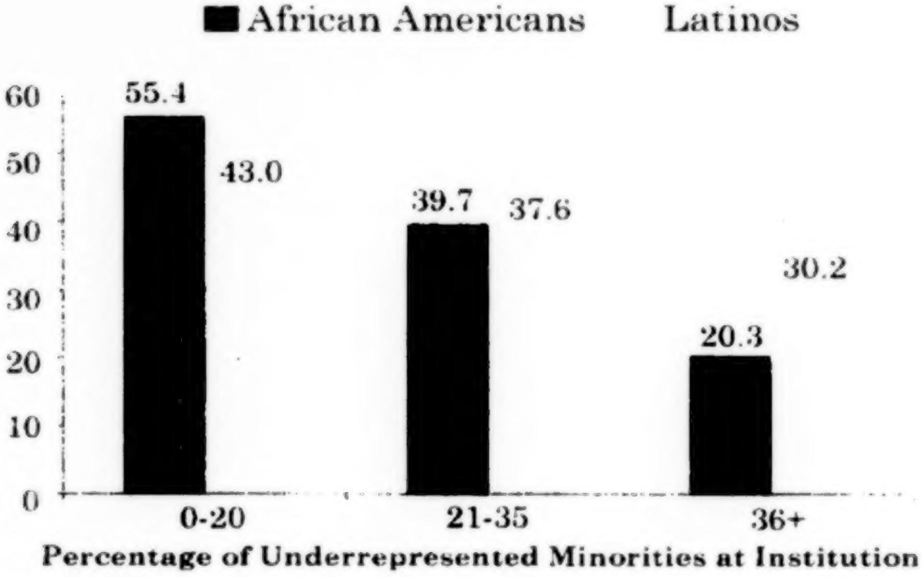
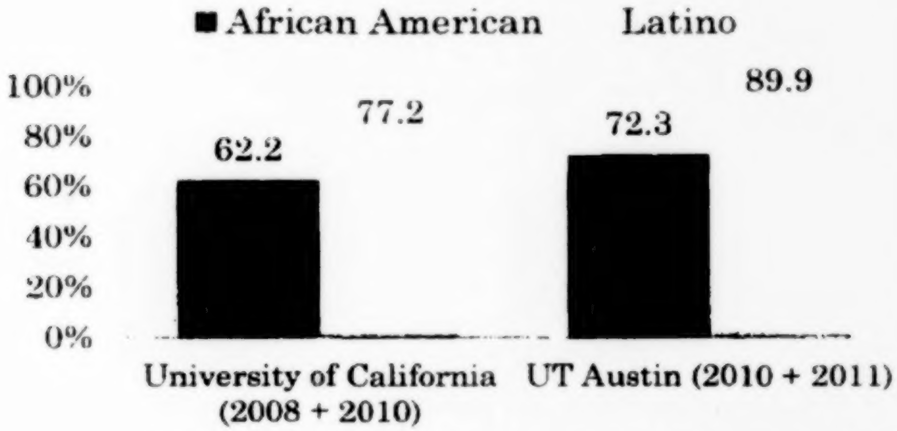
APPENDIX

***Figure A*. Percentage of Latino and African American Students Responding "Yes" to "Exclusion" as the Type of Discrimination Experienced.**



Data source: Diverse Learning Environment Survey, 2010 and 2011, HERI, UCLA. Based on 31 institutions across the country, including campuses in Texas and California.

***Figure B.* Percentage of African American and Latino Students Who Responded "Strongly Agree, Agree, or Somewhat Agree" to Survey Question: "Students of My Race/Ethnicity Are Respected on This Campus."**[1]



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[1] Responses at eight University of California campuses that administered the survey in 2008 and 2010, and at the University in 2010 and 2011. Within the University of California, the survey is called UC Undergraduate Experience Survey (UCUES), and at the University it is called Student Experience in the Research University (SERU). Analyses show statistically significant differences for each group. The survey responses in this chart are derived from a grand total of 1,151 African American students (1,010 at the University of California and 141 at the University) and 6,419 Latino students (5,788 at the University of California and 631 at the University). For additional details, see Kidder, *supra* note 43.

Table 1. **Average Percentage of Schoolmates from the Same Racial Group for African American and Latino Students in Public K-12 Schools in 2009-2010 for States.**

State	Average Percentage of African American Schoolmates for African American Students	Average Percentage of Latino Schoolmates for Latino Students
Alabama	65.7	*
Alaska	*	10.5
Arizona	10.6	61.4
Arkansas	57.8	27.5
California	19.4	67.1
Colorado	18.9	48.5
Connecticut	35.7	38.4
Delaware	43.6	24.2
Florida	46.5	49.3
Georgia	61.0	29.4
Hawaii	*	6.9*
Idaho	*	27.4
Illinois	64.7	57.2
Indiana	50.1	22.6
Iowa	18.6	22.7
Kansas	26.5	37.8
Kentucky	32.0	*
Louisiana	66.3	*

Maine	*	*
Maryland	63.5	28.6
Massachusetts	29.5	41.9
Michigan	67.1	23.8*
Minnesota	31.0	19.4
Mississippi	71.7	*
Missouri	58.9	*
Montana	*	*
Nebraska	33.4	38.8
Nevada	19.5	50.8
New Hampshire	*	*
New Jersey	47.2	47.9
New Mexico	*	70.9
New York	50.4	48.1
North Carolina	47.3	20.6
North Dakota	*	*
Ohio	62.4	*
Oklahoma	33.4	30.4
Oregon	*	34.9
Pennsylvania	56.0	37.3
Rhode Island	19.9	48.9
South Carolina	54.6	13.6
South Dakota	*	*
Tennessee	62.6	16.1
Texas	33.8	67.8
Utah	*	30.1

Vermont	*	*
Virginia	48.8	24.3
Washington	16.5	40.0
West Virginia	18.5	*
Wisconsin	51.3	29.4
Wyoming	*	19.4

Note: * African American or Latino students constitute less than 4.45% of total secondary school enrollment.

Source: National Center for Education Statistics, 2009-2010.

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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

—v.—

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMHERST, ALLEGHENY, BARNARD, BATES, BOWDOIN, BRYN MAWR, CARLETON, COLBY, CONNECTICUT, DAVIDSON, DICKINSON, FRANKLIN & MARSHALL, GRINNELL, HAMILTON, HAMPSHIRE, HAVERFORD, LAFAYETTE, MACALESTER, MIDDLEBURY, MOUNT HOLYOKE, OBERLIN, POMONA, REED, SARAH LAWRENCE, SIMMONS, SMITH, ST. OLAF, SWARTHMORE, TRINITY, UNION, VASSAR, WELLESLEY, AND WILLIAMS COLLEGES, AND BUCKNELL, COLGATE, WESLEYAN AND TUFTS UNIVERSITIES, *AMICI CURIAE*, SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are thirty-seven private, highly selective residential colleges whose small size and excellence attract students from around the nation and the world.[1] They provide their students with a liberal education in its broadest sense – a rich, deep training in diverse subject matters, in residential settings where education takes place not only in the classroom but throughout four years on campus with classmates from different backgrounds and with different experiences and viewpoints.

Because of their excellence, each of the *amici* colleges is highly regarded and besieged with applications from well-qualified high school seniors. Because of their size, they offer admission to only a small fraction of applicants. Because of their goals, they select applicants not mechanically by SAT score, but by looking holistically at each qualified applicant, taking into account a wide range of factors. Each year, *amici* decide which set of qualified applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of the larger society. Each college self-consciously seeks to assemble and house on-campus a highly diverse group of students – from different states and countries, from urban and rural backgrounds, home-schooled, prep-schooled, and public schooled, with differing economic circumstances, with different kinds of experience or talent or athletic ability, students who will be the first in their families to go to college and legacy students following after parents or grandparents.

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[1] Although four of the *amici*, Bucknell, Colgate, Tufts and Wesleyan, are universities, their small size, selectivity, and emphasis on a liberal education in a residential setting align them with the others, and for convenience we refer to *amici* as "colleges" throughout.

No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission. Letters consenting to the filing of *amici curiae* briefs have been lodged by the parties with the Clerk.

Amici have a direct interest in the outcome of this case because petitioner's claim is asserted, inter alia, under Title VI of the Civil Rights Act of 1964, which seemingly has identical application to public and private institutions alike. *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677 (1978) (applying Title IX of the Education Amendments of 1972, patterned on Title VI, to a private institution without suggestion of differential application); *Grove City Coll. v. Bell*, 465 U.S. 555, 566-67 (1984) (same).

Both the Court's opinion and Justice Kennedy's dissent in *Grutter v. Bollinger*, 539 U.S. 306 (2003), approvingly cited the brief filed by most of these same *amici* in *Grutter* and seemed to endorse and commend the ways in which *amici* seek to enroll broadly diverse classes. In view of Title VI and *Cannon*, a decision condemning Texas's admissions procedures might well be taken – depending on how it was written – to confound and restrict *amici's* effort to assemble diverse student bodies. To alert the Court to the substantial harm that applying petitioner's arguments to *amici* would cause – and advise it of the extent to which the "alternatives" touted by petitioner are impracticable and illusory for smaller selective institutions – *amici* submit this brief.

SUMMARY OF ARGUMENT

The Court should examine petitioner's sterile submission with a view to the experience of operating admissions programs at the nation's selective colleges and universities. The Court should consider the experience of admissions before diversity was highly valued, and the progress toward equal opportunity since. Private colleges were created as engines of social change, and the Court should consider the realities of selecting students in a society in which race still matters and the effects of discrimination and entrenched segregation still linger. If it does, it will affirm the judgment below.

African-American students were absent, or present in very small numbers, from most selective institutions of higher education, including *amici*, until the 1960's. Only when those institutions began to include racial diversity among the other kinds of diversity long sought for did they begin to enroll more than token numbers of African-American students. Research and experience both suggest that for small, highly selective private colleges like *amici*, carving out race from all the other kinds of diversity consciously aimed for would have a predictable, substantial resegregating effect.

Certainly *amici* could not possibly institute the Texas' practice of offering admission to the top 10% of high school graduates, or any program like it, without radically changing their nature. Additional alternatives suggested – admitting a percentage of each high school class, or focusing on class or economic circumstance without looking at racial background – could not work if the objective is to enroll a class that is both academically excellent and diverse. The rules petitioner urges would deprive *amici* of precisely the diversity that they value for its contribution to the residential, liberal education they provide. Seeking out and obtaining diversity, including racial diversity, does not violate Title VI and amounts to no quota. The competition between highly selective institutions ensures a meritocracy and militates against any racial division of spoils. Diversity as practiced at *amici* has had substantial educational benefits.

Both the deference due the educational policies of universities and colleges, *Grutter,* 539 U.S. at 328-29, and the respect due under *stare decisis* to *Grutter* and *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978), support the judgments below.

ARGUMENT

I. PRIVATE, HIGHLY SELECTIVE COLLEGES HAVE A COMPELLING EDUCATIONAL INTEREST IN ENROLLING BROADLY DIVERSE – INCLUDING RACIALLY DIVERSE – CLASSES, AND CANNOT DO SO WITHOUT TAKING THE DIVERSITY THEY STRIVE FOR INTO ACCOUNT.

During the late 1960's, as American society was coming to grips with the exclusion of African-Americans from many of the institutions and benefits of American life, *amici* took note of how few such students they had enrolled and began to seek out and enroll students from historically disadvantaged groups. The educational benefits that they gained from those efforts, and their assessment that substantial resegregation would likely follow if the Court precludes consideration of racial or ethnic diversity, are accurately reflected in the pathbreaking work by former Princeton President William G. Bowen and former Harvard

President Derek Bok, *The Shape of the River*.

Building on that work, the Court's consideration of the University of Michigan cases in 2003, inspired institutions and scholars to closely examine the benefits of diversity. The result has been an evolving and compelling body of research, applied across private and public sectors, which explores the benefits of diversity and the conditions under which the benefits of diversity are fully realized. *See* Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 Review of Higher Education, Winter 2007, at 185, 185 ("Much of the empirical work that links diversity and learning and democratic outcomes emerged from the developing area of research, now termed 'the educational benefits of diversity' because of its role in the University of Michigan affirmative action cases"); Chang, *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 Journal of Higher Education, May-June 2006, at 430, 431 ("Basically, these reviews showed that diversity-related benefits are far ranging, spanning from benefits to individual students and the institutions in which they enroll, to private enterprise, the economy, and the broader society.")

The argument of petitioner and her *amici*, if accepted, would harm the education offered at highly selective institutions, and the nostrums they offer to avoid or mitigate those harms are entirely impractical. *See generally* Brief for American Social Science Researchers supporting respondents.

A. Private, Highly Selective Colleges Are Committed To Obtaining The Educational Benefits Of Diversity, Including Racial Diversity.

In considering petitioner's challenge, the beginning of wisdom is to recognize, as Justice Powell and a majority of the Court did in *Bakke*, 438 U.S. at 312, that *educators* set the relevant policies of institutions of higher education, and that there are sound *educational* reasons why America's colleges and universities have virtually without exception concluded that *many different kinds of diversity, including racial diversity,* best create the circumstances for the learning required in the 21st century. *Grutter* expressly accepted that a university's interest "in attaining a diverse student body" is compelling. 539 U.S. at 329-33.

The point is basic, and the agreement of educators is broad,[2] particularly as regards liberal arts colleges which *intentionally* are close-knit communities in which students live and constantly engage with each other.[3] The broad diversity that characterizes American colleges and universities makes them unique, educationally superior, the envy of the world, and excellent beyond the capacities of narrower institutions.

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[2] *See, e.g.*, Ass'n of American Universities, ***Diversity Statement on the Importance of Diversity in University Admissions*** (by presidents of its 62 member institutions), Apr. 14, 1997, *available at* http://www.aau.edu/WorkArea/DownloadAsset.aspx?id=1652.

[3] *See* Umbach & Kuh, ***Students Experiences with Diversity at Liberal Arts Colleges: Another Claim for Distinctiveness***, 77 Journal of Higher Education, Jan. 2006, at 169, 172.

The Amherst Trustees' 1996 Statement on Diversity is representative of the views of *amici* generally:

> We will continue to give special importance to the inclusion within our student body, our faculty and our staff of talented persons from groups that have experienced prejudice and disadvantage. We do so for the simplest, but most urgent, of reasons: because the best and brightest people are found in many places, not few; because our classrooms and residence halls are places of dialogue, not monologue; because teaching and learning at their best are conversations with persons other than ourselves about ideas other than our own.[4]

That understanding is not newly minted. Oberlin College, which almost uniquely among *amici* has been steadily attentive to the importance of enrolling black Americans since well before the Civil War, concluded as early as the 1830s that "bringing together students with different backgrounds and experiences" made for a superior education.[5]

Grutter's nuanced, balanced insistence that consciousness and consideration of racial difference would be permissible in the context of a genuine commitment to diversity broadly conceived has had an extraordinary impact, rippling from admissions through curriculum and campus life.

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[4] www.amherst.edu/fac_serv/aaction/diversity. *See also, e.g.*,http://www.conncoll.edu/diversity/index.htm; http://www.middlebury.edu/studentlife/doc.

[5] Oberlin Alumni Magazine, Winter, 2002-03, at 2. The suggestion that upon enactment of the 1866 Civil Rights law Oberlin was violating the law – which is what petitioner's argument amounts to – is a terrible and indefensible misreading of history. *See* n.24 *infra*.

The kind of holistic consideration that Justice Powell referred to as "the Harvard College Program"–in which applicants are each considered, with the choice of offerees made from among well-qualified applicants after considering all their various strengths and interests, without quotas or reserved slots by race–is standard at each of the *amici* (and appears to be indistinguishable from the Texas plan). Seriously pursued, it necessitates consideration of race or ethnic background (all of them), because consideration of *every* kind of diversity (socio-economic, artistic, musical, athletic, legacy connection to the institution, foreign residence) self-evidently requires just that.

The proposition that broad diversity (including racial diversity) is important to education in our nation's colleges and universities, or at least that they may reasonably so conclude, is supported by thoughtful, experienced leaders such as former Secretary of State and Stanford Provost Condoleezza Rice,[6] in addition to all the *amici* supporting respondents. Their impressively unanimous judgments, supported by common sense and experience, cannot be displaced by sterile citations to inapposite cases or tendentious research.

Why is an education "characterized by encounters with difference" so vital? Because, as former Carleton President Robert A. Oden, Jr. said, "'the single greatest source of growth and development is the experience of difference, discrepancy, anomaly," and "the free and uncensored play of ideas and opinions and arguments and positions is central to the fabric of a liberal arts education, and a college peopled by those representing and trying out such ideas and opinions and arguments is a finer college for the presence of these people." A "pluralistic, widely representative college is a significant factor in the college choice of the world's most talented students."[7]

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[6] Lewis, *Bush Adviser Backs Use of Race in College Admissions*, N.Y. Times, Jan. 18, 2003, at A14.

All of the *amici* share exactly that experience and judgment, and believe that they would receive fewer applications and matriculate fewer of the students that they want of every sort (including white students) if they could not offer the broad diversity that today's students value and demand.

Deliberately seeking out diversity of every sort (including of gender, ethnicity, and race) – and not merely hoping it magically arrives – has been the rule in the judicial appointment process in state and federal courts for the past three decades; for the nation's two principal political parties, both of which seek to enlist candidates and spokesmen who *as a group* are diverse in various ways (including racially and ethnically); in federal and state cabinet selections; in the service academies; and in the military's officer ranks.[8] It is even more essential now that "minority" births (including Hispanics, blacks, Asians and those of mixed race) reached 50.4% of U.S. births last year.[9]

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[7] Inauguration Convocation Address, Oct. 25, 2002, *available at* www.carleton.edu/inauguration/speeches.php3.

The practical wisdom underlying these practices rebuts any assertion that diverse viewpoints and opinions could be adequately obtained by considering only economic circumstances and disadvantage. Those differences are valuable educationally too, and *amici* devote enormous resources to identifying and supporting such applicants, but they do not exhaust or reflect all the diversity that students will need to confront, understand, and be able to relate to and work with.

That educational conversations may be different when we speak with those whose experience is different – deeper, more powerful, with a different moral force – is the point made in Justice O'Connor's memoir of Justice Thurgood Marshall, Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L.

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[8] Successive presidents since at least 1976 have treated appointing more women, blacks, and Hispanic attorneys to the federal bench and cabinet as a laudable goal, not an equal protection violation. Federal and state judiciaries have been transformed from virtually all-white four decades ago to today's judiciary, which looks like the population at large. For the service academies, *see, e.g.*, Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003, at A17; Hunt, *Service Academies: Affirmative Action at Work*, Wall St. J., Jan. 23, 2003, at A15. Both political parties have for years made a public point of seeking to enlist well-qualified black and Hispanic candidates to run for office, and the ethnically balanced ticket has an even longer pedigree.

[9] Tavernise, *Whites Account for Under Half of Births in U.S.*, N.Y. Times, May 17, 2012, at A1.

Rev. 1217, 1220 (1992). It has been important for every President since President Johnson to give the nation that measure of diversity in their judicial and cabinet appointments; it is equally important that *amici* colleges be able to do so in admitting students as well.

B. Highly Selective Institutions Cannot Obtain The Diversity They Seek Except By Seeking It Directly.

For every aspect of the diversity they seek – including but not limited to socio-economic, athletic, artistic, intellectual, ethnic, and racial – *amici* have needed to identify students that can offer it, and consider those potential contributions in the discussion that takes place concerning virtually every well-qualified applicant. The Deans of Admissions and their staffs need to consider all the talents, interests, and backgrounds of qualified applicants in comparing each year's class. They look for students with particular backgrounds or talents or interests, international students, legacy students, students interested in as-yet-undersubscribed fields to better occupy recently hired faculty, students whose parents have not had the benefits of higher education, and students from deprived economic backgrounds or rural areas. And then the larger admission committee discusses each (or virtually each) qualified applicant file.

Typical of the factors holistically considered is this list from Amherst, in no particular order:

1. the candidate's standardized test scores;
2. the strength of the candidate's academic program in relation to the opportunities available at the candidate's secondary school;

3. the candidate's academic record, taking into account the rigor of the grading system at the candidate's secondary school;
4. the depth of academic talent at the candidate's secondary school, particularly important at secondary schools where rank in class information is provided;
5. evidence of intellectuality, creativity, or unusually well developed commitment to a particular academic field, as evidenced in the two required teacher recommendations, guidance counselor report, and the candidate's two required essays;
6. the extent and depth of the candidate's non academic achievement and leadership;
7. formalized and standardized assessments of the candidate's athletic or artistic ability made by coaches and arts faculty;
8. the candidate's socio-economic status, as determined by family income and educational attainment of parents;
9. particular personal, family and economic hurdles faced by the candidate and/or immediate or extended family, including but not limited to race and ethnic background;
10. ongoing and prospective support from extended family, community based organizations, opportunity programs, or religious organizations;
11. educational attainment of siblings; and
12. prospects for success or lack thereof in a candidate's particular field of academic interest.

The overriding task is to assemble the most interesting class of students, ready to learn from one another and from the college's faculty, and likely then to spread the benefits of the resources they have been privileged to receive. As Williams put it, "the college seeks students with strong intellectual skills who will benefit most from the education offered at Williams and then, in turn, benefit society by filling leadership positions in local and national life."

These factors are considered not to allocate benefits according to race, but to assess each student's likely success and contribution. In making those assessments, consideration of challenges surmounted is indispensable. The primary and secondary educational system in the U.S. is far from a level playing field, and although "an increasing share of U.S. students attend schools of a type "that was very rare when the civil rights movement was at its height—multiracial schools with more than 10% students from each of three or more racial groups"—black and Latino students are becoming more isolated from whites than they have been.[10]

Because of the unequal education applicants have received, and for most their experience that SAT and ACT scores are not predictive of educational achievement after the first year of college, highly selective colleges need to be especially alert to evidence of special efforts and accomplishment indicating exceptional promise and motivation on the part of students who have not had many advantages.

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[10] Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, Jan. 2009, *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/ orfield-reviving-the-goal-mlk-2009.pdf. Two in five Latino and African-American students are in 90-100% minority schools. *Id.* at 6, 12, 15.

Laden with applications from far more well-qualified students than they can possibly admit, *amici*'s admissions decisions are nuanced, multi-factorial, and never purely quantitative. They do not, and never have, admitted applicants by descending order from SAT scores until the class fills up. To the contrary; as Pomona College put it, "We have different expectations for different students: the exam scores from a daughter of two college professors are viewed in a different context than the scores from a first generation college student who attends an underfunded high school."

No numerical points or weights whatever are assigned for any racial or ethnic background; numerical quotas are not set or enforced. The same evaluative procedures are generally used for all applicants regardless of color or ethnic background; for example, different color files are not used, and file readers are not provided with periodic reports of the numbers of students of color admitted to date.

The process for each *amici* college is essentially the same as the Harvard College program described by Justice Powell in *Bakke* and the program upheld in *Grutter* – facially nondiscriminatory, without any quotas, considering racial or ethnic background as a "plus" in a particular applicant's file without insulating that individual "from comparison with all other candidates for the available seats." *Grutter*, 539 U.S. at 334-35.

Amici cannot be reasonably assured of having the desired range of talent, or international students, or legacy students, or students from underprivileged backgrounds, without noting and considering all those factors when it comes time to discuss each file. Nor could they obtain a class with more than token numbers of African-American or Latino students without making special efforts to attract such applications and then considering those factors as well (albeit in a way that ensures that no factor, including race, is "decisive when compared" with any other candidate, as *Grutter* and *Bakke* expressly envisioned). This is particularly important for those institutions (*e.g.*, Bates, Carleton, Grinnell, and Middlebury) which, because of their rural locations in notably nondiverse states, would without such efforts draw fewer applications from African-American or Latino students.

As Bowen and Bok summarize their findings, if liberal arts institutions are to fulfill their educational missions, colleges *have to* be sensitive to race in making admissions decisions. That need "stems directly from continuing disparities in pre-collegiate academic achievements of black and white students" as presently measured.[11] While a*mici* each uses grades and standardized tests as an important part of the process, they cannot rely on them exclusively, because "racial gaps of all kinds remain" even after attempting to control for the influence of other variables, and because long experience has taught *amici* that SAT scores for

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[11] Bok & Bowen, *The Shape of the River* 51 (1998). "People will debate long and hard, as they should, whether particular gaps reflect unmeasured differences in preparation and previous opportunity, patterns of continuing discrimination, failures of one kind or another in the educational system itself, aspects of the culture of campuses and universities, individual strengths and weaknesses, and so on. But no one can deny that race continues to matter." *Id. at* 279 n.2; *see generally id.* at 269-74.

African-American students do not accurately predict achievement later in college and beyond.

It follows—as both exhaustive research and the experience of the few state universities that were forced to abandon consideration of race confirm—that enforced elimination of the Harvard College/*Grutter* approach at highly selective institutions would have drastic resegregating impact.[12] Black enrollment would likely be reduced "by between 50 and 70 percent"; the probability of black applicants obtaining offers would drop to half that of white students; and the percentage of black students matriculating would drop from roughly 7.1% of the student body to roughly 2.1%. Seriously enforced, a race-neutral policy would "presumably take black enrollments . . . back to early 1960's levels, before colleges and universities began to make serious efforts to recruit minority students."[13]

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[12] Selectivity (the acceptance rate) at *amici* colleges ranges as high as 13% (one offer for every 7.5 applicants), and averages 25% to 33%. Even the women's colleges among *amici*, which receive proportionately fewer applications, have many more applicants than spaces. No *amicus* college admits applicants mechanically on the basis of test scores or grades, or ever has.

[13] *The Shape of the River*, 31-34, 39, 50-51, 280. *Amici*'s assessments are the same: elimination of the approach held permissible in *Grutter* would likely result promptly in sharp reductions in enrolled African-American students.

C. Selecting A Broadly Diverse Student Body Does Not Classify Students By Race Or Violate Title VI, And Without More Imposes No Quota, And Built-In Structural And Competitive Factors Afford Substantial Guarantees Against Abuse.

1. The central insight underlying the distinctions drawn by Justice Powell and the *Grutter* Court between the dual-track admissions process operated by the UC-Davis Medical School and the approach used at Harvard College and the U of M Law School is that consideration of all kinds of diversity does not deny the equal protection of law. A "facial intent to discriminate is evident" when public university operates two separate processes, for two lines of racially-reserved admission slots. But "[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process." *Bakke*, 438 U.S. at 318; *see also Grutter*, 539 U.S. at 334-39.

When colleges and universities decide that the advantages of diversity warrant encouraging applications from (and admittance to) students from Japan, Korea, China, South Africa, and Latin America, it makes no sense to say that white students from the domestic 50 states have thereby been "excluded . . . on ground of race, color, or national origin." By that same reasoning, the consideration expressly permitted by *Grutter* and *Bakke* of all aspects of a candidate's background in the service of "'attaining the goal of a heterogeneous student body,'" reflects no "facial intent to discriminate" and violates no rights under Title VI or the Fourteenth Amendment. *Grutter*, 539 U.S. at 324; *Bakke*, 438 U.S. at 318.

Consideration of an applicant's racial and ethnic background – and all backgrounds are considered, not just those of racial or ethnic minorities – is not different in kind from the consideration New England colleges have for decades given to applicants from California, Oregon, and Washington State, or the consideration that Reed and the Claremont colleges have given to the relatively fewer applications they received from the northeast. That interest in difference is not actionable discrimination, but simply the implementation of the judgment that given an overabundance of well qualified applicants, it is educationally beneficial for the institution and its student body to have members from far-flung states and myriad backgrounds. *Amici* colleges aspire, after all, to be national institutions, to draw students from (and prepare future leaders for) the whole nation.

2. Saying that consideration of racial background is inescapably a "quota" doesn't make it so. None of the *amici* operates under any quota, and their consciousness of race as one of the many factors to be included within the student body neither establishes nor conceals a quota system. A quota is a preset number (or narrow range) reserved for some applicants or limiting offers to another. Results that are fairly reached without such an allocation process, goals that are aimed for but often not met, and the widely varying numbers of offers to African-American and Latino applicants which depend on competitive consideration of applicants who may each present talents, back-

grounds, or achievements that the institutions are hoping to include, reflect no "quota."[14]

Both the process (a broad, holistic consideration of all kinds of diversity without separate committees or readers for applicants of color) and its output (wide variation year by year) refute any such label. Notwithstanding that Republicans and Democratic presidential vote tallies have varied narrowly for many elections between 47% and 53%, it would be nonsensical to identify a "quota" for either party in our electoral process. And the wide range of offers and matriculations at *amici* is far broader than that. At Amherst, for example, since 2003, offers extended in recent years to students with African-American backgrounds have varied widely, ranging without discernible trend from 95 to 179, resulting in matriculations of from 22 to 61 in classes of about 450.

Nor, to address another concern, does this holistic review at the *amici* colleges entail any governmental (or for that matter private) assignment of a personal designation according to a crude system of individual racial classifications," a concern expressed by Justice Kennedy in *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 789 (2007). Students self-identify (or not), and not according to any "white or nonwhite" dichotomy, but, if they choose, with the full richness of their background.

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[14] Justice Kennedy's dissent in *Grutter* contrasted what he saw as the narrow band of variation at the Law School with the broader variation reported at Amherst. *Amici* generally report at least that broad variation over the past ten years as regards offers to African-American and Hispanic students. The percentage of African-American and Hispanic students admitted and matriculated at *amici* is significantly below the percentage of such students in the general high school population.

3. In a variety of contexts, some justices have expressed concern that racial preferences may be self-perpetuating, or become fixed (or even expanding) entitlements. Whatever may be the case when government adopts quotas, no such tendency has been seen or is likely in the case of highly selective colleges.

The extraordinary competition among private colleges and universities – for the best applicants, the best matriculants, the best faculty, the most foundation and governmental grants, and the most important graduate fellowships – operates as a constant check on any abuse. Every institution has a powerful incentive to improve the intellectual capacity of its student body, class by class. The natural constraining power of this competitive quest for excellence virtually guarantees that the consideration of all the aspects of diversity has the genuine purpose of finding the best and the brightest, not filling any quota.

Nor will these efforts become entrenched. Over the past thirty years, the sharply increasing numbers of Asian-American applicants, the convergence of their test scores, and their interest in particular schools, have enabled highly selective schools to matriculate Asian Americans in sizeable numbers without any focus on doing so. As the black and Hispanic middle class expands and the educational opportunities available to those students improve, there is reason to expect a further narrowing of the test score gaps that have created the need to consider race among other diversity factors.

D. The Alternatives Suggested By Petitioner Cannot Work At Smaller Highly Selective Colleges.

Petitioner and her *amici* argue that the Texas 10% plan or replacing any consideration of race with socio-economic status would adequately obtain racially diverse student bodies. *It is vital for the Court to understand that even if those measures could work at large state universities – and the reported experience and reason suggest difficulties and reasons for concern – neither they nor any other alternatives of which we are aware could conceivably work at small, highly selective schools like amici.*

First, given how every *amicus* conducts admissions (virtually every folder read by multiple readers, and then evaluated in meetings without mechanical point systems), there is really no possibility of a *race-blind* admission process: consciousness of *all* the diversity each applicant would contribute is unavoidable.[15] There is no alternative for these colleges but to accept the reality of this *consciousness* of differences (including racial or ethnic background) and to use it intelligently as part of their complex weighing of multiple factors leading to admission decisions.

To the small extent that petitioner's *amici* even bother to recognize or address the problem, the alternatives suggested for obtaining diversity without attending to it—mechanical formulas looking to grades, tests scores, or graduation rank—would radically change the profile and indeed the nature of each *amici* college. No highly selective small college could use the "percentage of each high school class" method adopted by Texas and Florida, or Florida's guarantee of placement to all students who successfully complete a two year degree at a community college.

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[15] At a few of the *amici*, a small number of applicants with overwhelmingly superior intellectual credentials are admitted without committee discussion, but that small exception does not alter the point that all the remaining qualified applicants are competitively evaluated, with focus on the whole applicant and the likely contribution to, and success at, the school.

Similarly, it is unrealistic to believe that highly selective institutions could retain diversity, while not taking it directly into account, by improving search techniques, or focusing even more than they now do on low socio-economic rank (and they have in fact considerably increased that focus in recent years). California's efforts to restore at least some of the diversity lost since adoption of its race-neutral admissions policy has led to sharp drops of African-American and Hispanic students at the more selective institutions – *i.e.*, the ones most comparable to *amici.*[16]

After analyzing the problem, Williams College concluded that the use of a race neutral affirmative action plan based solely on socio-economic disadvantage would

- cut in half its already small pool of African-American and Latino applicants;
- leave it with a pool of remaining black applicants whose academic record would be on average considerably lower than it now can select from (because a disproportionate share of the economically disadvantaged students will have attended under-resourced high

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[16] *See* the *amici curiae* brief being filed by American Social Science Researchers.

schools and have generally weaker preparation);

- create greater competition for those at the higher end of the academic scale, resulting in a much lower yield on admitted students of color; and
- not only reduce the number of matriculating students of color, but also enlarge the existing socio-economic imbalance, since a much larger proportion of the admitted black and Latino students would be poor.

See also The Shape of the River, 46-50 ("class-based preferences cannot be substituted for race-based policies if the objective is to enroll a class that is both academically excellent and diverse").

Search techniques (including obtaining printouts of every minority student at a specified SAT level) are already extraordinarily comprehensive. Because so many of the poor are white, attending to socio-economic factors only without race consciousness could not possibly maintain the present mix of diversity. It would also result in a very different mix of students in any event, shedding the middle class applicants of color who, research and experience shows, are most likely to excel.[17] The result of a much poorer cohort of black and Hispanic students would likely be increased stereotyping, when "diminishing the force of such stereotypes" should be the goal. *Grutter*, 539 U.S. at 333.

Another difficulty with leaving racial diversity to chance is that a critical mass of students is important in attracting individual students. This does not mean quotas, but just as it is hard to attract a violinist to a school that has no orchestra, it is hard to attract students of color to Middlebury, Colgate, and other rural campuses in highly undiverse regions without a critical mass of fellow students.

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[17] *The Shape of the River*, 46-51.

And finally, there is the stark reality of the extraordinary high cost of providing the education that *amici* offer. Attempting to use socio-economic status to retain present racial and ethnic diversity could not work at all rural campuses, and even at others would require a huge increase in financial aid, well past the ability of most selective institutions.

II. THE COMMITMENT TO SEEK A BROADLY DIVERSE STUDENT BODY HAS BROUGHT MYRIAD BENEFITS WHICH THE COURT SHOULD RESPECT AND SAFEGUARD.

A. *Amici* Recognized That Their Student Bodies Were Not Racially Or Ethnically Diverse, And Have Undertaken To Obtain A Broader Diversity.

That the precious resources Americans have committed to private colleges from the earliest days of the Republic should be available to the students who in the judgment of each college will best advance its goals, including those previously excluded, is a view with deep roots in American history, and cannot be dismissed as a fad or late-twentieth century social engineering.

Hamilton was established as Hamilton Oneida College in 1793 as "an institution for the education of American *and Indian youth*." Dartmouth's charter created a college "for the education and instruction of youth of the Indian tribes, and also of

English youth and others." Oberlin resolved in 1835 that "the education of people of color is a matter of great interest and should be encouraged and sustained in this institution."[18] Bates was founded by abolitionists in 1855 who resolved immediately to admit applicants previously excluded from most American institutions of higher education.[19] Middlebury graduated a black student in 1823, and Amherst and Bowdoin followed in 1826 and 1833.[20] In short, even while most African-Americans were still enslaved, some northeastern colleges were intentionally recruiting diverse students in the service of their educational missions.

Despite such aspirations here and there, until the mid-1960's, African-American students were absent or rare at every one of the *amici* colleges to a degree inexplicable except as a consequence of the underlying discrimination rampant throughout American society and systematic denial of equal opportunity.[21] Even today, with their outreach efforts and consideration of color and ethnic background in the admissions process, none of the *amici* colleges enrolls African-American students in anything like their proportion of the high school population.

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[18] By 1900, Oberlin had graduated 128 African-Americans, nearly half of *all* black college graduates in the United States. Surely Oberlin's race-conscious efforts would not properly have been held to violate the 1866 Civil Rights Act upon its enactment.

[19] An early beneficiary of Bates' efforts, Rev. Benjamin E. Mays, a child of freed slaves, graduated from Bates in 1920, went on to become president of Morehouse College, and was described by Martin Luther King Jr. as "my spiritual mentor and my intellectual father."

[20] Wade, Jr., *Black Men of Amherst*, 5 (1976).

For the colleges as much as for the rest of American society, the Civil Rights Movement in the 1960's was a watershed, an occasion for taking stock, making commitments, and pursuing them. The trustees and faculty at each college examined the education mission they were charged with serving and considered whether the continued effecttive absence (or great paucity) of students of color was consistent with education broadly conceived and the public service each college aims to serve. They all concluded that special efforts to attract, enroll, and graduate students from groups historically excluded was an educational, social, and moral imperative. And it was not only trustees and faculties that changed their views and concluded that including students from African-American backgrounds was an educational imperative; applicants choosing among colleges also reached the same judgment, and began identifying campus diversity as a significant factor motivating their application and enrollment decisions as well.

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[21] No African-Americans graduated from Haverford until 1951. None graduated from Amherst from 1939 to 1947, even though under different leadership Amherst had, from 1915 to 1926, enrolled a number of African-American students, including four from the M Street (Dunbar) High School in Washington, D.C who are among its most illustrious and successful graduates by any standard – William Hastie (who after arguing a series of civil rights cases in the Supreme Court became the first African-American federal judge, and later served on the United States Court of Appeals for the Third Circuit), Charles Houston (Dean of the Howard Law School and NAACP Special Counsel who planned the legal strategy leading to *Brown v. Board of Education*), Charles Drew (who perfected the storage of blood plasma saving save thousands of lives in World War II), and Mercer Cook (twice a United States Ambassador). Wade, Jr., *Black Men of Amherst*, chs. IV-V.

Since the King assassination sparked reflection and action across American campuses, *amici* have graduated more African-American students, and are more diverse in multiple ways, than in the previous 175 years. They have done so through the use of race-conscious admissions efforts permitted by *Bakke* and *Grutter* – indispensable efforts that petitioner would foreclose.

B. The Colleges' Experience Demonstrates That Aiming for Diversity Has Had Educational Benefits – And Benefits For American Society.

In the years since *amici* colleges recognized that they were each more insular and less diverse than was educationally wise or socially defensible – and more than the students they sought to attract wanted them to be or their missions warranted – their efforts to cast their nets more widely have paid off in numerous respects. The careful, thoughtful, well-considered efforts to attract more qualified students of color to apply to and matriculate at the colleges have enabled the colleges to better accomplish the missions they set for themselves, which inclued, among other things, educating students who, individually and collectively, will contribute most to – and gain most from – the educational process, and be most successful in using what they have learned for the benefit of the larger society.

1. All of *amici* colleges, as part of their commitment to diversity and educational excellence, are cognizant of the interaction between campus diversity and educational attainment and all conclude that their diversity is an integral part of their educational strengths. Pomona, for example, studied the correlation between the diversity of students' interactions with others and various educational outcomes and concluded that increased diversity led to significant gains in educational attainment for both students of color and white students. These and other studies confirm the diffuse and wide-ranging educational benefits of the diversity sought by *amici*.

The educational benefits to diversity have also been fed back in the form of curricular and pedagogical innovations. As colleges gain experience from enrolling diverse students, the curriculum is adjusted to incorporate students' and alumni's practical experience of diversity, fostering better preparation for life beyond college. All colleges report changes and improvements in what is taught, how it is taught, and extracurricular programming.

For instance, Carleton's sciences faculty began an intensive effort to improve the success rates of students of color in science and math, which resulted in pedagogical innovations that benefitted Carleton's math and science students generally. To preclude colleges from casting a wide net and choosing a diverse class risks throwing away the educational gains that have already accrued and forestalling new innovations that arise from the experiences and perspectives of a diverse student body.

Beyond the incorporation of diverse perspectives into pedagogical design and practice, diversity is also an increasingly important part of the subject matter of various fields of study. The inescapable realities of increased diversity in the country and growing global interconnectedness have led *amici* colleges to incorporate the understanding of diversity in many fields of study. Put simply, students need to learn how to work with, market to, and buy from people from diverse backgrounds and cultures.

2. The consumers of education from *amici* colleges, the students, are in the best place to determine what they want out of their educational experiences, and overwhelmingly they demand diversity. The colleges are acutely aware that a lack of diversity will make it much more difficult to attract the best students in future classes.

Overwhelming majorities of incoming students rate "understanding other cultures" and "learning to relate to people of other races and nationalities" as "essential" or "very important" skills to learn in college. Campus diversity is highly correlated with various measures of student satisfaction, including the sense of community which is critically important to the effective functioning of small liberal arts colleges. A lack of student body diversity would prevent students from developing critical skills and decrease satisfaction with life on campus.

3. The outcomes of students of color who attend *amici* colleges bear out the educational benefits of attendance at diverse institutions. The graduation rates of students of color at liberal arts colleges are not substantially different from their peers (higher, at some of *amici*), and these students go on to

achieve great personal and professional success. To cite just one example, a survey of Williams alumni found that 87% of black graduates went on to a graduate or professional degree program, a higher proportion than white graduates. The list of successful students of color who have graduated from *amici* colleges and gone on to leadership roles in the public, private and nonprofit sectors is extensive. The contention that admissions policies that include race as a factor somehow placed these students at the "wrong" school is belied by their tremendous successes on campus and beyond.

III. BARRING INSTITUTIONS OF HIGHER EDUCATION FROM MAINTAINING THEIR OWN ADMISSION CRITERIA WOULD VIOLATE VITAL PRINCIPLES OF ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY, AS WELL AS STARE DECISIS.

Petitioner's argument for displacing the educational judgments of the University of Texas—and the educational judgments of *amici* and private colleges and universities generally—is at war with two fundamental principles of constitutional law: the rule that "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions," *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985), and the rule of *stare decisis*.

1. *Grutter* expressly followed *Ewing*'s rule of judicial restraint, recognizing "a constitutional dimension grounded in the First Amendment, of educational autonomy." 539 U.S. at 329. Academic freedom includes the "[d]iscretion to determine, on academic grounds, who may be admitted to study," "one of 'the four essential freedoms' of a university." *Ewing*, 474 U.S. at 226 n.12 (citations omitted).

The judicial restraint commanded by *Ewing* has old and deep roots, reaching back to *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819), and the Court's recognition there that a free society requires public and private spheres, and limitations on governmental intrusion and control so as to preserve those key distinctions. "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also . . . on autonomous decision-making by the academy itself . . . ." *Ewing*, 474 U.S. at 226 n.12 (citations omitted). Only a "hands off" policy leaves colleges free to reform, experiment, refine, and thereby offer to the whole society the improvements that result from a free market in ideas and practices.

Accordingly, "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms . . . ." *Ewing*, 474 U.S. at 225; *see also id.* at 227-8 (courts may displace such judgments, if at all, only if they were found to be such a substantial departure from accepted academic norms or "aberrant"); *Grutter*, 539 U.S. at 329 (in advancing an institution's goal of "attaining a diverse student body" as part of its "proper institutional mission," "'good faith' on the part of a university is 'presumed,'") (quoting *Bakke*, 438 U.S. at 318-19 (Powell, J.)); *Bakke*, 438 U.S. at 318-19 ("[I]n an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process," "good faith would be presumed").[22]

Individually but with impressive unanimity, private selective colleges and universities have made a collective judgment that obtaining broad diversity in their student bodies, including (but not limited to) racial diversity, is a matter of profound *educational* importance, and that the way to obtain that diversity is by seeking it, in a process in which the reality of race is considered competitively along with numerous other factors. Deference to the colleges' educational judgments that diversity is a core component of the education they are seeking to provide is plainly called for, as *Grutter* held. 539 U.S. at 328. The attempt by petitioners and her allies to strike racial and ethnic background from the list of all the factors that are considered in assembling a class has not met, and cannot conceivably meet, the *Ewing* standard.

Displacement of a college or university's core prerogatives—including the power to decide which set of applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society—would be an extraordinary departure from the deference that courts have long shown to institutions of higher education generally, and particularly private institutions.

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[22] *See also Ewing*, 474 U.S. at 227-28 (asking whether the challenged decision by educators was "beyond the pale of reasoned academic decisionmaking"). *Cf. Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89-90 (1978) (courts are not equipped or authorized to evaluate academic decisions made by institutions of higher education).

2. *Stare decisis* independently leads to the same judicial restraint required by *Dartmouth College* and *Ewing*. The standards for reversal of *Bakke*'s constitutional holding, as set forth in *Dickerson v. United States*, 530 U.S. 428 (2000), and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), are not nearly met.

After *Bakke* and then again after *Grutter*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion sketching out a permissible approach (which five justices plainly supported), and set sail accordingly. Enormous reliance interests have built up accordingly. In dozens of ways, the institutions where diversity is a significant reality have invested in change, and changed.

The peopling of the college communities with a more diverse group of students has made the colleges different (and better) than they were. Reliance on *Grutter* and *Bakke* has had huge impact on the world in which aspiring families and their high school students, and college students, live. *Grutter* and *Bakke* have left their mark on recruiting efforts, on relationships with secondary public and private schools and high school counselors, on support services and programs, on housing choices, and on the curricula, which have broadened and developed to meet the needs and expectations of a more diverse student body.

Not only have the colleges invested in reliance, so too have students and their parents. Current students and those matriculated for next year have expectations about being in a diverse community, and not being isolated. Thousands of such students have been aiming for admission to the *amici* colleges, or their highly selective university counterparts. Reversal of *Grutter* and *Bakke* would as a practical matter turn realistic opportunities into lottery chances. Without the ability to take race into account—and even more, with the expensive likelihood that differential admission rates in SAT bands after such a decision would be attacked as *prima facie* evidence of unlawful discrimination, with colleges left to prove that they did not exclude on the basis of race—the presence of African-Americans and Latinos on America's most selective campus would plummet, as it did in California's selective universities.

In short, upending the world that *Grutter* and *Bakke* invited and approved would interfere substantially with reasonable expectations and long-settled social patterns. That dislocation should weigh heavily against dispatching *Grutter* (which itself followed *Bakke*) and foreclosing the broadened opportunity they allowed for African-Americans and other disadvantaged students of color at the nation's most selective colleges and universities.

Extraordinary progress in opening up previously closed educational institutions has occurred since conscious efforts to include black Americans within the circle of those admitted to highly selective educational institutions in the United States began in the 1960's and were effectively held permissible in *Bakke*.[23] Many thousands of black and Hispanic Americans have graduated, taken their place in American society, and benefited the society at large by their accomplishments and civic contributions. For the Court to render a decision that would be widely taken as deeming their very degrees illegitimate—the basis for their achievements and contributions the product of violations of constitutional or statutory law—would be an extraordinary step, permissible, if at all, only if the constitutional or statutory text or history left no doubt whatever that *Grutter* and *Bakke* reached the wrong result.

History, though, confirms that *Grutter* and *Bakke* got it right. The Congress that adopted the Fourteenth Amendment repeatedly enacted race-conscious and race-targeted legislation in order to close the social gap between blacks and whites and eliminate the lingering effects of discrimination. That history precludes any finding that the "original understanding" of the Fourteenth Amendment prohibits what *Grutter* and *Bakke* permit.[24] In view of that telling original understanding, it is plainly not possible to say that the holding in *Grutter*—that race may be considered competitively, along with other factors, so long as separate racial tracks are not set up—was plainly wrong.

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[23] Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 569-71 (2002); *JBHE Annual Survey: Black First-Year Students at the Nation's Leading Liberal Arts Colleges*, Journal of Blacks in Higher Education, *available at* http://www.jbhe.com/2011/11/the-jbhe-annual-survey-black-first-year-students-at-the-nations-leading-liberal-arts-colleges.

[24] Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 784-85 (1985); Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 429-32 (1997); Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. at 577 & n.322.

* * * *

The judicial deference owed to colleges and universities, joined to the wise policy of *stare decisis*, counsels against any resolution of these cases that would interfere with the powers of colleges and universities generally—and particularly private institutions—to experiment and pursue their own judgments as to how to best use their resources for educational and charitable purposes, even when doing so entails some consideration of racial background as one factor, among many, to be considered and weighed competitively with many others.

CONCLUSION

Academic freedom and the deference due educational judgments leave colleges and universities free to select those students who, in their judgment and as *Grutter* and *Bakke* contemplated, will, individually and collectively, take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of the larger society. The Fourteenth Amendment and Title VI do not mandate admission to private colleges and universities on the basis of quantitative measures, or forbid them from considering race or ethnic background among other factors to be competitively evaluated and considered in admission decisions, without quotas. The judgment below should be affirmed.

Respectfully submitted,

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AMICUS
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Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTEREST OF AMICUS

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of the respondents.[1]

ADL was organized in 1913 – at a time when anti-Semitism was rampant in the United States – to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. Today, on the eve of its 100th anniversary, it is one of the world's leading civil and human rights organizations, and its history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority group or not. ADL believes that each person in our country has the constitutional right to receive equal treatment under the law and that each person has the right to be treated as an individual, rather than as simply part of a racial, ethnic, religious, or gender-defined group. In this connection, ADL has often filed briefs *amicus curiae* in this Court in cases arising under the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

Equal Protection Clause of the Fourteenth Amendment to the Constitution or the Nation's civil rights laws.[2]

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[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Taxman v. Bd. of Educ.*, 92 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); and *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

With respect to use of racial preferences in access to social opportunities such as employment and education, ADL has long wrestled with whether such preferences can be reconciled with its core mission – "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens." ANTI-DEFAMATION LEAGUE 1913 CHARTER (1913). And, while ADL has endorsed limited racial preferences in order to remedy specific discrimination, it has consistently opposed the non-remedial use of race-based criteria, except under highly limited circumstances in the educational context where the government can identify a compelling interest to justify them and has narrowly tailored their use to meet those legitimate interests.

In the context presented here, ADL agrees with the University of Texas at Austin that diversity in higher education is a compelling government interest. Through its work in a variety of education-related settings, ADL has grown to understand that diversity in education is critical, not only because of its contribution to the educational experience but also as a factor in the development of a fully integrated society which honors inclusiveness and which is free of racial and ethnic hatred and the discrimination which flows from it. The admissions policy at issue here is narrowly tailored to achieve that compelling government interest and does not operate as an overt or covert quota system. Therefore, ADL believes that on this record UT's use of race as one factor in its holistic review of applicants passes constitutional muster.

SUMMARY OF THE ARGUMENT

1. ADL's experience in a variety of education-related settings indicates that exposure to a diverse academic community serves critical societal needs. However, despite its commitment to diversity, ADL firmly believes that the Constitution prohibits affirmative action programs from imposing quotas, assigning persons to categories based on their race, or using race as a determinative factor in making admissions decisions.

2. This is the first case which has come before the Court in which ADL believes that a university has used the proper means to achieve a diverse student body. The uncontested record makes clear that UT (i) only implemented its current admissions policy because its prior, race-neutral admissions policy had not achieved UT's diversity goals, (ii) takes race into account only as part of a holistic review of applicants in which race is never a determinative factor in making an admissions decision, and (iii) does not use overt or covert quotas. These conceded facts demonstrate that UT's admissions process is narrowly tailored to achieve diversity in the context of higher education (which the Court has recognized constitutes a compelling governmental interest).

3. In light of these facts, the Court need not rely on UT's professions of good faith or defer to UT's legal judgment; the undisputed record shows that UT's admissions process satisfies strict scrutiny.

ARGUMENT

I. ADL'S EXPERIENCE DEMONSTRATES THE IMPORTANCE OF DIVERSITY IN HIGHER EDUCATION

Amicus ADL has long opposed both de jure and de facto segregation in our schools – its history of amicus activity in this Court's school desegregation cases extends back to *Brown*, and its governing body has condemned de facto discrimination in the Nation's schools repeatedly. ADL has fought to eradicate racial, ethnic, and religious bias in our Nation and to promote understanding among its disparate peoples for almost 100 years. As a leading civil rights organization, ADL has vigorously supported enactment and enforcement of the Nation's major anti-discrimination laws. It is a pioneer in the promulgation of hate crime statutes; variations of its model hate crime statute have been adopted as law in 45 states. It is a leader in producing educational materials and programs designed to fight hate, bias, and prejudice; its premier educational initiative, the A WORLD OF DIFFERENCE® Institute (the "Institute"), brings children of all races together to learn the values of respect and diversity, bridging racial, ethnic, and religious differences and striving to reduce the tensions that spring from them. The Institute has reached literally hundreds of thousands of teachers and peer trainers and, through them, millions of students, in an effort both to eradicate bias and hate before it hardens, as well as to promote diversity and pluralism.

ADL's real-world, front-line experience demonstrates that efforts to further diversity bear educational fruit. For example, ADL's experience with its CAMPUS OF DIFFERENCE™ program, which provides college and university students with practical, experiential, hands-on training to foster intergroup understanding and equip students to live and work successfully in a diverse world, has reinforced ADL's belief that diversity enriches the educational experience. ADL has found that a diverse educational environment challenges all students to explore ideas, perspectives and experiences that they might not otherwise explore, to see issues from new points of view, to rethink their own premises and prejudices, and to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other or differing views. It is not just ADL which has reached this conclusion: there is a growing body of literature demonstrating that "diverse student populations enhance educational outcomes in undergraduate and graduate higher education . . . ." *See* Kathryn A. McDermott, *Diversity or Desegregation? Implications of Arguments for Diversity in K-12 and Higher Education*, 15 EDUC. POLICY, no. 3, 2001 at 452, 456.[3]

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[3] Specifically regarding racial diversity as a component of diversity, "[r]esearch indicates that cross-race interaction has positive impacts on a range of important outcomes and that the greater the structural diversity of an institution, the more likely that students are to engage in these types of interaction." *See* Jeffrey

(Continued...)

In addition to aiding colleges and universities in achieving these educational goals, a diverse campus environment can also create opportunities for people from diverse backgrounds, with different life experiences, to come to know one another outside the classroom as more than passing acquaintances and to develop mutual respect for one another. Informal interactions of this kind "help students develop the skills to participate and lead in a diverse democracy." *See* Patricia Gurin, et al., *Diversity and higher education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. no. 3, 2002 at 330, 353.

ADL's experience with the CAMPUS OF DIFFERENCE™ program underscores what the American Council on Education[4] has recognized: learning in a diverse educational environment promotes personal growth by challenging stereotyped preconceptions, encouraging critical thinking, and helping students to communicate effectively with people of varied backgrounds,

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F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors, in* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES, Ch. 5-11 (Mitchell Chang, et al. eds., 2003).

[4] American Council on Education, *On the Importance of Diversity in Higher Education,* http://www.acenet.edu/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=45474 (last visited August 2, 2012).

thereby preparing students to become good citizens in an increasingly complex, pluralistic society. As the American Council on Education has noted, America's continued prosperity is dependent upon its ability to make effective use of the talents and abilities of all of its citizens, in work settings that bring together individuals from diverse backgrounds and cultures.[5]

In short, ADL's experience indicates that exposure to a diverse academic community not only reduces prejudice, but it also improves education, better prepares our students for possible graduate education and career opportunities, and enhances the United States' ability to compete in a globalized economy. Embracing diversity and promoting a fully integrated society is crucial not only to the struggle to defeat discrimination, but also to the continued vitality of our Nation and our society.

II. DESPITE THE IMPORTANCE OF DIVERSITY, THE ENDS DO NOT, AND CONSTITUTIONALLY CANNOT, JUSTIFY VIOLATIONS OF CORE EQUAL PROTECTION PRINCIPLES

ADL's staunch commitment to diversity has not diminished its belief in the centrality of the precept that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. For this reason, despite its commitment to diversity, ADL has *opposed* virtually all of the racial classifications that have been challenged in this Court, including racial preferences and quotas in affirmative action programs, arguing that they discriminate on the basis of impermissible characteristics and thus violate this core value of equal protection. *See* ADL amicus filings cited in fn. 2, *supra*. ADL has long maintained that when government uses race as a decisive factor in allocating opportunity or benefits, it ignores merit and improperly classifies citizens on the basis of immutable characteristics that are, or should be, irrelevant in a free and democratic society.

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[5] *See id.*

For example, in *DeFunis*, ADL argued that the University of Washington Law School violated the Fourteenth Amendment by instituting a policy "that amounted to the establishment of a quota, no matter what 'cloak of language' was . . . used by the Law School to disguise the fact from itself as well as from others."[6] Similarly, in *Bakke*, ADL took the position that the University of California was not entitled to "utilize race as the determinative factor in the admission and exclusion of candidates for its medical school at Davis."[7] Likewise, in *Grutter*, ADL argued that the University of Michigan's admissions policies

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[6] Brief of Anti-Defamation League of B'nai B'rith as Amicus Curiae at 22, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

[7] Brief Amici Curiae of Anti-Defamation League of B'nai B'rith, *et al.* at 6, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

"den[ied] to non-minority applicants the individualized consideration that is at the core of equal protection."[8]

ADL's longstanding position has been that affirmative action programs are invalid when they impose quotas, or use race as a determinative factor in making admissions decisions, or act in a manner that assigns persons to categories based on their race. ADL continues to believe that the use of race as a proxy for diversity "runs afoul of the Equal Protection Clause."[9]

Nevertheless, ADL also believes that affirmative action programs can be structured in a manner that will not violate equal protection principles, and that, when implemented properly, such programs can serve compelling government interests. As the former Chairman of ADL's National Law Committee explained (in a law review article he wrote in his personal capacity), "[f]ew would argue against the proposition that a diverse student body including qualified minority group members is educationally enriching for those admitted to law school. The issue is not the desirability of a diverse student body but the means by which it is to be achieved." Larry M. Lavinsky, DeFunis v. Odegaard*: The 'Non-Decision' With a Message*, 75 COLUM. L. REV. 520, 524 n.20

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[8] Brief Amicus Curiae of Anti-Defamation League in Support of Neither Party at 18, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[9] *Id.* at 15.

(1975). *See also Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (noting the "dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means").

This is the first case which has come before the Court in which ADL believes that a university has used the proper means to achieve a diverse student body. As discussed in more detail below (*infra* Sec. III.B.), UT takes an applicant's race into account only as part of a holistic review of applicants in which race is never a determinative factor in making an admissions decision. App. at 27a-32a. Moreover, unlike in other cases that have come before this Court, here it is uncontested that UT does not use overt or covert quotas and "does not monitor the aggregate racial composition of the admitted applicant pool during the process." *See id.* at 32a. *Compare id.* and JA 131a (Petitioner's concession as to the lack of quotas) *with Bakke*, 438 U.S. at 289 (where 16 special admissions seats were reserved for minorities, "[w]hether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status") *and Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting) (criticizing admissions officers at Michigan Law School for consulting "daily reports which indicated the composition of the incoming class along racial lines" during the period when admissions decisions were being made). Because the conceded record makes clear that UT has implemented an admissions process that satisfies strict scrutiny, increasing diversity while adhering to core equal protection principles, ADL, for the first time, submits a brief in support of a university's affirmative action plan.

III. UT'S USE OF RACE AS ONE FACTOR IN A HOLISTIC ADMISSIONS PROCESS SATISFIES STRICT SCRUTINY BECAUSE IT IS NARROWLY TAILORED TO ACHIEVE THE COMPELLING GOVERNMENT INTEREST IN DIVERSITY

"It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved*, 551 U.S. at 720. "This standard of review is not dependent on the race of those burdened or benefited by a particular classification." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citations omitted). *See also Grutter*, 539 at 379 (Rehnquist, J., dissenting) ("the same strict scrutiny analysis" applies "regardless of the government's purported reason for using race and regardless of the setting in which race [i]s being used").

As the Court has explained, "requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications . . . detailed examination, both as to ends and as to means." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995). Because "*all* racial classifications . . . must be analyzed by a reviewing court under strict scrutiny," even "so-called 'benign' racial classifications, such as race-conscious university admissions policies," must use narrowly tailored means to further ends that amount to compelling governmental interests. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (citations omitted).

Nevertheless, strict scrutiny is not "'strict in theory, but fatal in fact.'" *Adarand*, 515 U.S. at 237 (citation omitted). "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . . When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Grutter*, 539 U.S. at 326-27.

A. Diversity is a Compelling Government Interest

This Court has properly recognized that diversity in the context of higher education is a compelling state interest. *See Parents Involved*, 551 U.S. at 722 ("The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*. . . . The diversity interest was not focused on race alone but encompassed 'all factors that may contribute to student body diversity.'") (citing *Grutter*, 539 U.S. at 328, 337) (internal citations omitted); *see also Grutter*, 539 U.S. at 392-93, 395 (Kennedy, J., dissenting) (explaining that "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity" and approving the use of admissions policies that "giv[e] appropriate consideration to race" in the "special context" of university admissions, while objecting to the particular policies adopted by Michigan Law School).

As explained above (*supra* Sec. I), ADL agrees that a diverse campus environment enriches the educational experience, increases civic engagement, and better prepares students to succeed in their professional lives. *See also Grutter*, 539 U.S. at 330 (explaining the "educational benefits that flow from student body diversity" and citing studies showing that student body diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals") (citations omitted).

B. The Means Used by UT to Achieve Diversity Are Narrowly Tailored

Narrow tailoring requires that "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986). In the context of higher education, universities must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks" but they need not exhaust "every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339.

When a race-neutral alternative is not viable, universities must ensure that their race-conscious admissions policies "not unduly harm members of any racial group," a standard which can be achieved by implementing a policy that considers "all pertinent elements of diversity" so that the university "can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants." *Id.* at 341. The university must also "consider[] each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." *Gratz*, 539 U.S. at 271.

Here, UT has not only *considered* using race-neutral alternatives to achieve diversity, it has actually *used* just such a system between 1997 and 2004. App. at 120a-124a. Indeed, UT only implemented its current admissions policy after it had conducted a study, and engaged in extensive deliberations, to determine whether its race-neutral admissions policy was achieving UT's diversity goals. App. at 125a-126a. *See also* JA 396a ("After several months of study and deliberation, including retreats, interviews, review of data of diversity in the classroom, and other factors, UT Austin decided to authorize the consideration of race in its undergraduate admissions policy."). The admissions policy at issue here was established because UT reached the reasoned conclusion that its prior race-neutral admissions policy had proven insufficient to achieve those goals. *Id.* 125a-126a. *See also* JA 396a (UT's study demonstrated that "the educational benefits of a diverse student body were not being provided to all the University's undergraduate students" during the period when a race-neutral admissions policy was in effect).[10]

Moreover, the record indicates that the race-conscious admissions policy implemented by UT in 2005 considers "'all pertinent elements of diversity'" and does not "'unduly harm members of any racial group.'" *See Grutter*, 539 U.S. at 341 (citations omitted). As Petitioner concedes, when race is considered at all,[11] UT considers it in such a manner that "may be beneficial to minorities *or non-minorities*." JA 130a (emphasis added). Moreover, it is undisputed that race – again, to the extent it is considered at all – is considered alongside other intangible "special circumstances" such as socioeconomic status, family status, whether languages other than English are spoken at home, and family responsibilities, each of which contributes to creating a diverse student body. App. at 28a. Indeed, those special circumstances are just one part of a student's "personal achievement score," which takes into account an applicant's "leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service," none of which is "considered individually or given separate numerical values to be added together." *Id.* at 28a-29a. And even the personal achievement score is only one of the elements in an applicant's Personal Achievement Index, which also takes into account the applicant's score on two required essays. *Id.* at 26a-27a. As such, race can, at most, "influence only a small part of the applicant's overall admissions score," as part of a holistic review that is quality-controlled to ensure that it is being faithfully applied. *Id.* at 28a-29a.

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[10] UT has committed to re-evaluating the admissions process every five years, specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body or whether race-neutral alternatives exist that would achieve the same results. App. at 167a-168a.

[11] As Petitioner concedes, race is never taken into account in admitting those applicants admitted to UT pursuant to the Top 10 Percent Law. JA 118a-119a, 128a, 139a-141a.

In this case, it is noteworthy that none of those facts is in dispute. Indeed, Petitioner has affirmatively conceded that UT engages in a holistic review of applicants, and there is no evidence that suggests that race overrides any other factors under consideration. As Petitioner conceded in its statement of facts submitted to the district court, "[t]he consideration of race helps UT Austin examine the student in 'their totality,' 'everything that they represent, everything that they've done, everything that they can possibly bring to the table.'" JA 129a. Indeed, Petitioner acknowledges not only that UT's admissions policy mandates a holistic review, but also that it has been implemented in a manner that ensured that "UT Austin has not established a goal, target, or other quantitative objective for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008." JA 131a. *See also id.* (conceding that "UT Austin has not tracked or measured the impact of race as a factor in its admissions decisions").

C. The Court Need Not, and Should Not, Defer to UT Regarding Any Issue Other Than Its Educational Judgment

As the district court properly recognized (and Petitioner concedes, Pet. Br. at 50), deference is due to a university's "educational judgment that . . . diversity is essential to its educational mission" (App. at 148a, 166a (citing *Grutter*, 539 U.S. at 328)); a university's legal judgment regarding whether strict scrutiny has been satisfied, in contrast, deserves no such deference. *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) (distinguishing "deference to a university's definition of its educational objective" from "deference to the implementation of this goal"). Here, however, as the district court explained, "the undisputed record and evidence establishes that UT has given serious, good faith consideration to workable race-neutral alternatives" and the undisputed record likewise establishes that UT considers race "as a factor of a factor of a factor of a factor" in its admissions process. App. at 159a, 166a.[12]

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[12] In light of these undisputed facts, the Court need not reach the issue raised by Petitioner (and certain amici on its behalf) concerning the Fifth Circuit's purported "comprehensive deference to UT under a novel 'good faith' standard." Pet. Br. at 47-52.

ADL agrees that the Court should not "be satisfied by [UT]'s profession of its own good faith" or "take [UT] at its word" that the admissions policy it has implemented is narrowly-tailored. *See Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). In this case, however, the Court need not rely on UT's professions of good faith because Petitioner concedes that UT considered race-neutral alternatives and engaged in a holistic, non-quota-based review of applicants in which race was only one of the many factors considered. Because the undisputed facts satisfy the narrowly-tailored, strict scrutiny standard, summary judgment was properly granted to Respondents.

* * *

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF APPALACHIAN STATE UNIVERSITY AND 35 FELLOW COLLEGES AND UNIVERSITIES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici are a collection of diverse institutions of higher learning—large and small, public and private, sectarian and secular, and some historically black colleges and universities.[1] Amici urge this Court to reaffirm the principles embodied in *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Grutter* holds that student diversity on college and university campuses is a compelling state interest and that consideration of race, as one of many factors in an admissions process that considers applicants in an individualized and holistic way, is a narrowly tailored means to further that compelling interest. The amici who respectfully submit this brief in support of Respondents are: Appalachian State University, Belmont University, Brandeis University, Central State University, Drake University, Drexel University, Gettysburg College, Los Rios Community College District, Loyola University Maryland, Loyola University New Orleans, Miami Dade College, New York University, Northeastern University, Pepperdine University, Rhode Island School of Design, Rockhurst University, Southern Methodist University, St. Louis University, Syracuse University, Temple University, Texas Southern University, University of Central Florida, University of Colorado Boulder, University of Connecticut, University of Detroit Mercy, University of Houston, University of Massachusetts, University of Miami,

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[1] This brief is submitted pursuant to the parties' blanket consent. Pursuant to Rule 37.6, Amici state that no party or their counsel authored, or paid for, this brief in whole or in part.

University of San Diego, University of Scranton, University of Texas at El Paso, University of Wisconsin Oshkosh, University of Wisconsin System, Washington & Jefferson College, Washington State University, and Wayne State University.

As the individual statements of interest in the Appendix show, Amici differ in their educational missions, philosophies and constituencies. Despite these differences, Amici uniformly are committed to the pursuit of excellence in education, and uniformly believe that meaningful diversity among their students—including racial diversity—is essential to their unique educational missions.

Accordingly, Amici share Respondents' view that "overruling *Grutter* and *Bakke* (or effectively gutting them by adopting Petitioner's conception of strict scrutiny) would jeopardize the Nation's paramount interest in educating its future leaders in an environment that best prepares them for the society and workforce they will encounter." Resp. Br. at 3.

At the heart of *Grutter* is this Court's acknowledgement that diversity on campuses—as reflected by a critical mass of minority students—is a compelling state interest that justifies consideration of race in admissions decisions, and that colleges and universities should be afforded some measure of deference in determining what constitutes a "critical mass" of diverse students on their campuses. There is no reason to depart from those principles.

Amici do not suggest that every institution of higher education must consider race in its admissions process or consider it in the exact same way. Indeed, Amici themselves represent a broad range of approaches to admissions—including highly selective application processes and "open door" policies. Amici do suggest, however, that meaningful diversity cannot be achieved unless colleges and universities continue to have the latitude to consider race as one among many factors in an individualized student selection process.

Since its founding, this Nation has respected, protected, and fostered academic freedom. This key First Amendment value, in turn, requires that academic institutions have the leeway to determine, given each one's particular circumstances, what constitutes a critical mass of diverse students, whether that critical mass has been achieved, and the best way (within constitutional limits) to achieve that critical mass. Reaffirming the principles embodied in *Grutter* will continue to serve the good of students on college and university campuses, the academic institutions themselves, and our Nation.

Accordingly, Amici respectfully urge the Court to reaffirm the principle established in *Grutter* that some consideration of race, as one of many factors in the selection of students for admission to a college or university, comports with the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

SUMMARY OF ARGUMENT

This Court's decision in *Grutter* was based on long-standing principles of profound importance. Those principles remain true today. Thus, this Court should reaffirm that:

- diversity among students is vitally important to the educational process, indeed rising to the level of a compelling state interest;

- as part and parcel of the bedrock concept of academic freedom, courts should give due consideration to colleges and universities' experience and judgment regarding the best composition of their own student bodies and how to achieve that composition;

- diversity is not one-size-fits-all and thus institutions of higher learning should have latitude to take diversity into account in admissions in ways that further their particular educational emphases and missions; and

- consideration of race as one factor in a holistic admissions process is a narrowly tailored means to achieve diversity on college and university campuses and thus passes constitutional muster.

ARGUMENT

I. This Court Should Reaffirm *Grutter's* Holding That Diversity In Higher Education, Including Racial Diversity, Serves State Compelling Interests

This Court acknowledged more than thirty years ago that diversity in higher education serves compelling state interests in educating and equipping future leaders. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978). Justice Powell eloquently explained that "[t]he attainment of a diverse student body," including a racially diverse student body, "is a constitutionally permissible goal for an institution of higher education." *Id.* A diverse student body is linked to "[t]he atmosphere of speculation, experiment and creation ... so essential to the quality of higher education." *Id.* at 312 (internal quotation marks omitted). Thus, training and education that take place in a diverse environment prepare students "to render with understanding their vital service to humanity." *Id.* at 314. Justice Powell concluded that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 312-13 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

Twenty-five years later in *Grutter*, this Court reaffirmed the basic holdings of *Bakke*, concluding that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. "[E]ducation [is] pivotal to 'sustaining our political and cultural heritage'" and plays "'a fundamental role in maintaining the fabric of society,'" so the goal of "preparing students for work and citizenship" is one of "overriding importance." *Id.* at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). And an admissions policy that considers race (together with other diversity criteria) furthers students' education because it "promotes cross-racial understanding [and] helps to break down racial stereotypes." *Id.* at 330. These "substantial" benefits are "important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id.*

Concomitantly, "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* This Court noted in *Grutter* that "numerous studies show that student body diversity promotes learning outcomes, ... 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Id.*

In the case now before the Court, there is no credible dispute as to the truths spoken by Justice Powell in *Bakke* and reaffirmed in *Grutter*—that a racially diverse student body serves and enriches the higher education of all students and is essential to the training of leaders for our pluralistic world.

It was true when *Grutter* was decided, and is no less true today, that there is extensive evidence showing that meaningful interaction among students of different backgrounds improves the quality of education for all students. Indeed, *Grutter* has stimulated continued and increased research, so the body of scholarship supporting the importance of diversity has become broader and deeper. *See e.g.* G.R. Pike & G.D. Kuh, *Relationships Among Structural Diversity, Informal Peer Interactions and Perceptions of the Campus Environment*, 29 Review of Higher Educ. 425, 431 (2006) (in light of *Grutter*, schools using race-conscious admissions policies "are expected to empirically demonstrate the benefits of" diversity); M.J. Chang et al., *Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Educ. 430, 430-31 (2005) (because of conflicting viewpoints of *Grutter* majority and dissent, "there continues to be a pressing need to understand empirically how students actually benefit, if at all, from being in more ... diverse environments").

This ongoing research has borne out the rationale behind *Grutter*—namely, that diversity is a compelling state interest because it supports and enhances important educational goals. Studies demonstrate that "the vitality, stimulation, and educational potential of an institution are directly related to the composition of its student body, faculty, and staff." *Id.* at 431. And "campus communities that are more racially diverse tend to create more richly varied educational experiences that help students learn and also prepare them better for participation in a democratic society." *Id.*

Scholarly research considers not simply the composition of the student body, but also more nuanced data, such as the level of cross-racial interactions among students. *Id.* at 449. Studies have shown, for instance, that greater diversity in a student population leads to greater interaction among students of different backgrounds and views. G. Pike et al., *Evaluating the Rationale for Affirmative Action in College Admissions*, J. of Coll. Student Dev. 1, 13 (Mar.-Apr. 2007). And greater interaction, in turn, is "associated with greater gains in understanding people from different races and cultures." *Id.* These benefits are realized without some of the detriments posited by those who question the value of affirmative action, such as negative perceptions of peers or the campus environment resulting from a perception of unfairness in race-conscious admissions policies. *Id.*

Higher levels of cross-racial interactions on a campus have the positive result that one intuitively expects: students' increased "knowledge of and ability to accept different races [and] cultures." *Id.* This is an important goal and serves, in the words of *Grutter*, to "better prepare[ ] students for an increasingly diverse workforce and society." 539 U.S. at 330 (internal quotation marks and citation omitted). Less intuitive but at least equally desirable outcomes include enhanced "growth in general knowledge, critical thinking ability, and problem-solving skills." Pike et al. at 13. Students also showed higher levels of self-confidence in both the social and intellectual spheres. *Id.* In other words, increased diversity supports not only openness to others who are different, but also increased gains in the core intellectual and cognitive skills for which students attend college in the first place.

The positive effects of a diverse student body are felt by students who, themselves, do not have particularly high levels of cross-racial interactions. *Id.* at 18. "In other words, even those students who have very little cross-racial interaction, yet are part of a student body that has high average levels of interaction, tend to report greater individual gains in openness to diversity" than students who attend an institution with lower levels of cross-racial interaction. *Id.* The benefits of an atmosphere of cross-racial interaction, therefore, are not only multi-faceted (acceptance of others' viewpoints and experiences, increased cognitive development, and increased confidence), but also broad-ranging (benefiting even those students who personally have lower levels of cross-racial interaction). "Whatever the specific conditions might be, students who attend campuses with higher [levels of cross-racial interaction] are not only benefiting from simply observing more students interacting across racial differences, but are in all likelihood also benefiting from the overall institutional quality that sustains positive race relations ...." *Id.*

Amici value the educational outcomes that studies have shown are connected to a diverse student body—but Amici do not argue that diversity is a compelling interest because it brings a mythical unitary "minority" voice to the table. To the contrary, each individual—of any race or background—has his or her own unique point of view. Amici merely recognize that race is one of the myriad factors that inevitably shape an individual's perspective. Justice O'Connor made this point eloquently in honoring Justice Thurgood Marshall, observing that he brought "a special perspective" to the Court because he was intimately familiar with the plight of those who experienced racial discrimination. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992). Justice Marshall could not have brought a predetermined "African-American" perspective to the Court because there is no such thing. He brought his own perspective—which was in turn shaped to some degree by his race.

Racial diversity is not meant to, and cannot, bring a particular perspective to a college or university. But it does ensure a student body from a wide array of backgrounds, a condition that is needed to fulfill higher education's promise of "speculation, experiment and creation." *Bakke*, 438 U.S. at 312. The research demonstrating the benefits of cross-racial interaction, both for individual students and for the campus community, supports this proposition. Indeed, "[t]he experience of arriving on a campus ... with classmates from a diverse range of backgrounds is essential to students' training for this new world, nurturing in them an instinct to reach out instead of clinging to the comforts of what seems natural or familiar." Lee C. Bollinger, *Why Diversity Matters*, Chron. of Higher Educ. (June 1, 2007).

Collaboration among nations has increasingly become the norm in numerous fields such as business, science, and medicine. *See e.g.* James Fallows, *Dirty Coal, Clean Future*, The Atlantic Monthly, Dec. 2010 (describing joint Chinese and American efforts to improve energy extraction from coal), available at http://tinyurl.com/c92unx5; Robert Aymar, CERN (European Org. for Nuclear Research), *The Large Hadron Collider: A Paradigm for International Collaboration in Physics?* (Feb. 15, 2008) (describing framework for numerous countries' contributions to groundbreaking experiments in physics), available at http://tinyurl.com/9w53vna. This is why it is crucial for students to have the opportunity to gain direct, personal experience with others unlike themselves. Students cannot gain interpersonal experiences through lectures or books, but they will need these experiences if they are to thrive and lead. *See* Arthur H. Compton, Foreword to Huston Smith, The Purposes of Higher Education xiv (1955). "[T]he wealth of backgrounds, skills and opinions" of a diverse workforce is an important input to the economy, just as surely as are "raw materials, technology and processes." William G. Bowen & Derek Bok, The Shape of the River 12 (1998) (quoting Robert J. Eaton, Chairman and CEO of Chrysler Corporation).

And the compelling interest in diversity is not reducible merely to business metrics or quantitative outcomes. Diversity also helps students to avoid leading the unexamined life by confronting them with new views and ideas, which they can—and must—evaluate, sift, adopt, modify, or discard. This process is integral to higher education, and its presence as an element of a student's college or university experience is invaluable. The process of meeting and evaluating new viewpoints and ideas prepares students for the work of participating in a democracy. The exchange of ideas with others, and its predicate ability to listen to and learn from other viewpoints, is at the heart of a functioning democracy. As this Court has recognized, "[a]n educated populace is essential to the political and economic health of any community." *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

For all of these reasons, this Court held in *Grutter*—and should hold again in this case—that diversity in higher education is a compelling state interest that justifies the consideration of race as part of a holistic admissions process.

II. This Court Should Reaffirm *Grutter's* Holding That Race May Be Considered, As One Of Many Factors In An Individualized Admissions Process, As A Narrowly Tailored Means To Achieve Diversity In Higher Education

As this Court recently explained: "The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance ...." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (citing *Grutter*, 539 U.S. at 330).

There is no reason to depart from *Grutter*. Moving to an inflexible metric such as an upper limit on minority representation, and looking to that metric as the determining factor in whether an admissions system is narrowly tailored, would be in essence a quota system. And that is precisely what this Court rejected in *Bakke* and *Grutter*.

Instead, what the Constitution requires in this context is an admissions system that considers race as part of a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 337. In other words, an admissions process that "ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race," *id.*, is a narrowly tailored means that withstands strict scrutiny.

This concept of narrow tailoring, which extends back to *Bakke* and is carried forward in *Parents Involved*, rejects reductionist viewpoints that would portray diversity as a matter only of race—or racial diversity as a matter only of statistics. *Parents Involved*, 551 U.S. at 723 (point of *Grutter's* narrow tailoring analysis "was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance ....") (citation omitted).

In *Parents Involved*, this Court endorsed *Grutter's* "articulation of diversity," which, in turn, cited to "Justice Powell's opinion in [*Bakke*]." 551 U.S. at 722. Under this articulation, consideration of race cannot justify "an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups ...." *Id.* Instead, *Parents Involved* explains, "what was upheld in *Grutter* was consideration of 'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" *Id.* (quoting *Grutter*, 539 U.S. at 324-25); *see also id.* at 793 (noting with approval that, in *Grutter*, "the Court sustained a system that ... was flexible enough to take into account all pertinent elements of diversity and considered race as only one factor among many") (Kennedy, J., concurring) (internal quotation marks and citations omitted).

In fact, the admissions process at issue in *Grutter*—like the admissions processes in place at many colleges and universities today—sought various types of diversity, including, for example, "admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields." *Parents Involved*, 551 U.S. at 722 (quoting *Grutter*, 539 U.S. at 338) (brackets and internal quotation marks omitted).

In light of this Court's consistently articulated view of diversity, colleges and universities should not be required to reduce their admissions processes to a numbers game in order to create a narrowly tailored system that passes constitutional muster. Indeed, there can be no hard and fast formula for what amounts to a narrowly tailored means to achieve the compelling state interest of student body diversity. In *Bakke*, Justice Powell explained that the admissions process must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." 438 U.S. at 317. This Court agreed in *Grutter*: "[T]ruly individualized consideration demands that race be used in a flexible, nonmechanical way." 539 U.S. at 334; *id.* at 392-93 (Kennedy, J., dissenting) ("individual assessment" must be "safeguarded through the entire process").

Concomitantly, the assessment of whether an admissions process that takes race into account is constitutional must also be flexible and nonmechanical. *Parents Involved*, 551 U.S. at 725 ("'[c]ontext matters' in applying strict scrutiny") (quoting *Grutter*, 539 U.S. at 327). Reducing consideration of diversity to a numbers game would hamper institutions' ability to narrowly tailor their admissions processes so that they are directly aimed at achieving the compelling state interest at stake—meaningful diversity on their campuses and fulfillment of their educational missions. *Grutter*, 539 U.S. at 339 (The Constitution "does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.").

Nor do constitutional harms flow from the type of admissions process *Grutter* endorsed. This is because in an individualized and multifactorial admissions process, every applicant has the opportunity to demonstrate positive qualities regardless of his or her racial background. An applicant who is not a member of a racial minority, for instance, has the same opportunity as an applicant from a minority background to demonstrate intellectual capacity, desire to learn, tenacity to overcome obstacles, commitment to goals, ability to lead, and skill and sensitivity in relating to others. *See Grutter*, 539 U.S. at 338 (describing the wide range of ways to assess diversity included in University of Michigan's Law School admissions process). This is precisely the point of a holistic and individualized review process—to assess each individual on the merits of his or her achievements and promise within the unique context of his or her experiences, which include (for some applicants) experiences tied to membership in a racial minority group. *See Parents Involved*, 551 U.S. at 722 ("The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group.").

III. This Court Should Preserve Academic Freedom By Reaffirming That Due Consideration Of Colleges and Universities' Judgments About Whom To Admit—And The Consideration Of Race As One Of Many Factors In This Decision—Withstands Strict Scrutiny

Petitioner suggests that this Court should overrule *Grutter*. In this regard, she argues that the Fifth Circuit's decision—and by implication *Grutter*—is flawed because it is based on a mode of analysis that does not align with strict scrutiny. There are any number of reasons why Petitioner's invitation should be rejected. One of those reasons is that the outcome she seeks would amount to a retreat from settled law which, in this context, would undermine the core value of academic freedom—a longstanding value of constitutional dimension. Indeed, to adopt Petitioner's position and recede from *Bakke* and *Grutter* would be to impose a rigid test on the process of college and university admissions in contravention of academic freedom.

A central underpinning of this Court's ruling in *Grutter* is the concept of academic freedom—which, although not a specifically enumerated constitutional right, "long has been viewed as a special concern of the First Amendment." *Grutter*, 539 U.S. at 324. The overarching concept of academic freedom embraces "'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and *who may be admitted to study.*" *Id.* at 363 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)) (emphasis added).

"In ... select[ing] those students who will contribute the most to the robust exchange of ideas," a university uses its academic freedom "to achieve a goal that is of paramount importance in the fulfillment of its mission." *Id.* at 324 (internal quotation marks and citations omitted). This academic freedom, "grounded in the First Amendment," includes the "tradition ... of acknowledging a university's conception of its educational mission." *Id.* at 387-88. Thus, courts should give due consideration to "a university's considered judgment that racial diversity among students can further its educational task ...." *Id.* at 387-88; *see also Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring in part) (under the First Amendment, institutions of higher learning enjoy "particular latitude in defining diversity").

In numerous cases since *Sweezy*, including *Grutter* and others, this Court has emphasized the importance of academic freedom. In *Ewing*, this Court expressed its "reluctance to trench on the prerogatives of ... educational institutions" and affirmed its "responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'" *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). Justice Powell stated that courts should defer to "academic decisions made by the appropriate university authorities"—and for this reason, "[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed ...." *Id.* at 230 (Powell, J., concurring).

In *Parents Involved*, decided after *Grutter*, this Court re-emphasized the academic freedom of colleges and universities. This Court explained that "[i]n upholding the admissions plan in *Grutter*," the Court "relied upon considerations unique to institutions of higher education"—namely, "the expansive freedoms of speech and thought associated with the university environment" and universities' resulting "special niche in our constitutional tradition." 551 U.S. at 724 (quoting *Grutter*, 539 U.S. at 329). This Court held, in other words, that "[c]ontext matters" in applying strict scrutiny—and partly because the higher education context of *Grutter* was distinguishable from the secondary school context of *Parents Involved*, *Grutter* did not govern. *Id.* at 725; *see also Johnson v. California*, 543 U.S. 499, 515 (2005) (strict scrutiny "is designed to take relevant differences into account.").

Academic freedom is not an abstract concept. Students, faculty, and our society at large enjoy on a daily basis the real-world benefits of the special constitutional niche occupied by American institutions of higher learning. No central government agency orchestrates American higher education, directs what will be taught, or decides who may learn or teach. As a result, the American post-secondary system is a rich and varied landscape. Amici themselves demonstrate as much, comprising a diverse group of public and private, small and large, secular and sectarian institutions, and historically black colleges and universities. *See* Appendix. If this Court steps in and decides what kind of diversity is needed and how much, that will not only substitute the courts' judgment for that of the institutions themselves, it will also substitute a singular construct for the current variety of approaches to diversity taken by institutions that differ widely from one another.

Such an outcome is highly undesirable because diversity is not a one-size-fits-all concept. Each college and university must define for itself what student body diversity means. Experience and expertise underlie the judgments made by these academic institutions. This also is a hallmark of the long-revered concept of academic freedom. *See Sweezy*, 354 U.S. at 263. Thus, the deference afforded in *Grutter* is rooted in long-standing First Amendment principles and should be upheld.

American colleges and universities, like our Nation as a whole, continue to struggle with the legacy of racism and bigotry. These institutions must be able to exercise their academic freedom in order to contribute to the understanding and eradication of that legacy. Just as there is no single path to excellence in education itself, the pursuit of diversity should be left to colleges and universities that "perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). To abridge colleges and universities' freedom to approach diversity differently, and set unique and varied goals with regard to diversity, would undermine revered First Amendment principles of academic freedom. And beyond the diminishment of the valued concept of academic freedom, the Court would take away one of the most powerful tools at the disposal of colleges and universities in their fight against bigotry and prejudice: their ability to shape their student bodies according to their many and varied visions of diversity.

CONCLUSION

Amici urge this Court to reaffirm that student diversity on college and university campuses is a compelling state interest and that consideration of race as one of many factors in an admissions process that evaluates applicants in an individualized and holistic way is a narrowly tailored means to further that compelling interest. *Grutter's* holding comports with what strict scrutiny requires and also is faithful to the bedrock value of academic freedom.

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APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICUS CURIAE*

APPALACHIAN STATE UNIVERSITY

Established in 1899 as Watauga Academy, and state-supported since 1903, Appalachian State University is located in a unique, rural mountain environment. For much of its early history, the university was isolated in the Blue Ridge Mountains of northwestern North Carolina. More recently, Appalachian has educated students from all 100 counties in North Carolina and numerous other states and foreign countries. Appalachian has alumni in all 50 states and across the globe.

As a constituent institution of The University of North Carolina, Appalachian's fundamental mission is to discover, create, transmit, and apply knowledge to address the needs of individuals and society. Graduates should possess the knowledge, skills, and attitude that enable them to understand world cultures and events; analyze global systems; appreciate cultural differences; and apply this knowledge and appreciation to their lives as citizens and productive workers. Of all transforming and galvanizing forces, education has the greatest power to enlighten, empower, edify and equalize the members of a society. Human beings reveal and make themselves known to one another by infinite varieties of intelligence, language, race, values, politics, religion, national service, gender identity and expression, philosophies, life experiences, economic and educational backgrounds (including first-generation students), geographical location (including, e.g., Appalachia) and a host of other characteristics. Composition of a student body that reflects differences in such characteristics is a critical element in Appalachian's approach to liberal arts education and extracurricular activities that inform students about their own cultures, values, thoughts and actions, and those of others. At Appalachian, diversity is recognized as an essential binding agent of its interdisciplinary approach to education, as well as to the greater life experience.

Appalachian considers selection of students who are diverse, and its ability to consider race as one factor among many in the admissions process, as integral to its exercise of academic freedom under the United States Constitution.

BELMONT UNIVERSITY

Belmont University, located in Nashville, Tennessee, is a comprehensive university bringing together the best of liberal arts and professional education in a Christian community of learning and service. Enrolling over 6700 students, Belmont offers 75 undergraduate and graduate academic programs in seven colleges and schools. The university's mission is to be a student-centered Christian community providing an academically challenging education that empowers men and women of diverse backgrounds to engage and transform the world with disciplined intelligence, compassion, courage and faith. As an ecumenical Christian institution in the South, Belmont feels a special responsibility to carry out this mission by pursuing programs of recruitment and enrollment that insure the student body is as ethnically and racially diverse as possible. The University believes it cannot effectively fulfill its commitment to be a Christian community of learning and service without affirmative efforts to reflect the diversity of humanity on its campus.

BRANDEIS UNIVERSITY

Brandeis University was founded in 1948 by the American Jewish community as a private, coeducational and nonsectarian institution of higher learning and research. While Brandeis maintains a strong relationship with the Jewish community, it is not affiliated with any religious organization. From the first, the University has welcomed students and faculty of all backgrounds and beliefs in fulfillment of a mission that emphasizes academic excellence, the creation and transmission of new knowledge, open and vigorous intellectual inquiry, a commitment to social justice and diversity broadly defined. Brandeis strives to reflect the heterogeneity of the United States and of the world community in which its graduates will spend the remainder of their lives.

Named for one of America's most distinguished jurists, Brandeis University is passionate about the importance of a broad and critical liberal arts education in enriching the lives of students and preparing them for the fullest possible participation in a changing society. In identifying students for admission, the University seeks to build a select community of men and women who, in its judgment, can best contribute to and benefit from the educational environment and opportunities Brandeis offers. Factors considered in a flexible, holistic admissions process include quantifiable measures, such as grades and scores, but the University also carefully evaluates the breadth, rigor and success of an applicant's high school program and his or her extra-curricular and co-curricular interests and activities; special talents; evidence of leadership; geography, including country of origin in the case of international students; and other personal characteristics.

At Brandeis, diversity in the student body reflects the University's deep commitment to a campus community in which vigorous intellectual debate and the free exchange of ideas are paramount values. Brandeis believes that each student's unique variety of life experiences provides a valuable lens through which he or she views the world and shares it with others. Applicants are admitted to Brandeis based on the consideration of many factors and personal characteristics that directly contribute to academic excellence. To limit the admission procedures of America's public and private institutions of higher education to fixed numerical quotas or rigid guidelines would severely lessen our ability to identify the best students and to provide the rich educational environment that allows us to compete globally and attracts students from all over the world.

CENTRAL STATE UNIVERSITY

As Ohio's only public Historically Black University, Central State University, founded in 1887, academically prepares students with diverse backgrounds and educational needs for leadership and service in an increasingly complex and rapidly changing world. As an open access institution, the

University fosters academic excellence through a strong liberal arts foundation and majors in selected professional fields.

Central State University is dedicated to providing a nurturing and culturally enriched learning environment, stimulating in students an intellectual curiosity and a continuous search for knowledge, and teaching students to think critically and communicate effectively. Central State seeks to instill in students an aspiration for excellence through teaching, service, and scholarly research. Central State's core commitment to diversity is shown by the fact that it offers programs with multicultural and global perspectives, reaches out to underserved populations, and collaborates with other educational institutions, business organizations and governmental agencies to enrich learning experiences and educational opportunities for students.

DRAKE UNIVERSITY

When Drake University was established in 1881, the founders dreamed of an institution that was broad-based and liberally nonsectarian. The University's articles of incorporation provided that "all departments shall be open to all without distinction of sex, religion, or race." Today, Drake is a private, fully accredited, coeducational university on a 120-acre campus in the heart of Iowa's capital city. The Drake experience is distinguished by collaborative learning and the integration of the liberal arts with professional preparation. Students choose from more than 70 undergraduate programs of study and 20 graduate-level degrees offered by Drake's six colleges and schools. This exceptional learning environment prepares students for meaningful personal lives, professional accomplishments, and responsible global citizenship.

One of the key goals within Drake's vision is to ensure that our students, faculty, and staff are able to function effectively as members of diverse local, national, and global communities. Diversity is essential to the learning environment: a diverse campus population brings with it a mixture of ideas and perspectives, of new knowledge sets and new ways of looking at the world. Diversity feeds into the most fundamental purpose of a university—the discovery, exchange, and application of new ideas. When our students graduate and embark on careers throughout the country and world, their success will be dependent on their ability to work with all kinds of people, and to understand that difference is an opportunity—not a barrier. The ability to function effectively in a global arena is also essential to our national security, economic competitiveness, and ability to participate in collaborative solutions to the world's challenges.

Higher education is also our most powerful engine of socio-economic mobility. Allowing colleges and universities the freedom of inclusion enables these institutions to be on the front lines of helping break the cycle of poverty. Drake joins this brief because commitment to diversity is at the very heart of our mission as a university.

DREXEL UNIVERSITY

Drexel University was founded upon the principle of diversity as an educational goal, and it remains committed to that principle today. In 1892, noted financier, philanthropist, and advisor to U.S. Presidents, Anthony J. Drexel, created the Drexel Institute of Art, Science and Industry to provide higher education to men and women of the working class—people who were not welcome in the colleges and universities of that day. A.J. Drexel envisioned a learning environment in which young men and women, on an equal basis, would learn skills and acquire knowledge in subjects that would prepare them for rewarding careers. Woman's Medical College of Pennsylvania, now Drexel University College of Medicine, was created in 1848 by prominent leaders of the medical profession to allow women to learn the healing arts at a time when it was unacceptable for women to have lives outside the home. The graduates of "Woman's Med" have practiced medicine in poor and underserved communities for more than 150 years; those women doctors were pioneers in bringing preventive medicine, and medical research, to the benefit of others around the globe.

Today, Drexel University educates its students through experiential learning, combining service with technology, and helps prepare them for leadership roles not only in their chosen professions, but also in their communities. It is very much a part of our educational mission to expose our students to differences in race, gender and class, to help them learn to appreciate what difference offers, and to teach them to recognize and overcome bias, prejudice and discrimination, so that they may understand that our diversity creates our richness and strength as a nation and as a people. Drexel's cooperative education program encourages students to learn how to work together by placing them in real business settings—communities that are increasingly diverse. Drexel's undergraduate curriculum requires that each student participate in a civic engagement course that combines classroom study with community service in venues throughout the city of Philadelphia. Increasing cultural awareness in the urban environment as well as opportunities in co-op and study abroad to acquire global experience allow our students to learn from, appreciate, and respect people of different races and cultures.

We recognize that the best, most durable education comes from student-to-student interactions. These critically important lessons demand that our students reflect the diversity of the communities in which they live and work. Creating a more diverse student body is part of Drexel's strategic plan and an increasing number of students from across the nation and around the world are attending the University. By increasing the diversity of our student body, we have not compromised academic quality—indeed, average SAT scores have climbed steadily over the past several years as we have focused on encouraging minority students to attend and succeed. We have embraced diversity because we know that there is no other way to ensure that our students are properly prepared for a diverse world. We continue to honor our Founders' visions and create a purposefully diverse student community as an essential part of our educational mission.

GETTYSBURG COLLEGE

Gettysburg College is a highly selective, national college of liberal arts and sciences with 2,700 students, located in the historic town of Gettysburg, Pennsylvania. We augment academic excellence with community responsibility and global experiences, provide leadership opportunities, and engage with public-policy issues. Gettysburg College is a place of variety and diversity—a community where every student has the chance to stand out, take responsibility, and lead.

Gettysburg's commitment to diversity is deeply rooted in the history of the College, which was founded in 1832 by anti-slavery theologian Samuel S. Schmucker. Thaddeus Stevens, a well-known abolitionist, College Trustee, and the primary author of the 14th Amendment, provided the College's original six acres. During the Civil War, elements of two great armies swept through Campus on July 1, 1863, the first day of the Battle of Gettysburg. Pennsylvania Hall, now the College's administration building, became a hospital for hundreds of soldiers from both North and South. On November 19, 1863, students and faculty marched to hear Abraham Lincoln deliver his immortal Gettysburg Address.

Gettysburg College's commitment to diversity continues. It seeks students who are not only academically prepared for the College's rigorous programming, but who also provide diverse ideas, interests and backgrounds. We believe that the opportunity to engage on a daily basis with community members with diverse backgrounds and perspectives enriches the learning environment for all students. Thus, while the College's admissions process seriously reviews a student's academic background, other considerations in the admissions process include diversity in race, gender, geography, socio-economic background, disabilities, extra-curricular and academic interests, etc. While none of these categories is determinative, all of these factors, including race, work together in an individualized review of each application.

Without the ability to consider race as one of many factors that qualify our students for admission, Gettysburg College's commitment to diversity, like that of many other institutions, cannot realistically be realized.

LOS RIOS COMMUNITY COLLEGE DISTRICT

The Los Rios Community College District is a two year public institution with four separately accredited Colleges: American River College, Cosumnes River College; Folsom Lake College and Sacramento City College. Our colleges offer transfer education—students complete freshman and sophomore years and transfer to a four-year college or university—and AA/AS degrees and certificates in over 70 career fields. The first college in the District, Sacramento City College, was founded in 1916 and our most recently accredited college, Folsom Lake College, received its accreditation in 2004. The District currently serves more than 82,000 students which translates into a projected enrollment of 53,564 Full Time Equivalent Students for the 2011-2012 academic year.

The District has an "Open Door" admissions policy because it is the policy and primary purpose of the District to provide educational opportunity experiences to the residents of the community it serves. The District's students mirror the diverse population of the Sacramento Region: 42% White; 12% African-American; 17% Asian/Pacific Islander; 22% Hispanic/Latino; 6% Multi-Race and 1% Native American. The District recognizes and values the strengths of our diverse backgrounds and perspectives, and seeks to build a community in which all constituencies are highly qualified. Further, because diverse perspectives support the District's commitment to equality, equity and justice, the District believes our communities are best served by ensuring that all populations are represented equitably throughout the Los Rios community colleges.

LOYOLA UNIVERSITY MARYLAND

Founded in 1852, Loyola University Maryland is a Jesuit, Catholic university committed to the educational and spiritual traditions of the Society of Jesus and the development of the whole person. Accordingly, the University inspires students to learn, lead, and serve in a diverse and changing world. Loyola aims to lead students, faculty, staff, alumni, and friends forward to pursue an examined life of intellectual, social, and spiritual discernment. In pursuing these goals, Loyola asserts a bold vision: that Loyola University Maryland will be the nation's leading Catholic, comprehensive university. The standards by which we measure that achievement include the enrollment of outstanding students; the creation of a diverse and supportive community; the cultivation of a rigorous intellectual climate; the scholarly achievements of the faculty; the recognition of academic peers; the intellectual and professional attainments and generosity of spirit of the alumni.

The values most typically associated with Jesuit education are its commitment to academic excellence and its focus on educating the whole person. Seeking to increase its own diverse nature, Loyola encourages openness to new discoveries, ideas, methods, and perspectives, and it actively encourages and celebrates diversity in all forms. Loyola also seeks to encourage all of its constituents to respect, value, and welcome "the inherent value and dignity of each person" as a gifted contributor to the community as a whole. The University is committed to challenging and repudiating prejudice in all its forms, and to encouraging global and international awareness, both within and outside its curricula. In considering students for admission to the University, Loyola practices an holistic evaluation process, one which considers the full breadth of materials submitted and the multifaceted characteristics and qualities of each applicant. At Loyola, enhancing the geographic, ethnic, and socio-economic diversity of the students who apply and enroll remains a key priority, one which is inherent in our Jesuit heritage.

LOYOLA UNIVERSITY NEW ORLEANS

Loyola University New Orleans, a Jesuit and Catholic institution of higher education, welcomes students of diverse backgrounds and prepares them to lead meaningful lives with and for others; to pursue truth, wisdom, and virtue; and to work for a more just world. Inspired by Ignatius of Loyola's vision of finding God in all things, the university is grounded in the liberal arts and sciences, while also offering opportunities for professional studies in undergraduate and selected graduate programs. Through teaching, research, creative activities, and service, the faculty, in cooperation with the staff, strives to educate the whole student and to benefit the larger community.

MIAMI DADE COLLEGE

Miami Dade College is the largest institution of higher education in the United States, serving over 174,000 students. The College graduates more minorities than any other college or university in the nation, offering a model of community-responsive education.

Since opening its doors in the fall of 1960, MDC has served more than 1.5 million residents of the greater Miami area. Its students hail from around the world, and its alumni have become local, national and international leaders. The College's faculty and staff are guided by a central belief in the potential of each person. "Opportunity Changes Everything" is no mere slogan; limitations are transcended and lives change when new learning is made available. We believe that education is the true equalizer in a society, and the success achieved by our graduates is a testament to this.

MDC provides a full range of academic programs, offering associate degrees and bachelor's degrees in more than 200 program areas, as well as offering short-term workforce certifications. The College's future is intertwined with the future of South Florida and with the lives of the people who make this one of America's most diverse and exciting locales.

MDC believes that colleges have a profound interest in the benefits of assembling a diverse student body and we support the application of admissions criteria that support this goal. The benefits of participating in a diverse learning environment extend to the individual, his or her classmates, and the community, and they impact the educational, economic and civic life of the country. Exposure to the rich academic environment created by interaction with extensive diverse people, cultures, ideas and viewpoints promotes intermingling of different perspectives and experiences, which elevates academic and social exchange both inside and outside of the classroom; sharpens critical thinking and analytical skills; and encourages development of abilities required for success in our increasingly global marketplace.

Postsecondary institutions must provide an open door for all segments of America's communities including all races and ethnicities. At the core of a college's mission should be the achievement of a diverse student body.

NEW YORK UNIVERSITY

Founded in 1831, NYU is one of the world's foremost research universities and is a member of the selective Association of American Universities. The first Global Network University, it has degree-granting university campuses in New York and Abu Dhabi, and has announced a third in Shanghai; has a dozen other global academic sites; and sends more students to study abroad than any other U.S. college or university. Through its numerous schools and colleges, NYU conducts research and provides education in the arts and sciences, law, medicine, business, dentistry, education, nursing, the cinematic and performing arts, music and studio arts, public administration, social work, and continuing and professional studies, among other areas.

NORTHEASTERN UNIVERSITY

Founded in 1898, Northeastern is a private global research university located in the heart of Boston, Massachusetts. We are driven by the fundamental belief that learning is about engaging with the world to solve problems and lead change. This tradition of partnership and engagement creates an innovative, distinctive approach to education and research. Our mission is to educate students for a life of fulfillment and accomplishment, and to create and translate knowledge to meet global and societal needs.

Northeastern is the recognized leader in experiential learning, anchored in the world's farthest-reaching cooperative education program. We offer students opportunities for professional work, research, service, and global learning in the U.S. and 89 other countries. The university's use-inspired research enterprise focuses on solving global challenges, with particular emphasis on three imperatives: health, security, and sustainability. Northeastern offers a comprehensive range of undergraduate and graduate programs leading to degrees through the doctorate in eight colleges and the School of Law.

Our vision is to be a university that expands the meaning and impact of our engagement in the world, using our knowledge and resources as positive forces for change in both our local communities and our global society. We assist our students in becoming engaged citizens of the world who realize that their knowledge and actions can have positive consequences for their own lives and those of others.

This vision will be realized through interdisciplinary scholarship and translational research by which we will dynamically participate in addressing problems in our urban environment, in our region, and across the globe. Northeastern translates fundamental research into applications that will contribute to economic development and enhance societal well being. Our collaborative approach encompasses partners in government and industry, and artists, innovators, and scholars both inside and outside our community.

Diversity is one of our core values and we celebrate diversity in all its forms and foster a culture of respect that affirms inter-group relations and builds community. Indeed, we strive to create a vibrant and diverse community, characterized by collaboration, creativity, an unwavering commitment to excellence, and an equally unwavering commitment to exhibiting respect for one another. We aspire to be a model for what our society can be.

PEPPERDINE UNIVERSITY

Pepperdine University is an independent private university committed to the highest standards of academic excellence and Christian values, where students are strengthened for lives of purpose, service, and leadership. Pepperdine was established as Pepperdine College in 1937 by Mr. George Pepperdine and achieved university status in 1970 with the addition of its graduate and professional schools. Mr. Pepperdine envisioned a college with the highest academic standards guided by the spiritual and ethical ideals of Christian faith. Pepperdine is affiliated with the Churches of Christ, of which Mr. Pepperdine was a lifelong member. The University enrolls approximately 7,500 students in its five colleges and schools. The University's home campus is in Malibu, California and also offers educational programs in its facilities in Heidelberg, Germany, London, England, Florence, Italy, Buenos Aires, Argentina, Lausanne, Switzerland, Shanghai, China, and Washington, D.C.

As a Christian university committed to the highest standards of academic excellence, diversity is a profound interest for Pepperdine for two distinct, yet inextricably related reasons—because its religious beliefs call it to embrace and actively promote diversity and because of the educational benefits derived from providing an educational experience in the context of a diverse student body.

From a faith perspective, the loving welcome of those unlike us is not a mere nicety; it is a core, essential teaching of biblical Christianity. Indeed, from its beginnings the early church defined itself as a universal community, in which all people from all walks of life, all races, ethnicities, and backgrounds were welcome. Pepperdine draws on this ancient biblical tradition to build and retain a community that is welcoming to diverse people, which cultivates one-on-one interaction between those who may be considered somehow different from the majority.

Intertwined with its faith basis, Pepperdine believes that critical educational benefits flow from a diverse student body. A diverse student body provides a multiplicity of experiences, viewpoints, and perspectives from which all can learn. A diverse student body promotes more spirited, lively, enlightening, and interesting classroom discussion. It nurtures understanding among individuals that are seemingly "different." It prevents "minorities" from feeling isolated or being the sole spokesperson for their group. It provides an energized experience that challenges and stretches students while breaking down stereotypes, which can only come from one-on-one interaction with those that are different from you. Again, particularly for Pepperdine as a Christian university, this one-on-one interaction not only provides an educational benefit, but also follows the ancient church model of ministry to those that have been marginalized in some manner by society.

RHODE ISLAND SCHOOL OF DESIGN

Founded in 1877, Rhode Island School of Design is one of the oldest and best-known colleges of art and design in the U.S. Each year approximately 2,400 students from around the world pursue a creative, studio-based education at RISD, which offers rigorous bachelor's and master's degree programs in 19 architecture, design, fine arts and art education majors.

Philosophically, one of RISD's most fundamental tenets is that artists and designers must think globally and help to shape the world in which we live. The arts are the only truly universal language, and it often has been artists who, through that language, have built the first bridges of understanding between different nations, different cultures, different beliefs. RISD therefore seeks to teach its students not only the technical skills, but also the perspectives, that will enable them to fulfill that important responsibility, by combining both critical thinking and critical making. To accomplish that goal, RISD must have flexibility to bring together a broadly diverse group of students whose backgrounds, interests, and experiences can inform, inspire, and even provoke each other's work. In RISD's view, a deep understanding of culture—both one's own and that of others—is the basis for the creation of culture.

Simply put, higher education is not a "reward" or "entitlement" for those students who performed the "best" in their prior academic work, and colleges and universities should not be viewed as merely passive recipients of those students, with no further interest in who they are once they arrive or after they graduate. The strength of the American system of higher education is that each institution has the freedom—and the responsibility—to adopt and actively pursue its own unique mission, to seek to change the world in some way by seeking to educate and change a few of its inhabitants. An institution cannot effectively create its desired "outputs," however, if it cannot control its "inputs." RISD joins in this brief because an admissions program of the kind advocated by the Petitioner in this case, relying largely on traditional academic measures and limiting its discretion to shape its classes, would seriously compromise RISD's, and every institution's, ability to pursue its core mission.

ROCKHURST UNIVERSITY

Rockhurst University, founded in 1910, is a Catholic, Jesuit university serving 3,000 students in the business and cultural heart of Kansas City, Missouri. As one of 28 Jesuit universities and colleges in the United States, Rockhurst is part of the largest network of independent higher education institutions in the nation. Academic excellence, a value-oriented education, interdisciplinary studies, a global perspective and justice remain hallmarks of Jesuit education today.

Rockhurst promotes an understanding of the benefits and complexities of inclusivity for its students, faculty, staff, and the community. This effort is an important part of educating "men and women for and with others." Rockhurst's Jesuit mission emphasizes social justice and equality for all people, including the goal of freedom from exclusion or marginalization. All members of the Rockhurst community are called to embrace a set of values that promote the personal care for every community member and a sensitivity toward the dignity, sacredness, and uniqueness of every person.

SOUTHERN METHODIST UNIVERSITY

Southern Methodist University in Dallas was founded in 1911 and opened in 1915, the result of a partnership between the Methodist Church and city leaders. The former sought to establish a new institution west of the Mississippi to continue its mission in higher education; the latter foresaw that Dallas would need a distinguished, comprehensive university to become a great American city.

SMU is known for developing leaders through campus and community activities, preparing students as active citizens as well as successful professionals. Students have taken the lead on innovative programs such as a service and research component of the new Human Rights major and the Maguire Center for the Study of Ethics and Public Responsibility; helping to transform low-income and refugee housing through the Hunt Institute for Engineering and Humanity; and developing research projects with a direct impact on the community through SMU's Big iDeas program. Other students pursue research projects abroad with University support. Students have access to 150 study abroad programs in 50 countries.

SMU offers 103 bachelor's degrees, 104 master's degrees, two graduate professional degrees, and 27 doctorates. They are offered through Dedman College of Humanities and Sciences, Meadows School of the Arts, Cox School of Business, Bobby B. Lyle School of Engineering, Dedman School of Law, Perkins School of Theology and Annette Caldwell Simmons School of Education and Human Development. SMU is nonsectarian in its teaching and committed to freedom of inquiry.

SMU enrolls nearly 11,000 students, approximately 6,200 undergraduates and 4,800 graduate students from all 50 states and the District of Columbia. More than 1,100 students come from approximately 90 foreign countries. Students represent diverse economic, ethnic and religious backgrounds, with a minority enrollment of 25 percent.

ST. LOUIS UNIVERSITY

Saint Louis University is a Jesuit, Catholic university ranked among the top research institutions in the nation. The University's mission is the pursuit of truth for the greater glory of God and for the service of humanity. Founded in 1818, it is the oldest university west of the Mississippi River and the second oldest Jesuit university in the United States. The University fosters the intellectual and character development of more than 14,000 students on campuses in St. Louis and Madrid, Spain. In 1944, Saint Louis University was the first university in Missouri, and the first institution of higher learning in one of the 15 former slave states, to admit African-American students. Among the University's many points of pride is its ranking as one of the country's top universities in the awarding of doctoral degrees to African-American students.

As a Jesuit, Catholic university, Saint Louis University is committed to social justice and has a special commitment to ensuring that it provides educational opportunities for students of all backgrounds and experiences. The University works diligently to recruit and retain a diverse student body, which includes diversity in race and ethnicity. The University believes that the achievement of such a diverse student body in institutions of higher learning and the ability of higher education institutions to establish focused programs and policies that attract, admit and retain that diverse student body serves a special interest in fostering an inclusive living and learning environment for its students. This, in turn, serves the ultimate goal of educating men and women of all races and ethnic backgrounds who can make a difference in their communities and their world.

SYRACUSE UNIVERSITY

Syracuse University is a private university that was first incorporated in 1870 by a special act of the New York State Legislature. It is a non-sectarian, equal-opportunity, affirmative action university that prohibits discrimination and harassment.

TEMPLE UNIVERSITY

Founded in 1884, Temple University is a comprehensive urban research and academic institution with more than 39,000 students. Today, Temple University is a state-related university in Pennsylvania's Commonwealth System of Higher Education whose mission is to provide excellent educational opportunities primarily to middle and working class students, without regard to their status or station in life. Diversity is central to Temple's mission and historically one of its greatest strengths. Temple's richly diverse student body enhances the educational and extra-curricular community.

Temple University's Policy 04.81.02 (adopted in 1977) affirms the University's commitment to diversity by providing "students of any race, color, national and ethnic origin ... all the rights, privileges, programs and activities ... made available to students at the University." The number of self-identified minority students at Temple has increased substantially in the last 25 years. The expansion of Temple's student body diversity has been achieved while simultaneously raising academic standards and dramatically increasing graduation rates among students of color.

Temple University is proud of its diverse student population and University community. Temple joins this brief because of its strong interest in fostering and maintaining student diversity, which in turn provides the best possible educational environment. Fostering diversity requires consideration of all facets of Temple's applicants including race, gender, socio-economic status, and life experience as some of the many factors in the admissions process.

TEXAS SOUTHERN UNIVERSITY

Texas Southern University, which traces its beginnings to 1927, is one of the nation's largest Historically Black Colleges and Universities (HBCU). The mission of the University is to provide academic and research programs that address critical urban issues and prepare an ethnically diverse student population to become a force for positive change in a global society. The public University is located in Houston, Texas, the fourth largest city in the United States, and one of the fastest-growing and most forward-moving cities in the world. More than 9,500 students, along with 1,500 faculty and staff, comprise the University community. Like its curricula, the student body is characterized by diversity. While many of the undergraduate and graduate students enrolled are native Texans, almost every state in the country is represented among the student and faculty population. The University's international student population hails from such places as Africa, Canada, the Canal Zone, the Caribbean, Central America, China, Europe, Mexico, South Asia, and the West Indies. The University has served as a cornerstone for developing the greatest potential in leaders from various socio-economic, cultural, and racial backgrounds.

Of the nine University schools and colleges, many have programs unique to the area and several have received national recognition for their outstanding performance. The Thurgood Marshall School of Law, originally established by the Texas Legislature in 1947 as a Negro law school, was named the most diverse law school in the nation three consecutive years by *U.S. News & World Report*. A majority of the African-American lawyers in Houston are TSU graduates. The College of Pharmacy and Health Sciences has historically produced over 27 percent of all African-American pharmacists in the nation.

The University believes that *Grutter* is a sound decision that allows institutions of higher education the freedom to institute programs and policies that attract and admit a diverse student body at the undergraduate and graduate levels. The University feels strongly that a diverse student body enriches the learning environment for all students.

UNIVERSITY OF CENTRAL FLORIDA

The University of Central Florida is one of the most dynamic public universities in the country. UCF began offering classes in 1968 and has grown to almost 59,000 students, making it the second largest university in the country. While large, the university continues its focus on excellence, with the incoming freshman class having an average SAT score of 1250 (three score combination 1840) and a high school grade-point average of 3.87. Upon becoming university president more than 20 years ago, John Hitt established five over-arching goals for the university. One of those goals was to become more inclusive and diverse.

Currently forty percent of UCF's student body is non-white and students come from all 50 states and 141 countries. *Hispanic Outlook in Higher Education Magazine* ranked UCF eighth in the country in providing bachelor's degrees for Hispanic students, awarding 1,604 degrees in the 2010-2011 academic year. Demographic trends in the United States—suggesting that the minority populations of the country will be a combined majority by 2025—make it essential that diversity remain an imperative in UCF admissions, recruitment, and marketing endeavors and processes. UCF's recruitment and admissions support the critical goal of creating and maintaining an atmosphere of inclusiveness, mutual respect and support, and acknowledgement, because each new class of students contributes to the ongoing campus dialogue by adding to the pool of diverse experiences and backgrounds. UCF believes that this campus atmosphere is diminished by restrictions on admissions criteria and assessment of the type proposed by Petitioner. The goal is to develop and maintain our atmosphere of diversity, inclusion, and mutual respect and support—and that goal is best supported by a holistic review of our candidates for admissions, including race, ethnicity, socio-economic background, and many other factors (such as rigor of high school courses, choice of most rigorous courses available at high school, upward trend of GPA while increasing rigor of courses, leadership roles in extracurricular activities, leadership roles in community involvement, prominent roles in high school activities, and clarity of goals as expressed in personal statement).

UNIVERSITY OF CONNECTICUT

The University of Connecticut was founded in 1881. As a public institution of higher education, we have an obligation to educate a student population that reflects the breadth of backgrounds in our society. Representation among our community should reflect the rich diversity of ethnicity, race, gender, culture, religion, sexual orientation, and ability of not just the State of Connecticut, but our country and beyond. We acknowledge the value of diversity in background and creed in its contribution to a creative and challenging educational environment. Our setting must be one that can consider, in a critical manner, intellectual contributions from the broadest range of perspectives possible. The presence of diversity is essential to the intellectual enterprise of the University.

Further, we are aware of the disparities in educational attainment between cohorts of different racial and ethnic backgrounds. Beyond the noble cause of improving the human condition and offering all individuals the opportunity to pursue their gifts of the mind, we have an obligation to avert a possible economic crisis driven by disparities in educational attainment.

While the University of Connecticut has no formal policy with respect to race or ethnicity in admissions, the University employs recruiting strategies and undertakes a holistic review of each applicant in order to admit classes that meet the University's goals, one of which is ensuring a diverse student body, in recognition of the increasingly diverse society we live in. We join this brief as it intersects with our mission to provide a world-class education, ultimately preparing our students to serve as citizens of a diverse world. It is a mission to which we are dedicated and secure in knowing that it ultimately serves the greater good of our state, our country and beyond.

UNIVERSITY OF DETROIT MERCY

The University of Detroit Mercy is the largest and most comprehensive Catholic university in Michigan. UDM was formed in 1990 by the consolidation of the University of Detroit, founded in 1877 by the Society of Jesus, with Mercy College of Detroit, founded in 1941 by the Religious Sisters of Mercy. UDM's mission is to provide excellent, student-centered education in an urban context. A UDM education seeks to integrate the intellectual, spiritual, ethical and social development of students. Our goal is to help students realize their dreams and ambitions. To achieve that goal, UDM offers challenging academic programs taught by talented, committed professors and supplemented by hands-on research, co-op and internship opportunities.

Composed of approximately 5,500 students, our student body is a dynamic mix of people with all ranges of talents and interests. Most of our students come from throughout Michigan, but 33 states and 24 countries are also represented. About 23 percent are students of color, making UDM one of the most diverse of the 28 Jesuit colleges and universities. The heterogeneous quality of UDM's student body reflects that of the real world and employers comment that UDM students are well prepared to succeed in the diverse workforce of the 21st century. That's why for the 11th consecutive year, U.S. News & World Report has ranked UDM in the top tier of Midwest regional universities.

In the Jesuit and Mercy traditions, UDM is committed to providing opportunities for all students. In 1967, the University initiated a special program to meet the needs of high-ability, low-achieving students in accessing a college degree. This initiative continues today as our admissions staff reviews not only student applicants' test scores and GPA but also their potential, thereby admitting students who can meet the challenges of a college education with additional support services and developmental counseling. At an urban university, these students are predominantly students of color. It is important that UDM and other universities continue to use a variety of factors in the admissions process to achieve a diverse student population—students who will graduate to lead and serve in their communities and professions.

UNIVERSITY OF HOUSTON

The University of Houston was founded in 1927 with a specific commitment to effectively educate the community's working men and women and their sons and daughters. That commitment to access, excellence and affordability has remained and today the University of Houston enjoys one of the most diverse student populations in the country while achieving Tier One status as a public research institution. Our mission is to offer nationally competitive and internationally recognized opportunities for learning, discovery and engagement to a diverse student body that now numbers 40,000—and one in which there is no racial or ethnic majority. This year, the U.S. Department of Education classified the University of Houston as both a Hispanic-Serving Institution and an Asian-American-Serving Institution, further confirming its dedication to recruiting, encouraging and supporting all components of the cosmopolitan city it serves. The University of Houston believes institutions of higher education should be permitted to continue considering factors that allow them to meet the challenges of educating a dynamic mix of nontraditional and traditional students.

UNIVERSITY OF MASSACHUSETTS

Founded in 1863, The University of Massachusetts is a land-grant research university whose mission is to provide a high quality affordable and accessible education and to conduct programs of research and public service that advance knowledge and improve the lives of the people of the Commonwealth, the nation and the world. This mission speaks to the interconnectedness of dimensions of difference, all of which are essential to our definition of an excellent University.

One of the University's trustee-approved priorities is that it will "continue a focus on diversity and positive climate." The University continues to value difference and diversity as a way to ensure excellence. Indeed, the University has long believed that diversity is a prerequisite for excellence.

Perspectives of difference can refine solutions. Recognizing that the benefits of diversity accrue to all, the University regularly renews its commitment and resolve to strive until we get it right or at least significantly better. We also believe that environments of truly valued diversity manifest more than a focus on the numbers of people of color. When we at UMass manage to encourage different angles of perception on ways of knowing, creating, and learning, we find that we pose better questions, resulting in fuller and richer responses. It is a hallmark of our excellence and integral to the intellectual, social and moral vitality of this community of learners.

UNIVERSITY OF MIAMI

The University of Miami was founded in 1925 with classes starting in 1926. It is a private, not-for-profit University with 12 schools and 5 campuses. As of September 30, 2011, it had over 14,000 full-time students and 1000 part-time students.

UNIVERSITY OF SAN DIEGO

The University of San Diego is a Roman Catholic institution committed to advancing academic excellence, expanding liberal and professional knowledge, creating a diverse and inclusive community, and preparing leaders dedicated to ethical conduct and compassionate service. Known for its commitment to teaching, liberal arts, ethical values, and community service, USD received international recognition in Fall 2011 when it was recognized as an Ashoka Change Maker campus for its innovative, socially minded curriculum and programs.

Central to USD's mission is its commitment to creating a diverse and inclusive community. The University works diligently to recruit and retain a diverse student body which enhances and enriches the learning experience for the entire campus community. Educating students in a diverse environment provides them with broad perspectives and experiences that will prepare them to be effective leaders and contributors to our global, national and local communities. The ability to consider all factors, including race and other diversity criteria, as part of an admissions process that involves an individualized and holistic review of each applicant enables institutions of higher education, like USD, to fulfill their educational missions and to have the greatest impact on our students and society as a whole.

UNIVERSITY OF SCRANTON

Founded in 1888, Scranton is a private, nationally recognized Catholic and Jesuit university in

Pennsylvania's Pocono Mountains region. The University offers 61 undergraduate and 25 graduate programs to approximately 6,000 students.

Spirituality is at the core of Scranton's mission as a Catholic, Jesuit institution of higher learning. The chief characteristics embedded in the Ignatian vision include: the concept of the Magis, or a restless pursuit of excellence grounded in gratitude; Cura Personalis, individual attention to students and respect for the uniqueness of each member of the University community; seeking God in all things; liberal education; service of faith and the promotion of justice; and contemplation in action. Scranton's institutional commitment to diversity is grounded in these core Jesuit principles. Scranton strives to develop "men and women for and with others," and in doing so is committed to increased recruitment and retention of students, faculty and staff from diverse backgrounds and to policies and measures that make our campus a nurturing environment that fosters innovation, confidence and a healthy sense of competition.

Scranton's commitment is evidenced by—to name a few indicators—its complex community of scholars, its goal to significantly increase the cultural diversity of the faculty, its annual commitment to increasing student body diversity with double-digit increases in multiple years, its launching of a Women's Studies program and a Women's Entrepreneurship Center, its campus-wide, year-long programs focusing first on Latin America and then on Africa, and its Latin American Studies and Asian Studies programs.

UNIVERSITY OF TEXAS AT EL PASO

The University of Texas at El Paso was founded in 1914 as the Texas State School of Mines and Metallurgy. In 1919, it joined The University of Texas System as the College of Mines and Metallurgy and is the second oldest academic institution in the UT System. In 1949, the Texas Legislature changed the institution's name to Texas Western College, reflecting the increased number of liberal arts programs offered. It was as Texas Western College that UTEP achieved national fame by winning the 1966 NCAA basketball championship for the first time with a starting lineup that was 100% African-American, reflecting the institution's long-standing commitment to diversity. In 1967, Texas Western College became The University of Texas at El Paso.

UTEP primarily serves the population of the Paso del Norte region, which includes western Texas, southern New Mexico, and the northern portion of the state of Chihuahua, Mexico. This geographically isolated region along the U.S.-Mexico border has been characterized by low educational attainment and the lowest median income in Texas. UTEP's mission, as a public university, is to place the human and economic development and quality of life of the region at the center of its teaching, research, and service functions. With a student population that is more than 75% Hispanic, and ranked 72nd among all U.S. universities in annual research expenditures, UTEP envisions itself as the only national research university that serves the 21st century demographic, a demographic that is largely urban, minority, and first-generation college student. UTEP's vision includes being recognized nationally as "the preeminent institution in fostering student participation and success, especially [among] young people, working adults, returning students and lifelong learners from socioeconomic groups that have traditionally been under-represented in U.S. higher education" (UTEP Strategic Plan, 2008-2015).

UTEP is committed to both access and excellence—to both Closing the Gaps and achieving Tier One status. As UTEP's president wrote in the Texas Tribune in 2010, "Demographics have shifted dramatically, driven largely by the rapid growth of the Hispanic population, and it's time to recognize that low-income and minority students have every right to expect the same level of educational excellence experienced by their peers in more affluent settings. Texas' future prosperity resides in these undereducated segments of our population. We literally cannot succeed without setting high expectations for them and fully developing their talents."

UNIVERSITY OF WISCONSIN OSHKOSH

The University of Wisconsin Oshkosh has been providing the residents of northeastern Wisconsin with high-quality affordable education since 1871. Among the largest public universities in the state (enrollment 13,500) and with nearly 80,000 alumni, UW Oshkosh is committed to providing students with a broad knowledge base and transferable skills as well as a strong sense of values and ethics that prepares them for civic leadership in society.

UW Oshkosh offers 60 undergraduate majors, 17 master's degree programs and one doctoral degree

(Doctorate of Nursing Practice). As the nation's first Fair Trade University, UW Oshkosh has been nationally recognized for its role in embracing sustainable practices, such as building "green," examining its carbon footprints and promoting social justice. An integrated Campus Sustainability Plan, established in 2006, guides the University's effort to be a leader in responsible environmental stewardship, education, outreach and research.

UNIVERSITY OF WISCONSIN SYSTEM

The University of Wisconsin System is one of the largest systems of public higher education in the country, serving more than 182,000 students each year and employing more than 32,000 faculty and staff statewide. The UW System is made up of 13 four-year universities, 13 freshman-sophomore UW College campuses, and statewide UW-Extension. Together, these institutions are a tremendous academic, cultural, and economic resource for Wisconsin, the nation, and the world.

WASHINGTON & JEFFERSON COLLEGE

Washington & Jefferson College is located in the rolling hills 30 miles south of Pittsburgh. The 11th oldest college in the country, W&J is a highly selective, private, residential, liberal arts college with a long history and continuing commitment to educating the sons and daughters of local coal miners and steel workers. W&J was formed by the joining of two schools. Because of the many young men volunteering to fight in the Civil War—Washington College students primarily for the North, Jefferson College students primarily for the South—there were not enough young men to sustain both colleges, and the rival institutions merged. After the war, veterans from both sides returned to resume their studies at the newly united college. The former soldiers found themselves sharing rooms and classrooms with those they had literally tried to kill across the battle lines. Had these young men not learned to appreciate one another's differences and live together productively, Washington & Jefferson College would not exist today.

The W&J campus is still influenced by that commitment to uniting individuals with different views in pursuit of common educational goals. W&J continues to be a place where liberals and conservatives, rich and poor, black and white, all debate issues, listen to one another, and respect one another in the classroom, on the athletic field and in residence halls. A major plank in W&J's strategic plan calls for the College to "increase the diversity of the learning environment." To that end, W&J has formed a partnership with the YES Prep program based in Houston, Texas, to encourage Hispanic and African-American students to matriculate at W&J. In 2010, W&J admitted the most racially diverse class in the history of the College.

W&J also has a long history of supporting African-Americans in their quest to succeed not only at the College, but in the broader world. In a famous incident in 1923, W&J forfeited a major football contest against another school rather than acquiesce to its demand that W&J bench its one African-American player. Many Southern schools at that time routinely refused to play if there was an African-American on the field. However, unlike many northern colleges and universities, W&J acted on principle and refused to comply. This "uncommon integrity," identified in our mission statement, has always been an integral part of the fabric of the College.

Additionally, W&J has a national reputation for producing future physicians from all races and ethnicities. This reputation is largely due to the work of biology professor Clarence Dewey Dieter, who assured all students that, despite medical school quotas for African-Americans and Jews that were common in the United States in the mid-twentieth century, he would guide all his qualified students to the best medical schools. His success in overcoming quotas and gaining access for his students was legendary.

The long-standing dedication of W&J to diversity is exemplified in our motto, Juncta Juvant, "Together We Thrive."

WASHINGTON STATE UNIVERSITY

Washington state's land-grant research university, Washington State University was founded in Pullman in 1890. Today, it is co-located in Pullman and Spokane with additional campuses in the Tri-Cities (Richland, Pasco, and Kennewick) and in Vancouver, across the Columbia River from Portland, Oregon. Considered one of the leading public research universities in America, WSU has 11 colleges and a graduate school which offer strong and varied academic programs. The liberal arts and physical and social sciences have an important place in the curriculum, along with business, communication, education, architecture, pharmacy, nursing, and the traditional land-grant disciplines of agriculture, engineering, and veterinary medicine. More than 2,100 instructional faculty members provide learning opportunities to a student body of approximately 27,000.

WSU students are of diverse social, economic, and ethnic backgrounds from throughout the nation and about 98 foreign countries. Washington State University affirms that diversity is crucial to its mission as a public land grant institution. Diversity is manifested, among other indicators, in a faculty, staff and student body that represent all of the populations that the University serves including, but not limited to, diversity in race, ethnicity and gender. The chance for students to know and work closely with their teachers is a WSU tradition and the richness of this experience is enhanced considerably by having a diverse student body and faculty. The University embraces a worldview that values the benefits derived from diversity and cultural differences, and recognizes the importance of global interdependence in the creation of a sustainable world.

WAYNE STATE UNIVERSITY

Founded in 1868, Wayne State University is a nationally recognized metropolitan research institution offering more than 400 academic programs through 13 schools and colleges to approximately 31,000 students. Wayne State's main campus in midtown Detroit, and its five extension centers offer higher education to people throughout Michigan. It boasts the largest single campus medical school in the country, the only public law school in Detroit and one of just two public law schools in Michigan and whose graduates serve at the highest levels of law and government, and graduate and PhD programs.

Wayne State is a nationally recognized urban center of excellence in research and one of only two public urban universities holding the Carnegie Foundation for the Advancement of Teaching's designation as an institution with "very high research activity" as well as the foundation's most comprehensive classification for community engagement. WSU is among the nation's top public universities for total research expenditures according to the National Science Foundation.

Wayne State is dedicated to preparing students to excel by combining the academic excellence of a major research university with the practical experience of an institution that by its history, location and diversity represents a microcosm of the world in which we live. Reflecting its location and the excellent international reputation of its graduate schools, particularly in the sciences, Wayne State boasts the most diverse student body among Michigan's public universities. Its students represent 49 U.S. states and more than 60 countries.

In 2006, the Michigan Constitution was amended to bar the use of 'preferences' in public education. Wayne therefore is unlikely to be directly impacted by the outcome of this litigation. We believe that the resulting constraints on admissions practices have not been beneficial to the education of students at public universities in Michigan.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN/ASIAN AMERICAN FACULTY AND STAFF ASSOCIATION OF THE UNIVERSITY OF TEXAS AT AUSTIN, ASIAN DESI PACIFIC ISLANDER AMERICAN COLLECTIVE OF THE UNIVERSITY OF TEXAS AT AUSTIN, OTHER ASIAN AMERICAN AND PACIFIC ISLANDER EDUCATION AND YOUTH-SERVING ORGANIZATIONS, AND HIGHER EDUCATION OFFICIALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

The Asian American Legal Defense and Education Fund ("AALDEF"), 18 Asian American and Pacific Islander education and youth-serving organizations, and 52 higher education faculty and officials (listed in full in the Appendix) submit this brief as amici curiae in support of Respondents in this case. Amici comprise a broad range of organizations and individuals working on issues affecting Asian Americans and Pacific Islanders in kindergarten through 12th grade and higher education.

AALDEF, headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF's Educational Equity Program promotes the rights of Asian American and Pacific Islander students in K-12 and higher education. AALDEF has an interest in this litigation because its work with community-based youth advocates across the country reveals that

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[1] In accordance with Supreme Court Rule 37.3(a), all parties have consented to the filing of amicus briefs, and copies of the letters of general consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for amici state that this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici or their counsel.

Asian American and Pacific Islander students benefit from individualized race-conscious admissions policies as well as from diverse educational settings.

Two amici are organizations with the express purpose of supporting Asian American and Pacific Islander staff and students at the University of Texas at Austin ("UT"). The Asian/Asian American Faculty and Staff Association aims to unite Asian and Asian American faculty and staff at UT and promotes networking and support for equal opportunity, growth, and mutual benefit among its constituents. The Asian Desi Pacific Islander American Collective is a student organization dedicated to empowering Asian American and Pacific Islander students at UT.

Several other amici are professional associations dedicated to supporting Asian American and Pacific Islander faculty and staff at institutions of higher education nationwide. These amici's members and participants include over 1000 Asian American and Pacific Islander higher education professionals with firsthand knowledge of the benefits of diversity at their places of employment.

Other amici are nonprofit organizations that advocate on behalf of or provide social services to Asian American and Pacific Islander high school-aged youth across the United States. Many of these youth-serving organizations are members of the National Asian American Education Advocates Network, a K-12 education advocacy consortium.

These amici have a unique understanding of the needs and experiences of underserved Asian American and Pacific Islander youth who are preparing for college.

Finally, many undersigned amici are individual faculty members and officials at institutions of higher education. Ten are employed at UT itself. A number of these amici are education, legal, and social science scholars whose work examines the diverse educational experiences of Asian American and Pacific Islander communities. Many have taught in higher education and produced scholarship about the impact of educational admissions policies on Asian American and Pacific Islander students.

Based on these collective experiences, amici are well qualified to answer a key question before the Court: how narrowly-tailored, individualized, race-conscious admissions policies impact Asian American and Pacific Islander students in higher education.

SUMMARY OF THE ARGUMENT

The admission of students with a "broad[] array of qualifications and characteristics" advances the compelling interest of colleges and universities in attaining a diverse student body and the educational benefits that follow. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.)). By considering the achievements of undergraduate applicants in the context of the attributes and obstacles that have influenced them, institutions like UT not only enrich academic discourse and classroom learning, but also open new pathways for success.

Racial and ethnic origin is but "one modest factor among many others" considered in the larger achievement matrix that UT uses in its individualized review of applicants who are not entitled to automatic admission under Texas's Top Ten Percent Law ("Top 10% Law"). *See Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). It provides an important texture to an applicant's profile without predominating over other defining qualities and factors. Asian Americans and Pacific Islanders—a unique cross-section of identities and experiences that spans a range of comparative privilege and disadvantage—benefit from this individualized approach to admissions, as do Africans Americans, Latinos, and Whites.

Petitioner and some of the amici who support her position erroneously assert that African Americans and Latinos are the only beneficiaries of UT's admissions policy. From this faulty premise, they incorrectly contend that UT has expanded admissions opportunities for African Americans and Latinos at the expense of Asian Americans and Whites.

In reality, a narrowly tailored, *Grutter*-compliant admissions program like UT's strongly benefits the Asian American and Pacific Islander community. UT's individualized review allows for the consideration of educational inequities faced by students from certain subgroups that are frequently hidden by the aggregation of data into a single "Asian" category. Students belonging to these subgroups in Texas and elsewhere have faced pervasive social and economic disadvantages akin to that experienced by many African Americans and Latinos, educational attainment levels that are among the lowest of all ethnic and racial groups, and even racial intimidation and harassment. Many of their parents (if not the students themselves) made a difficult transition to the United States as refugees, and others come from communities that have been subjected to colonization on their own native land. By considering the role that these students' racial and ethnic origin have had on their experiences and achievements, UT's admissions process encourages racial disaggregation and individualized treatment and thwarts the harmful "model minority" myth that masks tremendous diversity within the Asian American and Pacific Islander community.

Several key arguments presented by Petitioner and her amici rely on factual distortions and the improper treatment of Asian Americans as a monolithic group. First, they assert that UT has deemed Asian Americans to be "overrepresented" on its campus. That claim is completely untrue. Second, they assert that UT has limited admission of Asian American students in order to match the racial demographics of Texas. Since UT adopted its race-conscious policy, however, the percentage of Asian American students enrolled at UT has exceeded the percentage of Asian Americans in Texas by more than a factor of five.

Third, Petitioner and her amici attempt to show that UT has engaged in discrimination against Asian American applicants, but their analyses are hopelessly riddled with legal and methodological errors. They conflate distinct concepts—affirmative action and negative action—producing a muddled and highly misleading picture of admissions at UT and other selective universities. In reality, UT utilizes affirmative action to take into account the race of applicants on an individualized basis and enroll students from diverse backgrounds. This is entirely distinct from negative action, whereby a university discriminates against a racial group in order to suppress their levels of enrollment. The undersigned amici would vigorously oppose any form of negative action, formal or informal, affecting Asian Americans or any other group—but there is simply no evidence of it at UT. Petitioner's amici also attempt to prove discrimination based on differential standardized test scores, but they ignore the strong consensus of social scientists that such differences reflect disparities already present in the applicant pool and, indeed, have existed for many years in UT's Top 10% plan and other race-neutral admission programs.

In the end, despite claims by Petitioner and her amici that Asian Americans and Pacific Islanders are poised to reclaim opportunities lost to diversity initiatives should this Court rule against UT's admissions program, the overwhelming evidence indicates the opposite. Many Asian applicants in communities struggling with low educational attainment will suffer if admissions programs such as UT's are dismantled.

Equally important, Asian Americans and Pacific Islanders—along with students of other races—will not experience the kind of diversity that enriches their education and prepares them for careers in an increasingly intercultural and global workplace. Petitioner's challenge endangers "[b]road access to the education that leads to leadership roles [and that is] essential to public confidence in the fairness and integrity of public institutions." Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as *Amici Curiae* in Support of Respondents at 9, *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (No. 02-241).

For these reasons and those described below, this Court should uphold UT's admissions policy and the rulings of the courts below.

ARGUMENT

I. UT'S ADMISSION PROCESS DOES NOT DISCRIMINATE AGAINST OR DISADVANTAGE ASIAN AMERICAN APPLICANTS.

The record below establishes that in its effort to obtain the educational benefits that result from student diversity, UT uses race within the context of "a highly individualized, holistic review" that gives "serious consideration to all the ways an applicant might contribute to a diverse educational environment." *See Grutter*, 539 U.S. at 337. As Petitioner has admitted, UT has not established a "goal, target, or other quantitative objective" for the admission of any particular group. *See* JA 131a. Instead, it allows applicants of all races, including Asian Americans and Pacific Islanders, to benefit from the consideration of their race in the distinctive context of their background and experience. As discussed below, the arguments by Petitioner and her amici that Asian Americans are somehow victimized by this policy of individualized review are entirely unfounded in law and fact.[2]

A. UT Does Not Treat Asian Americans as Overrepresented.

Petitioner and her supporting amici repeatedly claim that UT has deemed Asian Americans to be "overrepresented" in its student population. *See* Pet. Br. at 7, 19, 28 n. 7*; see also* Brief for the Asian American Legal Foundation and the Judicial Education Project as Amici Curiae in Support of Petitioners ("AALF Br.") at 2, 9, 12-13 n.7, 22. From this premise alone, Fisher concludes that UT "employs race in admissions decisions to the detriment of Asian Americans." Pet. Br. at 7. Amici AALF similarly asserts that "[t]he very fact that UT currently deems Asian Americans overrepresented

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[2] Petitioner and her amici do not allege particular harm to Pacific Islanders resulting from UT's individualized admissions process.

. . . shows that the use of race in admissions will aim to reduce the representation of Asian Americans while increasing the representation of Hispanics and African Americans." AALF Br. at 2.

Such a claim – involving the numerical balancing of racial groups by a university bureaucracy and the imposition of a glass ceiling on a group deemed to have performed too well – would be deeply troubling, if true. It is not.

There is no support for Petitioner's claims in the record. She cites UT's Proposal to Consider Race and Ethnicity in Admissions, dated June 25, 2004, *see* Pet. Br. at 7 (citing SJA 25a), but nowhere in this document is the word "overrepresented" used. Instead, UT described African American and Hispanic students as underrepresented based on their overall enrollment and classroom presence at the university. UT did not find, and there is no basis for concluding, that Asian Americans or any other group has been deemed overrepresented.

Petitioner also refers to the District Court opinion in this case. *See* Pet. Br. at 19 (citing App. 154a). There, in finding that under *Grutter*, UT could consider Texas population data in determining "which minority groups qualify as underrepresented and which ones do not," Judge Sparks observed that "compared to their percentage of Texas' population as a whole, Hispanics remain underrepresented" while Asian Americans "are largely *over* represented compared to their percentage of Texas' population." *See* App. 154a-155a (emphasis in original). The court's empirical observation about the differences between the UT student population and Texas demographics does not support Petitioner's claim about UT's admission policies. To the contrary, as the District Court observed, the fact that the percentage of Asian American students at UT is five times larger than the percentage of Asian Americans in Texas is compelling evidence that no ceiling has been imposed. *See* App. 156a, n.11. In other words, as discussed in Section II.B, *infra*, the data only negate Petitioner's claim that UT has limited Asian American admissions to mirror Texas demography.

For this reason, admission policies at UT cannot reasonably be compared to the abhorrent quotas and restrictive polices imposed against Jews throughout the past century. *See* AALF Br. at 18-19; Brief Amicus Curiae of the Louis D. Brandeis Center for Human Rights Under Law, The 80-20 National Asian-American Educational Foundation, et al., in Support of Petitioner ("80-20 Br.") at 20-34. Without question, there is a disturbing history of discriminatory admission policies, particularly at elite private universities, affecting Jews, African Americans, Asian Americans, women, and others. *See* Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* (2005). Nor do amici deny the possibility that some institutions may apply exclusionary policies against minority applicants, including Asian Americans, today. As discussed below, amici would vigorously oppose any cap, quota, or other kind of negative action, formal or informal, against any racial group. Nevertheless, there is no evidence that UT has suppressed Asian American admissions in any manner. Indeed, all evidence is to the contrary.

B. UT Has Not Limited Asian American Admissions to Match the Racial Demographics of Texas.

Petitioner and her supporting amici claim that UT has limited admission of Asian American students to "mirror the demographics of Texas." *See* Pet. Br. at 19; *see also id.* at 28 (referring to "UT's differing treatment of Asian Americans and other minorities based on each group's proportion of Texas's population"); AALF Br. at 2 (asserting that "UT currently deems Asian Americans overrepresented and seeks to reduce demographic differences between its student population and the State as whole"). This claim is also baseless.

A simple comparison of the numbers of Asian Americans that UT admitted and enrolled and the percentage of Asian Americans in Texas shows that UT has not tried to match the two. The Asian American population in Texas has rapidly expanded over the last 30 years, reaching 3.8% of the state population in 2010.[3] Nevertheless, Asian American enrollment at UT has increased at an even faster rate. From 1986 to 2001, enrollment of Asian Americans at UT increased from 6% to 19%. *See* UT Austin, *1995-1996 Statistical Handbook—Students* 21; UT Austin, *2001-2002 Statistical Handbook—Students* at 25.[4] From 1999 to 2010, enrollment of Asian Americans from Texas remained in the range of 17% to 20%. *See* SJA 157a; UT Austin, *Implementation and Results of the Texas Automatic Admissions Law*, Dec. 23, 2010 ("2010 Top 10% Report") at 8. The latter period encompasses both six years of race-neutral admissions (following *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)) and six years of race-conscious admissions (following

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[3] In 1980, 120,000 Asian Americans lived in Texas, making up only 0.8% of the overall state population. *See* Campbell Gibson & Kay Jung, U.S. Census Bureau, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990 for the United States, Regions, Divisions*

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and States, tbl.58 (2002). By 1990, that number had grown to 319,000, or 1.9% of the state population, *id.*, and by 2000 it reached 562,000 or 2.8% of the overall state population, *see* U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2000.* From 2000 to 2010, the Asian American population in Texas expanded to 965,000 or 3.8% of the state population. *See* U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2010.* This 72% increase outpaced even the Hispanic or Latino population, which increased by 42% from 6.7 million to 9.5 million.

[4] Admissions numbers reflect a similar trend. From 1990 to 2009, the number of Asian American applicants whom UT admitted rose from 10% to 18% of all admitted students. *See* UT Austin, *1990-1991 Statistical Handbook—Students* 23; UT Austin, *2009-2010 Statistical Handbook—Students* 24. UT's Statistical Handbooks consolidate data on Asian American admittees from within and outside Texas. UT's Top 10% Reports distinguish between these groups.

Grutter). If the "core purpose" of the current policy has in fact been "to decrease or limit" the percentage of Asian Americans students to match "the racial composition of the State," see AALF Br. at 7-8, UT has done, as the District Court observed, "a particularly bad job of it," App. 156a, n.11.

Acknowledging that "the total number and percentage of Asian Americans have in fact increased at UT in the last ten years," amicus AALF weakly posits that UT's "efforts at racial balancing" have been "less effective than it would like." AALF Br. at 12-13 n.7. But there is no basis in the record to suggest that UT has sought this goal. To the contrary, the record shows that the consideration of race in UT's admissions process can positively impact applicants of any race, and the university makes no effort to monitor the number of applicants admitted in any particular group to ensure that a particular threshold is met. *See* JA 206a (Ishop Dep.); JA 284a-285a (Walker Dep.); JA 398a.

AALF then speculates that "many Asian Americans in Texas go to public school and may benefit from the Top Ten program," which would "mean only that the racial preferences and discrimination applied to students who are not in the top 10% of their classes must be even more aggressive in order to supplement or mitigate the effects of that program." AALF Br. at 12-13 n.7. AALF cites no evidence in support of this argument. In reality, the data show that from 2004 to 2010 a higher percentage of Asian American students admitted by UT have been admitted through individualized (non-Top 10%) admissions than the corresponding percentage of Hispanic admittees. *See* SJA 158a tbl.2a; 2010 Top 10% Report at 9 tbl.2a.[5] These numbers confirm that rather than attempting to match the racial composition of its student body with Texas demographics, UT has admitted students outside the Top 10% plan based on an individualized review of each applicant's performance and personal circumstances.

C. There Is No Evidence of Negative Action Against Asian Americans at UT.

1. Narrowly tailored affirmative action programs do not constitute negative action against Asian American applicants.

Following on their inaccurate claims that UT deems Asian Americans to be "overrepresented" in its student body and treats them differently "based solely on demographics," Petitioner and her amici argue that UT engages in "overt" discrimination "against Asian-American applicants." *See* Fisher Br. at 28, 55; *see also* AALF Br. at 2, 9, 12-13 n.7, 22. Again, these arguments are entirely unsupported by evidence in the record or empirical data.

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[5] In 2008, the year for which Fisher applied for admission, 16% of the total number of Asian Americans admitted to UT from Texas high schools were admitted through individualized review, as opposed to 13% of Hispanic students. SJA 158a tbl.2a.

Furthermore, they conflate two distinct concepts—affirmative action and negative action—producing a muddled and highly misleading picture of admissions at UT and other selective universities.

Under this Court's holdings in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter*, universities may pursue educational diversity (of which racial diversity is one element) by taking into account the race of applicants in a narrowly tailored manner to enroll students from diverse backgrounds. An individualized affirmative action program is completely distinct from negative action, which involves discrimination by a university to suppress enrollment of a particular racial group, such as Asian Americans. *See* William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 Asian L.J. 29, 33, 60 (2000); Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 3-4 (1996). To allege racial discrimination by comparing admissions for Asian Americans exclusively with other minorities—as Petitioner and her amici do—is to fall victim to a causation fallacy assuming "a finite number of minorities that can be admitted [to a university and] that spots for certain minorities must come at the expense of other minorities." *See* Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 Mich. J. Race & L. 391, 421 (2008). In other words, it assumes that college admissions is a "zero sum" game where minorities compete exclusively with one another for seats, and not with Whites as well.[6]

In reality, all applicants to UT and other selective institutions with a race-conscious admissions policy complying with *Gratz* and *Grutter* compete in a single pool, regardless of race. Even though racial quotas have been illegal since this Court's ruling in *Bakke*, Petitioner's amici treat collegiate admissions as if a quota for Whites keeps their numbers constant and caps the total number of minorities. In fact, many of the spots theoretically made available by ending affirmative action would go to Whites, who comprise a much larger percentage of the population than Asians. *See, e.g.*, Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. Hum. Resources 435, 448-50 (2012). This fact breaks the causal link that Petitioner's amici repeatedly claim between race-conscious admissions and alleged discrimination against Asians.[7] Therefore, any

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[6] It also ignores the reality that some universities (but not UT) give preference in admission to children of alumni, a policy that disproportionately benefits White applicants. *See Affirmative Action for the Rich: Legacy Preferences in College Admission* 127 (Richard D. Kahlenberg ed. 2010).

[7] Petitioner's amici rely heavily on researcher Thomas Espenshade's work to show how differences between SAT scores of Asian Americans and other groups demonstrate a "penalty" on Asians. *See* AALF Br. at 9-10; 80-20 Br. at 5-6. Espenshade's estimates, however, pertain to 1997 data for

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three elite private universities and are therefore inapplicable to this case. Furthermore, while it is true that Espenshade sought to "quantify the effects of race-conscious admissions policies," *see* AALF Br. at 9, amici do not make clear that "race-conscious admissions" for Espenshade include not only affirmative action but also negative action against Asian Americans. In other words, when Espenshade suggests that Asian Americans would benefit from the elimination of race-conscious admissions, he includes in his analysis the removal of a 50-SAT-point advantage that White applicants received over Asian Americans (*i.e.*, negative action). *See* Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 Soc. Sci. Q. 293, 298 (2005) (assessing removal of "disadvantage in admission" experienced by Asian Americans as well as preferences for other groups); *id.* at 301 (referring to "what some might term 'disaffirmative action' for Asians"). The same data in Espenshade's more recent book confirm that in his model, in terms of the overall impact on Asian American admission offers, ending negative action was estimated to have an effect more than five times greater than the effect of ending affirmative action for African American and Latino students. *See* Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 334 tbl.9.1, App. tbl.C.9.1 (2009). Other academics have challenged Espenshade's work as misleading or "internally contradictory" because it "confounds the role of negative action . . . with the role of affirmative action," and have described his conclusions as "untenable" because they assume that "the role of negative action is truly de minimis." *See, e.g.*, William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 Mich. J. Race & L. 605, 614-15 (2006).

must be caused by something other than race-conscious affirmative action. This is where negative action comes in.

Negative action creates a de facto cap on admissions for Asian American students. It can be implemented by inflexible, numerical quotas or by an unquantified admissions calculation. Kang, *supra*, at 3-4. The analysis of whether a university is engaging in negative action against Asian American students must be divorced from any inquiry about the legality of a race-conscious admissions policy. Negative action against Asian American (or other minority) applicants may be real, but it is a phenomenon unrelated to affirmative action. The existence of a narrowly tailored, race-conscious admissions plan has no bearing on whether a university engages in negative action.

2. SAT score data at UT do not show negative action against Asian Americans.

Claims about differential standardized test scores by race are often highly misleading, if not demonstrably false. Differences in average scores among racial or ethnic groups at institutions such as UT reflect the racial/ethnic test score disparities already present in the applicant pool, resulting from socioeconomic differences, educational practices, and other environmental factors. *See* Claude S. Fischer et al., *Inequality by Design: Cracking the Bell Curve Myth* 46 (1996); William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of*

Considering Race in College and University Admissions 16 (2d ed. 2000). They are to be expected regardless of whether race neutral or race conscious criteria are used. *See, e.g.*, Maria Veronica Santelices & Mark Wilson, *Unfair Treatment?: The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 Harv. Educ. Rev. 106 (2010); William T. Dickens & Thomas J. Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less Than Meets the Eye*, 38 Indus. Rel. 331 (1999).[8] Substantial racial/ethnic SAT score averages on par with UT's individualized admissions pool are found nationwide, including at other leading universities like UC Berkeley and UCLA that use race-neutral admissions. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case* 29-36 (2012). The College Board, which created the SAT, has itself acknowledged this phenomenon. *See* Jennifer L. Kobrin et al., *A Historical View of Subgroup Performance Differences on the SAT Reasoning Test* 19 (The College Board 2007) (finding that score gaps between different racial groups have "remained generally consistent" for 20 years).

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[8] These disparities would exist even in the extreme (but counterfactual) case of a university admitting students in rank order based *solely* on their SAT scores. *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1064 (2002).

This is as true at UT as elsewhere. Even though Petitioner's amici repeatedly suggest that Asian American applicants must achieve higher SAT scores in order to gain admission to UT, *see, e.g.*, AALF Br. at 9-12, 30, only two cite actual UT score data. Amicus 80-20 observes that for the class admitted to start in the fall and summer of 2009 (the year after Fisher applied for admission), enrolled Asian Americans students admitted through individualized admissions had a mean SAT score of 1991 (on a scale of 2400), compared to mean scores for White (1914), Hispanic (1794), and African American (1524) enrollees. 80-20 Br. at 6. Amici Richard Sander and Stuart Taylor cite the same data. *See* Brief Amicus Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 3-4 & n.4. Although these amici attribute these differences to UT's race-conscious admissions policy, their claim is fatally undermined by the fact that similar variations in SAT scores existed throughout UT's *race-neutral* admissions between 1997 and 2004. *See* SJA 55a-62a. For example, in 2004, the year before the current race-conscious policy took effect, the mean SAT score for enrolled Asian American students admitted through individualized review was (on a scale of 1600) 37 points higher than Whites, 115 points higher than Hispanics, and 188 points higher than African Americans in the same pool. *See id.* at 62a. Similar gaps have existed and continue to exist in SAT scores for students admitted under the race-neutral Top 10% plan. For example, in 2009 Top 10%-admitted Asian American enrollees had a mean SAT score of 1874, compared to 1864 for Whites, 1628 for Hispanics, and 1584 for African Americans. *See* 2010 Top 10% Report at 14.[9] It is spurious for amici to attack UT's admissions policy based on a longstanding phenomenon that has existed under race-neutral and race-conscious policies alike.

In addition, Petitioner's amici treat SAT scores as the ultimate and indeed only indicator of merit in educational admissions. In fact, standardized test scores are only one among many factors considered in UT's individualized review process, *see* Section II.D, *infra*, and their predictive power has been called into question by numerous studies, *see, e.g.*, Sunny X. Niu & Marta Tienda, *Test Scores, Class Rank, and College Performance: Lessons for Broadening Access and Promoting Success*, Rassegna Italiana di Sociologia (forthcoming) (manuscript at 2, 13). Significantly, students admitted under the Top 10% plan achieve on average better grade point averages in their first year at UT than non-Top 10% students, even though non-Top 10% students have on average higher SAT scores. *See* JA 343a-344a; SJA 49a-53a. SAT scores can also be boosted by test-preparation courses, to the advantage of those with financial means rather than merit. *See* Brief of the Asian American Center for Advancing Justice et al. as Amici Curiae in Support of Respondents ("AAJC Br.") at § III.C (citing Jay Rosner, *Disparate Outcomes by Design: University Admissions Test*, 12 Berkeley La Raza L.J. 377, 383-84 (2001); Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 Am. Soc. Rev. 487, 490-91 (2007)). For these reasons, while a statistically significant difference in SAT scores between Asian American and White admittees might be one indicator of negative action, it would be far from sufficient to establish a prima facie case of discrimination.

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[9] Similar score gaps can be found in reported ACT scores. 2010 Top 10% Report at 15. Beginning in 2009, UT stopped concording applicants' ACT scores into equivalent SAT scores due to changes in the structures of both tests. *Id.* at 3.

Petitioner's amici make no effort to analyze differences between the SAT scores of Asian and White students at UT.[10] An examination of those scores does not show that negative action is afoot. First, mean SAT scores of Whites and Asians at UT admitted through individualized admissions (both before and after implementation of the current policy) reflect only small differences.[11] Second, an analysis of (i) SAT scores by major and (ii) concentration of racial groups across majors reveals a likely nondiscriminatory reason for these differences. UT requires Texas residents to apply to undergraduate programs by selecting a first-choice and second-choice major.[12] Based on these priorities, UT admits students generally into one of six colleges (Liberal Arts, Social Work, Nursing, Business, Communications and Geosciences) or into a specific major at three other colleges (Natural Sciences, Education, and Engineering). Asian Americans at UT are more concentrated in those schools with the highest mean SAT scores at UT (Business, Engineering, and Natural Sciences) and have the lowest concentration in schools with the lowest SAT scores (Liberal Arts, Fine Arts, and Education). *See* SJA 54a-63a; 166a; 2010 Top 10% Report at 14-15. By contrast, Whites have larger concentrations in schools with the lowest SAT scores. Thus, along with the complex nature of individualized review, the various environmental factors, and issues with the predictive power of SAT scores, students' selection of majors explains in part the minor

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[10] As discussed in Section II, *infra*, Asian Americans are a highly diverse community with a broad range of religious and cultural differences, immigration histories, and socioeconomic experiences. This diversity is reflected in substantial SAT and educational attainment disparities among different Asian American subgroups.

[11] The score differential between 1996 and 2008 fluctuated within 6 and 46 points, which is minimal in light of the range of possible scores. *See* SJA 50a, 52a; UT Austin, *Implementation*

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and Results of the Texas Automatic Admissions Law, Oct. 29, 2009, at 12 tbl.6a, 13 tbl.6c.

[12] Admissions for Texas residents are handled centrally by UT for eleven of its undergraduate schools. JA 408a. The School of Architecture and College of Fine Arts make their own admissions decisions. JA 409a.

difference in scores between Asian American and White enrollees at UT.[13]

Petitioner's amici have not meaningfully analyzed these data. Nor do they address the longstanding SAT score disparities among admittees under UT's race-neutral Top 10% plan, which, as discussed above, indicate the impact of factors independent of race-conscious admissions. Nor are they able to correlate higher standardized test scores with better academic performance at UT. Instead, they seek to manipulate the causation fallacy to "triangulate" Asians as unwitting victims of UT's individualized admissions process.[14] The Court should reject this unfounded effort.

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[13] Consistent with UT's experience, national studies show that SAT scores for students who intend to study engineering and natural sciences tend to be at the high end of standardized test score distributions. *See* College Board, *College-Bound Seniors Total Group Profile Report* 13 (July 2010).

[14] *See* Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 122-23 (1999) (observing that opponents of affirmative action in 1980s attempted to shift debate "from the real issue at hand—whether or not several leading universities imposed racial quotas on Asian American students to preserve the Whiteness of their student bodies—to the false issue of whether affirmative action programs designed to benefit Blacks and Latinos unfairly discriminated against Asian Americans").

II. UT'S POLICY OF INDIVIDUALIZED REVIEW IS BENEFICIAL TO ASIAN AMERICANS AND PACIFIC ISLANDERS.

An overriding theme of Petitioner's and her amici's briefs is that UT's admissions process for non-Top 10% applicants is discriminatory because it uses race to benefit Latinos and African Americans, but not Asian Americans. *See, e.g.*, Pet. Br. at 7, 46; 80-20 Br. at 3; Brief of the Texas Association of Scholars as Amicus Curiae in Support of the Petitioner at 7. In fact, UT's policy of individualized review strongly benefits Asian Americans and Pacific Islanders by allowing for the consideration of economic and educational inequities faced by students from certain subgroups—differences that are often hidden by the aggregation of data into a single "Asian" category and the promulgation of the pervasive and harmful "model minority" myth.

A. The "Model Minority" Myth Masks Tremendous Diversity Within the Asian American and Pacific Islander Community.

The treatment of any racial population as monolithic is problematic, and falls prey to racial stereotyping. Asian Americans, as amicus AALF correctly observes, are "a highly heterogeneous group coming from numerous countries and widely varied ethnic, cultural, intellectual, economic, and political backgrounds." AALF Br. at 28. Because Asian Americans as well as Pacific Islanders, with whom Asians have historically been aggregated into a combined racial category, have such high levels of diversity, including a wide array of languages and religious and cultural traditions, it is impossible to generalize a "typical" Asian American experience. Robert T. Teranishi, *Asians In the Ivory Tower: Dilemmas of Racial Inequality in American Higher Education* 26 (2010). As discussed below, narrowly tailored, individualized admissions programs like UT's are well suited to take into account the heterogeneity of the Asian American and Pacific Islander community as they pursue the substantial educational benefits of student diversity. *See, e.g., Smith v. University of Washington Law School*, 392 F.3d 367, 378 (9th Cir. 2004) (upholding admissions program that recognized "different cultures, backgrounds, and languages" of "applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan and the People's Republic of China").

In particular, the "model minority" myth, which correlates Asian American and Pacific Islander identity with academic and professional achievement and mobility, fails to capture the complex reality of their experience. This "monolithic image of success" inappropriately "lumps all Asian Americans together, implying that the needs of recent Southeast Asian refugees can be ignored because third- or fourth-generation Japanese or Chinese Americans have been relatively successful." Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian L.J. 71, 90

(1997). The stereotype also downplays what AALF rightly describes as "the long and ugly history of racial discrimination against Asian Americans," *see* AALF Br. at 13-14, and contributes to the persistence of discrimination today, *see* Frank H. Wu, *Yellow: Race in America Beyond Black and White* 49-77 (2003); Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-39 (1993).

B. The Different Immigration Histories of Asian American and Pacific Islander Subgroups Have Shaped Their Socioeconomic Experiences in the United States.

The history of U.S. policy on Asian immigration has vacillated from openness in the late 1800's—when the country needed the pioneering efforts of Asian immigrants—to exclusion during the internment camps of World War II and the anti-Asian immigration acts which largely closed U.S. borders to Asian immigration until the 1950's. *See* Angelo N. Ancheta, *Race, Rights, and the Asian American Experience* 21-27 (1998); *see also* Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 Asian L.J. 33 (1995) (discussing challenges by Asian immigrants in nineteenth and twentieth centuries to denial of American citizenship). Since then, differences in the migration paths taken by Asian American and Pacific Islander subgroups have led to substantial economic and educational disparities in the Asian American community today.

Some Asian immigrants voluntarily traveled to the United States for better opportunities, were prepared to leave their homelands, and had connections here to help get them on their feet. Many were admitted to the United States under immigration policies giving employment preference to professionals "holding advanced degrees" or who have "exceptional ability." *See, e.g.*, Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978. Large percentages of immigrants from countries like Singapore, Korea, India, China, Japan, and Taiwan arrived as the result of employment preferences, and "[t]he capital that these individuals possess is often correlated with educational and social mobility in the United States." Teranishi, *supra*, at 31.[15]

By contrast, the cultural capital of refugees who entered in the "surge of immigration from Southeast Asian countries . . . starting in 1975 under refugee and asylee status" has been profoundly different. *Id.* More than one million Vietnamese, Cambodian, Hmong, Mien, and Laotians arrived from 1975 to 1990 after the end of the Vietnam War, and nearly all were refugees. Most started their new lives in

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[15] In 2010, the United States admitted 81,331 immigrants from Asia under the employment-based preference. *See* Department of Homeland Security, *Yearbook of Immigration Statistics: 2010* at 31. Thirty six percent of the admittees were from India, 20% were from China, and 14% were from South Korea. In contrast, only 253 individuals (0.3%) were admitted under the employment-based preference from Vietnam.

America with few material goods, their remaining family members scattered or lost, and often traumatized by war, their escape, and often years in refugee camps. They were forced to navigate a country and social and educational systems unfamiliar to them and for which they were unprepared, hindered by a lack of English fluency and inherent economic and social disadvantages.

Native Hawaiians, a subgroup of Pacific Islanders, and Pacific Islanders in U.S. territories such as Guam and Samoa are not immigrants at all, and like Native Americans have been subjected to colonization and marginalization on their own native land. Their post-colonial histories and relative lack of agency have made these communities the most misrepresented of any group of Asian Americans and Pacific Islanders by the model minority myth. *See Id.* at 34.

Today, many Southeast Asian and Pacific Islander communities remain economically disadvantaged and struggle with long-term poverty, language and literacy issues as well as post-traumatic stress disorder. *See, e.g.*, Min Zhou & Carl Bankston, *Straddling Two Social Worlds: The Experience of Vietnamese Refugee Children in the United States*, Urban Diversity Series No. 111, 20-22 (2000). In 2010, while other ethnic groups had poverty rates at or below the national average for Asian American of 12.5%, rates for Hmong (27.5%), Cambodians (21.9%), Laotians (16.0%) and Vietnamese (15.6%) were substantially higher. U.S. Census Bureau, *2010 American Community Survey*

1-Year Estimates ("ACS 1-Year Estimates"); *see also* Teranishi, *supra*, at 35. Unemployment rates for Hmong (9.9%), Laotians (8.8%), and Cambodians (9.4%) also exceeded the average for all Asian Americans (5.6%). Poverty (18.8%) and unemployment (9.8%) rates for Native Hawaiians and Pacific Islanders are similarly high. ACS 1-Year Estimates.

These socioeconomic factors are accompanied by poorer educational outcomes. Southeast Asians lag behind other Asian American subgroups in educational attainment. In 2010, over 30% of Hmong, Cambodian, Vietnamese, and Laotian individuals over the age of 25 did not have a high school degree, compared with an average of 15% for all Asian Americans. *See id.* Predictably, the road to higher education only gets tougher for Southeast Asians, with attainment rates for bachelor's degrees at about 11% for groups other than Vietnamese, who are just above 18%. *Id.*[16] The high degree of variation in educational attainment and academic preparation within the Asian American and Pacific Islander community is demonstrated by the fact that their test scores "actually have the widest standard deviation for any racial group." NYU CARE & The College Board, *Asian Americans and Pacific*

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[16] While only 12.6% of Native Hawaiians and Pacific Islanders did not have a high school degree, the percentage who earned a bachelor's degree fell to 11.4%, compared to 29.6% of all Asian Americans. ACS 1-Year Estimates.

Islanders: Facts, Not Fiction: Setting the Record Straight 10-12 (2008) (discussing how variation in test scores reflects "differences in social and cultural capital among the population"); *see also* Valerie Ooka Pang et al., ***Asian American and Pacific Islander Students: Equity and the Achievement Gap***, 40 Educ. Researcher 378, 382 tbl.2 (2011) (establishing that Filipino, Lao, Cambodian, Native Hawaiian, Guamanian, Samoan, and Other Pacific Islanders perform less well than Whites and other Asian American ethnic groups on California Achievement Test); Coalition for Asian American Children and Families, *Hidden in Plain View: An Overview of the Needs of Asian American Students in the Public School System* 14-16 (2004).

C. Substantial Economic and Educational Disparities Exist Among Asian American Subgroups in Texas.

Consistent with national data, significant economic and educational disparities can be found among Asian American subgroups in Texas. According to the 2010 Census, the three largest Asian American ethnic groups in Texas are, in descending order, Indian, Vietnamese, and Chinese.[17] Students in Texas communities with a high concentration of Indian and Chinese students tend to be more affluent and achieve higher SAT scores.[18] For example, Coppell, an upper-middle class suburb that has benefited economically from development near the Dallas/Fort Worth International Airport, has one of the most distinguished school districts in the state. Fifty-seven percent of the Asian American population in the Coppell school district is Indian.[19] Median income in Coppell is $101,510, and less than 10% of its students are deemed to be economically disadvantaged. The average SAT score for Asian American students in Coppell is 1213, and 79% of Asian students test as college ready.

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[17] Native Hawaiians and Pacific Islanders make up 0.1% of the population in Texas. *See* U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2010*.

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[18] Even though the Texas Education Agency ("TEA") does not report disaggregated data on Asian American subgroups, disparities can be assessed by comparing economic and educational data for census designated places with data on different Asian subgroup concentrations as surveyed by the U.S. Census Bureau. This analysis shows that as the proportion of Indian and Chinese students in the population increases, both average SAT scores for Asian students and the percentage of Asian students who test as "college ready" tend to increase and the percentage of Asian students deemed "economically disadvantaged" tends to decrease. (The TEA reports only students' math and critical reading scores, even though UT also considers applicants' writing scores in its admissions process.) These trends run inversely as the proportion of Vietnamese students increases: average SAT scores and the percentage of Asian students who test as "college ready" tend to decrease and the percentage of Asian students considered "economically disadvantaged" tends to increase. *See* U.S. Census Bureau, *2006-2010 American Community Survey 5-Year Estimates* ("ACS 5-Year Estimates"); Texas Education Agency, *2009-2010 Academic Excellence Indicator System Reports*; *see also* U.S. Census Bureau, *2008-2010 American Community Survey 3-Year Estimates*.

[19] Approximately 12% of the Asian American population in Coppell ISD is Chinese, and 4% is Vietnamese. *See* ACS 5-Year Estimates

By contrast, students in communities with higher Vietnamese populations tend to be more economically disadvantaged, achieve lower SAT scores, and are less prepared for college. For example, 54% of the Asian American population in the Arlington school district, another suburb of Dallas-Fort Worth, is Vietnamese.[20] Median income in this city is $51,260, and 60% of its students are economically disadvantaged. The average SAT score for Asian American students in Arlington is 1056, and only 57% of Asian students test as college ready.

As discussed, the economic and educational disparities experienced by Vietnamese and other Southeast Asian communities in Texas reflect in large part their migration experiences. After leaving their homeland due to unrest or persecution and arriving with few economic resources, members of refugee communities have sometimes been met with hostility based on race or ethnic origin. In Texas, some Vietnamese refugees found opportunities in commercial shrimping along the Gulf coast.

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[20] Approximately 10% of the Asian American population in Arlington ISD is Chinese, and 14% is Indian. *See* ACS 5-Year Estimates

Working long hours, these refugees began buying their own boats, only to face intimidation and harassment by armed White supremacists. *See Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1001-06 (S.D. Tex. 1981). Students growing up in these communities have faced unique challenges and have immeasurable potential to contribute to the diversity of the learning environment at UT.

D. Members of Disadvantaged Asian American and Pacific Islander Subgroups Benefit from UT's Individualized and Narrowly Tailored Admissions Process.

Petitioner argues that UT discriminates in favor of certain groups and against Asian Americans "by using race in admissions decisions to benefit the former but not the latter." Pet. Br. at 46.[21] This claim fundamentally misapprehends how the process works. Under UT's system of individualized review, no student automatically benefits just because he or she belongs to an underrepresented or disadvantaged group. To the contrary, all students, including Asian Americans, can benefit from UT's individualized consideration of their race in the distinctive context of their background and experience.

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[21] Petitioner and her amici also suggest that UT's Top 10% plan is sufficient to enroll a critical mass of minorities on campus. *See, e.g.*, Pet. Br. at 37-42. The effectiveness of such "percentage plans," however, depends on a high level of de facto racial segregation in the underlying secondary school system. *See* Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 Ohio St. L.J. 1729, 1733-1734 (2001). Amici question the wisdom of relying solely and on a long-term basis on a system that presupposes the existence of residential segregation for ensuring educational diversity at UT. In addition, this approach tends to disadvantage Asian Americans and Pacific Islanders because they tend to live in more integrated communities than other racial groups. *See* John Iceland, *Beyond Black and White: Metropolitan*

As an individual factor, race has no predetermined or numerical impact on an applicant's Personal Achievement Score ("PAS"). *See, e.g.*, JA 172a-173a (Ishop Dep.).[22] Instead, as one admissions official observed, consideration of an applicant's race or racial background can be "as beneficial for some as their level of involvement with student council may be beneficial for some, as the strength of their letter of recommendation may be beneficial for some." JA 209a (Ishop Dep.). Importantly, the consideration of race in admissions can positively impact applicants regardless of whether they belong to an underrepresented

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Residential Segregation in Multi-Ethnic America 33 Soc. Sci. Res. 248, 250 (2004).

[22] In calculating the PAS, UT considers an applicant's demonstrated leadership qualities; awards and honors; work experience; involvement in extracurricular activities and community service; and special circumstances such as the applicant's socioeconomic status, family status and family responsibilities, and race. *See* SJA 152a.

minority or some other group. *See* JA 206a (Ishop Dep.); JA 284a-285a (Walker Dep.). In this respect, UT's plan is even more narrowly tailored than the plan in *Grutter*, in which the University of Michigan Law School considered race as a "plus factor" only with respect to applicants belonging to underrepresented minority groups. *See Grutter*, 539 U.S. at 321. In addition, no one at UT monitors the number of admittees in any particular group to ensure the enrollment of a critical mass of underrepresented minority students. *Compare* JA 398a, *with Grutter*, 539 U.S. at 318.

Because the consideration of race in UT's individualized admissions process can benefit any applicant, Asian Americans and Pacific Islanders (including but not limited to members of disadvantaged subgroups) can benefit from it as well. *See Smith*, 392 F.3d at 379 & n.11 (upholding admissions program that gave "plus factor" to Filipino applicants "in order to enroll a sufficiently large and diverse group of Asian Americans"); Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 Vand. L. Rev. En Banc 113, 120-21 (2012) (stating that UT admissions process can benefit "Asian students who defy the stereotype of the 'model minority' and are burdened by poverty—the reality for discrete Asian sub-groups in America"); Kidder, *Negative Action*, *supra*, at 623 (observing that "some underrepresented . . . groups (e.g., Filipinos, Southeast Asians, Pacific Islanders) can directly benefit from affirmative action in higher education"). For UT applicants with lower SAT scores and GPAs, consideration of race in the distinctive context of their background and experience may give them a higher PAS. For example, a student of Southeast Asian origin whose parents are refugees and who attends a majority-minority public high school in Texas may receive a higher score than she would absent the consideration of race. A higher PAS will not guarantee her admission to UT, but might improve her chances.

In short, UT's process of individualized review advances its compelling interest in achieving the educational benefits of student diversity, increases the likelihood of admission for those who do not have the same social mobility and capital as others, and has the potential to benefit all Asian American and Pacific Islander applicants. Claims that UT's policy pits "one minority group against another," *see* Pet. Br. at 45, or use consideration of race to divide minority applicants into winners and losers, *see* 80-20 Br. at 3; AALF Br. at 6, have no basis in the record.

III. THE EDUCATIONAL BENEFITS OF STUDENT DIVERSITY ACCRUE TO ALL STUDENTS.

Finally, it is critical to recognize the benefits from the diversity produced by an individualized race-conscious admissions process accrue to all students, including Asian Americans and Pacific Islanders. Studies have demonstrated that interactions with a diverse student body, both in and out of the classroom, lead to positive learning and civic outcomes for Asian American students. *See* NYU CARE, *Asian Americans and the Benefits of Campus Diversity: What the Research Says* 1 (2012); Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 351-353, 354 tbl.3 (2002); Mark E. Engberg & Sylvia Hurtado, *Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences*, 82 J. Higher Educ. 416, 434 (2011) (observing that while "the effects of intergroup learning on the pluralistic measure were significant for all other groups," Asian American students "seem to demonstrate the strongest benefit"). These benefits continue as students graduate and enter the "increasingly diverse workforce and society." *See Grutter*, 539 U.S. at 330 (citation omitted). Student diversity also has positive social effects on the campus as a whole. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring); *Grutter*, 539 U.S. at 328-29; *Bakke*, 438 U.S. at 312-13. Asian Americans and other groups come to see each other more favorably, which leads to improved intergroup relations and reduced racial stereotyping. *See Grutter*, 539 U.S. at 328-29. Because UT's process of individualized review is narrowly tailored to achieve the educational benefits of student diversity, this Court should uphold it as constitutional. *See generally* AAJC Br. at §§ I-II.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decision below.

Respectfully submitted,

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AUGUST 2012

APPENDIX

APPENDIX: LIST OF AMICI CURIAE

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Asian Americans United

Asian Desi Pacific Islander American Collective, University of Texas at Austin

Asian Pacific American Network of the American College Personnel Association

Asian Pacific Americans in Higher Education

Asian/Asian American Faculty and Staff Association, University of Texas at Austin

Asian/Pacific Islander Caucus-National Conference on Race and Ethnicity in Higher Education

Asian Youth and Parents for Advocacy and Leadership

Association for Asian American Studies

Boat People SOS – Delaware Valley

Center for Pan Asian Community Services, Inc.

Chinese for Affirmative Action

Coalition for Asian American Children and Families

Khmer Girls in Action

Lowell Community Health Center Teen Block

MinKwon Center for Community Action

Providence Youth Student Movement

Southeast Asia Resource Action Center

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE ASIAN AMERICAN LEGAL FOUNDATION AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amicus curiae the Asian American Legal Foundation ("AALF"), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans. Americans of Asian origin have a particular interest in use of race in public university admissions. They have historically been, and continue to be, denied access to public schools due to overt racial and ethnic prejudice as well as ostensibly well-intentioned "diversity" programs such as the program at issue here. In case after case, only strict application of the Fourteenth Amendment's guarantee of equal protection has allowed Asian Americans to live free of racial persecution.

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles, and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on our society. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

SUMMARY OF ARGUMENT

Government action based on race and racial stereotypes is repugnant to the principles of a society based on equality under the law. It also is corrosive to human dignity and the fundamental value of individual rights under our Constitution. The experience of Asian Americans illustrates the great dangers, and the substantial costs, of allowing race to play any role in government decisions generally, and in education in particular.

1. In the name of racial diversity, racial preferences in college admissions programs in general, and at the University of Texas at Austin ("UT") in particular, discriminate against Asian-American applicants by deeming them overrepresented relative to their demographics in the population and thus less worthy of admission than applicants of underrepresented races. At highly selective schools, such discrimination imposes an admissions penalty on Asian Americans equivalent to hundreds of SAT points relative to Hispanic and African-American applicants, and a lesser, but still significant, admissions penalty relative to White applicants. The empirical experiences of Texas, Florida, and California when they eliminated race-based admissions policies likewise demonstrate that such policies discriminate against Asian Americans. The very fact that UT currently deems Asian Americans overrepresented and seeks to reduce demographic differences between its student population and the State as a whole shows that the use of race in admissions will aim to reduce the representation of Asian Americans while increasing the representation of Hispanics and African Americans.

Such discrimination is especially pernicious given that Asian Americans as a group have long faced government discrimination in this country. In education, in particular, Asian-American schoolchildren were some of the first victims of the separate-but-equal doctrine endorsed in *Plessy* v. *Ferguson*. Though the stereotypes and justifications for such classifications have changed over time, discrimination against Asian Americans continues to this day. Regardless of the justifications for racial limits on educational opportunities for Asian Americans, such discrimination was and remains odious to the ideals of this nation and destructive to the individuals affected.

UT's race-based admissions policies are merely the latest method for government to pick and choose among the races, to the benefit of whichever races are currently in political favor and to the detriment of whichever races are not. In the end, however, it is the individual students, judged by the color of their skin rather than by their individual qualities and achievements, who pay the price.

The Asian-American experience with racial discrimination casts a hard and unflattering light on the use of race in the name of diversity and helps illustrate why such use of race in education is far from benign and should be rejected.

2. Racial diversity is not a compelling interest justifying the use of race in college admissions processes. This Court's endorsement of that interest in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and its application and the lax standard of review by the court below should be disavowed by this Court.

Regardless how many other factors are taken into account in UT's admissions program, where the baseline for diversity and eligibility for racial preferences are based on the comparative racial demographics between UT and the State, the program constitutes forbidden racial balancing. That UT's efforts are inefficient, in conflict with other admissions considerations, or slow to come to fruition does not change the structure and goals of UT's race-based policies and hence does not change their odious character.

Attempts to force racial diversity necessarily act to the detriment of genuine individual diversity. The very act of classifying students by "race" in the first place creates artificial groupings that mask the myriad differences within those classifications, and detracts focus from the individual. Asian Americans again illustrate this point. Though lumped together in a single group for racial diversity purposes, Asian Americans are in fact highly heterogeneous with extremely varied experiences and viewpoints. Treating them as one group for purposes of diversity merely promotes stereotypes that are detrimental to genuine diversity and is most harmful to those students who most need non-discriminatory access to educational opportunities.

While there is no doubt that diversity is valuable, true diversity is found only at the individual level, created by individual differences in ability, experience, interest, opinion, and other personal qualities, judged without resort to the invidious shortcut of racial stereotyping. *Racial* diversity is no more than a false proxy for individual diversity, perpetuates and exaggerates the role of race and racial stereotypes in government and society, and makes impossible the goal and ideal that individuals be judged by the content of their character, and not the color of their skin. Indeed, racial diversity is literally only skin-deep.

The malleable and indeterminate nature of the interest in racial diversity as articulated in *Grutter* also encourages universities and others to be disingenuous regarding the role race plays in admissions. Admissions programs are encouraged to hide the use of race and their goal of proportional racial representation behind a façade of "holistic" evaluations, to bury or refuse to keep data on the use of race in their decisions, and to manipulate their definitions of "critical mass" in order to justify continuing preferences. Deference to the "good faith" of administrators in applying racial diversity likewise makes it more difficult to "smoke out" improper uses of race in admissions. *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Such an easily abused and misguided interest in racial diversity is not compelling and administrators should not be given deference in the pursuit of that interest. Rather, this Court should overrule those aspects of *Grutter* that accept racial diversity as a compelling interest and reinstate a faithful application of traditional, and highly skeptical, strict scrutiny to the use of race in UT's admissions process, and more generally to racial classifications in education.

ARGUMENT

I. Racial Diversity Programs Continue a Long History of Invidious Discrimination Against Asian Americans.

Efforts to manipulate the racial composition of schools necessarily come with a steep cost – borne in the first instance by individuals on the wrong side of the racial balancing act because their racial groups lack political or social clout. Schools in general, and highly competitive universities in particular, have a limited number of slots. Every slot allocated to someone who would not have been admitted but for their race is a slot *denied* to someone else who would have been admitted but for their race. The costs of such racial gerrymandering fall not merely on members of a supposedly privileged racial majority, but on individuals belonging to *any* non-preferred or "over-represented" race that must be displaced in order to increase the numbers of a preferred or "under-represented" race or ethnicity. UT's current racial diversity efforts exact just such a cost and discriminate against Asian Americans.

Asian Americans have long been the victims of racial discrimination in education and elsewhere. Early on they were excluded from schools based on derogatory racial stereotypes of inferiority. Lately it seems their numbers are being limited because they would make up too large a percentage of certain schools if Asian-American individuals were judged solely by their individual qualifications and qualities. Neither excuse can justify judging individuals by the color of their skin.

A. Racial Diversity Programs Discriminate Against Asian-American Individuals by Treating Them as Members of an Overrepresented, and Hence Disfavored, Race.

The origin and structure of UT's racial-preference program reveal that a core purpose and goal of that program is to increase admissions of underrepresented minorities and to make the racial composition of the student body more closely approximate the racial composition of the State. In its proposal to adopt the race-based admissions policy under review in this case, UT asserted that "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission."[2] UT claimed that the mismatch in demographics meant that its students were "being educated in a less-than-realistic environment that [was] not conducive to training the leaders of tomorrow." Pet. App. 49a-50a (citation omitted).

The racial composition of Texas as of the 2010 Census was:

45.3% Non-Hispanic Whites;

37.6% Hispanic;

11.8% African American; and

3.8% Asian American.

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[2] *Proposal to Consider Race and Ethnicity in Admissions* at 24 (June 25, 2004) (hereinafter "2004 Proposal"). Supp. Joint App. ("SJA") 24a.

http://en.wikipedia.org/wiki/Demographics_of_Texas.[3]

The racial demographics of UT in 2010, however, was:

52.1% Non-Hispanic White;

17.6% Hispanic;

4.5% African American; and

15.9% Asian American.

University of Texas at Austin Accountability Report, January 2012, at 2 (available at http://www.txhighereddata.org/Interactive/Accountability/UNIV_Complete_PDF.cfm?FICE=003658).[4]

Having defined mismatched racial composition as detrimental to UT's mission, the inevitable and intended function of UT's racial preference program is to correct that mismatch; admitting more students of "underrepresented" races and fewer students of "overrepresented" races. At UT, therefore, the goal of "realistic" racial demographics means racial preferences are necessarily used to try to increase the percentage of Hispanics and African Americans and to decrease or limit the percentage of Whites and Asian Americans.

UT's representational goal is corroborated by its treatment of Hispanics and African Americans, but not Asian Americans, as underrepresented minorities. Pet. App. 126a n. 5 (D.Ct. Opinion) ("UT does not consider Asian-American students to constitute an underrepresented minority at the University."). Indeed, under UT's theory of reproducing a demographically "realistic" environment, Asian Americans – a demographic minority long subject to racial discrimination – are necessarily viewed as *over*represented at the University. As such, the race of Asian-American applicants can serve only as a thumb on the scales against them – their potential presence in the class filling spots that could otherwise go to students from underrepresented races.

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[3] Those racial categories account for 98.5 percent of the population of Texas, with small percentages of Native Americans, Pacific Islanders, and other groups filling out the mix.

[4] This figure includes 0.2% of multi-racial students where one part of the racial mix is African American. *Accountability Report* at 2.

Data from affirmative action programs around the country and the empirical experience in Texas, Florida, and California confirm that the inevitable result of race-conscious admissions policies is to discriminate against Asian-American students.

A 2005 study by Thomas Espenshade and Chang Chung of Princeton University attempted to quantify the effects of race-conscious admissions policies in 1997 at several elite universities and reached a deeply troubling conclusion. Controlling for numerous factors, their study found that, all other things being equal, race-conscious admissions policies provided African-American applicants the "equivalent of 230 extra SAT points (on a 1600-point scale)" and 185 extra points to Hispanic applicants relative to White applicants. Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOCIAL SCI. QUARTERLY 293 (June 2005).

Asian-American applicants, by contrast, faced the equivalent of a 50-point *penalty* relative to White applicants. *Id.* at 293-94. The net penalty for Asian Americans under those race-based diversity programs, therefore, was 280 SAT points relative to African-American applicants and 235 points relative to Hispanic applicants. In other words, under race-based admissions policies, Asian-American applicants face a 235- to 280-point higher admissions hurdle than Hispanic and African-American applicants and a 50-point higher admissions hurdle than White applicants solely because of their race.

The study further concluded that eliminating racial preferences (both positive and negative) would result in a 33% increase in Asian Americans admitted to these schools (an increase from 23.7% to 31.5%, or 7.8%, of admitted students). *Id.* at 297-99. In the group of 45,549 applicants and 9,988 admitted students who were studied, that translates to 772 Asian-American applicants who were denied admission because of their race. And that was for just *three* universities in one year.[5]

A 2008 study out of the University of Florida sought to test the predictions of Espenshade and Chung by looking to the real-world results in California, Texas, and Florida during the time period surrounding the elimination of race-based preferences in those States. David R. Colburn, Charles E. Young & Victor M. Yellen, *Admissions and Public Higher Education in California, Texas, and Florida: The Post-Affirmative Action Era*, 4 INTERACTIONS: UCLA J. OF EDUC. AND INFORMATION STUDIES (2008) (available at http://escholarship.org/uc/item/35n755gf). Looking at freshman enrollment patterns from five universities in those States from 1990 to 2005, they concluded that "Asian-American students in California were the major beneficiaries of" eliminating race-based admissions policies in California, making substantial gains in admittance at the three top University of California schools. *Id.* at 10-12. Asian Americans likewise made significant, though somewhat smaller, gains in Texas and Florida, with their gains limited to some extent by the smaller Asian populations in those States and by the impact of alternative programs – the top 10% program in Texas and a similar top 20% program in Florida – adopted to mitigate the effect of eliminating race-based affirmative action.[6] The authors ultimately determined that "[o]ur conclusions underscore much of what Espenshade and Chung (2005) and others have argued." *Id.* (abstract).

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[5] The impact on White applicants of eliminating all racial preferences was a 2.4% increase in Whites admitted (an increase from 51.4% to 52.8%, or 1.4%, of admitted students), translating to 122 students denied admission because of their race. *Id.* at 297-99. Whatever the total numbers for different racial *groups*, however, the impact on *individual students* denied admission because of their race is exactly the same – they suffer racial discrimination, are demeaned as individuals, and are denied the equality and dignity this country rightly claims are the entitlement of all persons, regardless of race.

Professor Espenshade and another colleague returned to the issue of racial preferences and "recently completed an extensive examination of how much weight is placed on applicants' many characteristics in the elite private university admission process." Thomas J. Espenshade & Alexandria Walton Radford, *Evaluative Judgments vs. Bias In College Admissions*, FORBES.COM, Aug. 11, 2010 (available at http://www.forbes.com/2010/08/01/college-admissions-race-politics-opinions-best-colleges-10-espenshade-radford.html). The more recent evidence is that race now seems to play an even larger role:

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[6] Looking at additional schools in States that maintained their race-based admissions policies, the authors found that the results from that "control group reveal that their racial and ethnic diversity numbers remained relatively constant throughout [the same period] as compared to those for the California, Florida, and Texas universities." *Id.* at 17.

> Measured on an all-other-things-equal basis, black applicants have an admission advantage compared with whites equivalent to 310 SAT points (on the old 1,600-point scale), while the advantage for Hispanic candidates is 130 points. Asian-American applicants face a disadvantage of 140 SAT points. This means that Asian students have to have an SAT score 450 points higher than otherwise similar black applicants to have the same chance of being admitted.

Id.

This extensive evidence confirms that race-based admissions policies, at UT and around the country, exact a heavy toll on, and operate as a racially discriminatory barrier to entry for, Asian-American students.[7]

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[7] That the total number and percentage of Asian Americans have in fact increased at UT in the last ten years says little about UT's treatment of Asian Americans, other than that its efforts at racial balancing are less effective that it would like (or might have been throttled back in recent years due to the pendency of this litigation). It also might well reflect that many Asian Americans in Texas go to public school and may benefit

B. Discrimination Against Asian-American Individuals in Order to Benefit Other Races Is Odious and Demeaning to Individual Students.

It is *amici*'s firm conviction that the use of race to judge individuals is odious and particularly offensive when done by the government. *See Shaw* v. *Reno*, 509 U.S. 630, 643 (1993) ("[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'") (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)).

Defenders of race-based admissions policies perhaps take comfort in imagining that current racial preferences merely make up for past racial discrimination – a claim not seriously advanced by respondents in this case – and that the students injured thereby are merely Whites who have unfairly benefited from past discrimination. By themselves those excuses merely mirror the offensive treatment of current students as representatives of their race, rather than as individuals. With respect to racial preferences that work to the detriment of Asian-American students, however, those excuses are doubly offensive – treating them as racial avatars and ignoring the

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from the Top Ten program. But that would mean only that the racial preferences and discrimination applied to students who are not in the top 10% of their classes must be even more aggressive in order to supplement or mitigate the effects of that program. The racial bar for Asian Americans who do not conform to the academic stereotypes of model-minority overachievers thus would be even higher in order to limit what UT views as an already overrepresented race.

long and ugly history of racial discrimination against Asian Americans.

Asian Americans have long been subject to overt racial discrimination in this country. In the 1800s and 1900s, individuals of Chinese descent were disparagingly viewed as faceless members of a "yellow horde" and subject to numerous racist restrictions purporting to serve the greater public good. Such restrictions extended to numerous areas of life and business. *See, e.g.*, Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982). Restrictions on Chinese Americans were so common and oppressive that they gave rise to the expression "a Chinaman's Chance," a phrase meaning "having little or no chance of succeeding." *News Watch Diversity Style Guide*, *at* http://www.ciij.org/publications_media/20050321-133409.pdf.

Such overt discrimination likewise took place in education. Chinese-American children were excluded from public schools or forced into segregated schools. *Ho* v. *San Francisco Unified Sch. Dist.*, 147 F.3d 854, 864 (CA9 1998) (describing public school discrimination and segregation targeting Chinese-American children in San Francisco and elsewhere); *see generally*, Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 207-208 (May 1998).

In fact, although it is not widely recognized, Chinese-American schoolchildren were some of the earliest victims of "separate but equal" jurisprudence as it related to education. *See Wong Him* v. *Callahan,* 119 F. 381, 382 (C.C.N.D. Cal. 1902) (denying a child of Chinese descent the right to attend his neighborhood school in San Francisco, holding that the more distant "Chinese" school was "separate but equal"); *Gong Lum* v. *Rice,* 275 U.S. 78, 87 (1927) (applying separate-but-equal doctrine of *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), to deny a nine-year-old Chinese-American girl in Mississippi entry to a "white" school because she was a member of the "yellow" race).

Only through vigorous and repeated resort to the Equal Protection Clause has such discrimination been kept even partially at bay, most famously in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which held that Chinese Americans were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance.[8]

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[8] *See also Ho Ah Kow* v. *Nunan*, 5 Sawy. 552 (C.C.D. Cal. 1879) (invalidating San Francisco's infamous "Queue Ordinance" – which forced Chinese-American prisoners to cut off their long ponytails or "queues" – on equal protection grounds); *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880) (striking down prohibition on Chinese Americans fishing in California waters); *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880) (declaring unconstitutional a California constitutional provision that forbade corporations and municipalities from hiring Chinese); *In re Lee Sing*, 43 F. 359 (C.C.D. Cal. 1890) (striking down "Bingham Ordinance," which mandated residential segregation of Chinese Americans); *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898) (holding that Chinese-American boy, born in San Fran-

Likewise in education, Asian Americans have long been forced to rely on the Equal Protection Clause to combat repeated efforts at discrimination. For example, in *Tape* v. *Hurley*, 66 Cal. 473, 6 P. 129 (1885), the court had to order San Francisco public schools to admit a Chinese-American girl who was denied entry because public schools were not open to "Mongolian" children. *See* McClain, *In Search of Equality*, at 137. In response, the California legislature authorized separate "Chinese" schools to which Chinese-American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864; *see also* Kuo, 5 ASIAN L.J. at 207-208 (discussing "Chinese" segregation).

This Court itself has not been unmindful of the discrimination in education faced by Asian Americans and the essential role of the Fourteenth Amendment in combating that discrimination. In *Lee v. Johnson*, 404 U.S. 1215, 1215-16 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry * * * was the classic case of *de jure* segregation involved in *Brown* v. *Board of Education*, 347 U.S. 483 [1954] * * *." This Court recognized that "*Brown* v. *Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco." *Lee*, 404 U.S. at 1216 (citing *Yick Wo* v. *Hopkins*, 118 U.S. 356).

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cisco, could not be prevented from returning to the city after a trip abroad).

Notwithstanding repeated resort to the Fourteenth Amendment and the courts, discrimination against Asian Americans, particularly in education, has continued well into modern times, though often glossed over with more creative claims to be acting in the public interest. *See* David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer,* 16 HARV. BLACKLETTER L.J. 39, 54 (Spring 2000). In the 1998 *Ho* case, for example, Chinese Americans were still battling express racial quotas limiting the percentage of Chinese students in any individual San Francisco public school, including magnet schools. *Ho,* 147 F.3d at 857. For the Chinese-American students who made up a substantial percentage of the student population throughout the city and of students eligible for certain selective magnet schools, such racial caps had a severe and negative impact. John C. Yoo & Eric M. George, *When Desegregation Turns Into Discrimination,* WALL STREET J., May 26, 1998 (available at http://www.law.berkeley.edu/faculty/yooj/professional/writings/lowell.html).[9] While the *Ho* case was settled after an appellate ruling made it obvious that the School District would be unable to satisfy strict scrutiny of their racial restrictions, there is little doubt that many cities and States will resume such racially discriminatory policies if they believe this Court's jurisprudence will allow it. This case thus can be either the starter's gun or the death knell for more aggressive anti-Asian racial restrictions in education in the future.

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[9] *See also* Lawrence Siskind, *Racial Quotas Didn't Work in SF Schools,* SAN FRANCISCO EXAMINER (July 6, 1994) (at http://heather.cs.ucdavis.edu/pub/AffirmativeAction/Siskind.html) ("In 1993, Chinese-American applicants [to San Francisco's 'academically preeminent Lowell High School'] were required to score 66 out of a perfect 69 to gain admittance. 'Other Whites' and several other groups could qualify with a 59; blacks and Spanish-surnamed, with a 56.")

The admissions data discussed in the previous section also shows that discrimination against Asian Americans continues. The higher bar for admissions imposed on Asian-American applicants at selective colleges and universities may not be based on racist notions of Asian inferiority as was past discrimination, but it is still based on offensive racial stereotypes regarding the academic prowess, but supposedly uninteresting and fungible sameness, of Asian Americans. *See, e.g.*, Daniel Golden, *The Price of Admission* 201 (1997) (describing a Dean of Admissions as stereotyping a Korean-American applicant as looking "like a thousand other Korean kids with the exact same profile of grades and activities and temperament" and as "yet another textureless math grind").

In fact, much of the current discrimination against Asian-American students – particularly when done in the name of increasing racial diversity – painfully echoes the treatment of Jewish students in the 1920s through the 1950s. In the 1920s, Harvard College and other prominent universities reacted to the perceived "over-representation" of Jews in their student bodies by setting up informal quotas and other restrictive policies that persisted through the 1950s.[10]

Those institutions argued that their diversity schemes brought benefits to all and would lessen ethnic tension. "Harvard initiated its diversity discretion program to decrease the number of Jewish students; President Lowell of Harvard called it a 'benign' cap, which would help the University get beyond race." Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability Of Dworkin's Defense Of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 36 (1996). No matter how lofty the stated purpose, however, these race-based admissions programs injured individuals by singling them out for unequal treatment. "In the 1930s, it was easier for a Jew to enter medical school in Mussolini's Italy than in Roosevelt's America." Siskind, *Racial Quotas Didn't Work in SF Schools, supra* at 17 n. 9.

Today, "Asian Americans are the new Jews, inheriting the mantle of the most disenfranchised group in college admissions." Golden, *The Price of Admission* at 199-200.

This Court repeatedly has warned that "[c]lassifications based on race carry a danger of stigmatic harm," may "promote notions of racial inferiority," and threaten "to incite racial hostility." *Croson*, 488 U.S. at 493; *Shaw*, 509 U.S. at 643. Once again, the Asian-American experience bears out this concern.

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[10] *See* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws*, 66 BROOK. L. REV. 71, 111-12 (2000); Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 385-399 (1979); Nathan Glazer, *Diversity Dilemma*, THE NEW REPUBLIC (June 22, 1998) (available at http://www.tnr.com/archive/0698/062298/glazer062298.html).

In San Francisco, for example, discrimination against Asian-American schoolchildren led to precisely the type of stigmatization this Court warned against in *Croson* and *Shaw*. In connection with the *Ho* case challenging San Francisco's racial quota system, newspapers widely reported the shame and anger felt by children targeted by the racial quotas. As stated by the parent of one "Chinese" youth turned away because of his ethnicity, "[h]e was depressed and angry that he was rejected because of his race." Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, SAN FRANCISCO EXAMINER (Feb. 14, 1999) (available at http://www.sfgate.com/cgi-bin/article.cgi?f=/e/a/1999/02/14/METRO13421.dtl&ao=all). "Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?" *Id.*

Asian Americans familiar with the situation in San Francisco, including *amicus* AALF's own Lee Cheng, have testified regarding the emotional fall-out from discrimination against Asian Americans in education:

> Many Chinese-American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

Lee Cheng, *Group Preferences and the Law*, United States H.R. Sub-Comm. on the Constitution, Hearings (June 1, 1995) (available at http://judiciary.house.gov/legacy/274.htm).[11] Many Asian-American students are unwilling to state their race at all on college applications or, if of mixed heritage, will self-identify with their non-Asian parents.[12]

These very real and personal examples of stigmatization and injury to Asian-American students excluded from schools because of their race confirm and illustrate this Court's recognition that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities." *Rice* v. *Cayetano*. 528 U.S. 495, 517 (2000). Glossing over racial discrimination as an attempt to create racial diversity, or to mirror the state population as an educational tool, alters the demeaning and stigmatizing qualities of such discrimination not one bit.

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[11] Indeed, *amicus* AALF had its inception largely as an outgrowth of the need to bring about the *Ho* case, and its founders played an instrumental role in bringing that challenge. They have personally lived through and been affected by the discriminatory laws and policies in San Francisco and California that limited Asian-American enrollment and made it more difficult for Asian Americans to gain entry into quality academic institutions such as Lowell High School in San Francisco, U.C. Berkeley, U.C. Hastings School of Law, and U.C. Berkeley-Boalt Hall School of Law. The matters raised in this brief are not merely debating points for this Court; they are a product and reflection of the personal experience of individuals who know precisely what it is like to be discriminated against because of their race or ethnicity.

[12] Rich Lowry, *Hiding their Race: Asians' new college fear*, NEW YORK POST (ONLINE), Dec. 16, 2011 (http://www.nypost.com/p/news/opinion/opedcolumnists/hiding_their_race_sKvjDf84vh22J21Ri7DDNK); *Some Asians' College Strategy: Don't check "Asian."* USA TODAY (ONLINE), Dec. 3, 2011 (http://www.usatoday.com/news/education/story/2011-12-03/asian-students-college-applications/51620236/1).

The Asian-American experience with racial discrimination – both past and present – should cast a far less benign light on current efforts to impose skin-deep diversity rather than to strive for genuine, non-race-based, individual diversity. Although UT's current foray into racial gerrymandering is framed in high-minded educational terms and prefers other minorities rather than the majority White race, it nonetheless continues to group individuals, including Asian Americans, based on race, and to tilt the scales against members of that historically disadvantaged group when they are deemed overrepresented in schools. But there is no "correct" proportion of racial representation in schools; only such individual diversity as varied accomplishment and personal qualities produce. Racial discrimination remains odious no matter the excluded student's race, and is an especially bitter pill when applied to Asian Americans, who constitute a minority without significant political influence and have been subject to a long and continuing history of such discrimination by those with greater political clout.

This Court has been mindful of the wrongs done to Asian Americans in the past, should continue to be mindful of the discriminatory costs of racial diversity efforts in the present case, and should reject UT's scheme to categorize and gerrymander students by race.

II. Diversity Is Too Malleable and Slippery an Interest to Be Accepted as "Compelling" or Left to the "Good Faith" of Those Who Would Judge People, Even in Part, Based on Their Race.

In *Grutter*, 539 U.S. at 333, 337, this Court accepted the proposition that racial diversity was a compelling state interest that justified racial preferences if such preferences were buried within a broader "holistic" set of admissions policies directed at achieving an undefined "critical mass" of certain minority students. That holding encouraged racial gerrymandering so long as it was sufficiently concealed rather than blatantly overt, erroneously attributed to racial diversity the beneficial qualities of individual diversity, and encouraged ongoing and disingenuous manipulation by universities and the courts. This Court should disavow *Grutter*'s holding that *racial* diversity is a compelling interest and the lax standard of review that has evolved from that case. It should reinstate a faithful application of traditional strict scrutiny to racial classifications in education.

A. Attempts to Make Universities Look Like Society Are Just the Latest Excuses for Proportional Racial Representation and Quotas.

It is the current and correct wisdom that racial quotas are constitutionally unacceptable. *Grutter*, 539 U.S. at 330, 334. Overtly enforcing a particular racial composition of the student body presumably would be struck down by this Court without hesitation, regardless of any claimed benefits. However, where the goal and means of racial balancing are hidden behind the façade of a "holistic" admissions program, justified by impossible-to-disprove educational claims, and are less immediate in reaching any final balance, they apparently receive a pass. *Id.* at 318-19, 337.

Such distinctions between overt and obscured racial balancing in the name of "diversity," however, are illusory where a university is given a presumption of acting in good faith in its use of race, and its supposed educational judgments are never second-guessed. Pet. App. 34a-37a (court of appeals decision). And where universities are also allowed to define the "critical mass" for various races as equivalent to the percentage of those races in the population at large, Pet. App. 40a-42a, 49a-51a, the distinction disappears entirely. Far from promoting genuine diversity – which is a function of individual qualities, abilities, experience and interests – using racial demographics as the yardstick for diversity merely masks racial stereotyping and appropriates the language of diversity for the far less noble goal of proportional racial representation.

The perversion of the otherwise worthwhile goal of "diversity" and of this Court's critical mass theory as justification for race-based admissions can be seen in the structure and implementation of UT's racial diversity program.

In addressing the critical mass argument in their 2004 proposal, UT expanded their argument to include the claim that individual classes, rather than the University as a whole, had insufficient underrepresented minorities to cure racial isolation or generate sufficient interaction among the races. Pet. App. 21a-23a. But UT's disparate treatment of Asian Americans and Hispanics shows this argument to be a make-weight excuse for furthering its overarching goal of causing the racial composition of the school to reflect that of the State.

While UT's analysis of 2002 classes containing between 5 and 24 students revealed that 43% had only one or no Hispanic students, it also showed that 46% had had only one or no Asian-American students. Pet. App. 21a. Limiting that analysis to classes containing between 10 and 24 students similarly showed that 37% had only one or no Hispanics, whereas 41% had only one or no Asian Americans. Pet. App. 22a. The evidence below likewise showed that in 2008, the gross numbers and percentage of Hispanic students at UT exceeded that of Asian Americans. Pet. App. 154a-155a & n. 10; *see also 2012 Accountability Report* at 2 (in Fall of 2010 Hispanic students were 17.6% and Asian Americans 15.9%; in Fall 2011 Hispanic students were 18.2% and Asian Americans 16.2%).

Notwithstanding the favorable comparison of Hispanic presence at UT and Asian-American presence, the University views Hispanics, but not Asian Americans, as having failed to reach a critical mass and thus as entitled to racial preferences. The reality is that, by any objective standard, *both* groups have achieved the "meaningful representation" necessary to produce substantial educational benefits. *Grutter*, 539 U.S. at 319. This inevitably leads one to question whether UT's view of critical mass itself varies according to race, whether UT is simply indifferent to the harms from a supposed lack of a critical mass when it comes to Asian Americans, or whether discussion of critical mass is merely subterfuge for the different goal of proportional racial representation. The latter answer is the most plausible given that UT applies its program only to "underrepresented minorities," which the district court recognized "necessarily involves the comparison of a minority group's representation at a university to its representation in society." Pet. App. 155a.

Given that UT expressly describes the difference between the racial composition of the State and the racial composition of the school as interfering with its mission, *see supra* at 7, there can be little doubt of its intent to use racial preferences as long and as much as necessary to eliminate that compositional difference, regardless of any genuine notion of achieving some critical mass of minority students.

In the end, using variance from the racial composition of the State as the yardstick for inclusion in a race-based admissions policy, and having elimination of the variance as the program's goal, is not meaningfully different from setting any other quota or racial balance. That UT has chosen to achieve this balance through incremental and less efficient uses of race rather than a forced percentage system does not change the essential nature of the quota imposed – it just means it will take somewhat longer to implement.[13]

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[13] The notion that race plays only a minor role in admissions as part of a "holistic" evaluation deserves little credence where UT's express goal is a particular result and a particular racial balance mirroring that of the State. In early efforts, race may impact only a handful of admissions decisions for students who

But as long as the school's educational mission is viewed as requiring student exposure to a racial mix mirroring that of the State itself, race will always be decisive for each incremental step towards that goal.

B. Efforts to Generate Racial Diversity Lump Individuals into Misleading Racial Groups and Undermine Genuine Diversity.

Using race-based admission policies to attempt to replicate the racial composition of a State has the further and obvious problem of treating individuals as largely fungible representatives of broad racial and ethnic categories. Such categorizations – even if playing only a partial role in admission decisions – rely on racial stereotypes regarding the perspectives

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are all close to the admissions line, but when that fails to achieve the requisite "diversity" in racial composition, it will necessarily play an ever-increasing role until the desired balance is achieved. (Indeed, the recent restriction of admissions under the Top Ten Percent program to 75% of admissions, Pet. App. 19a n. 56, seems precisely such an effort, increasing the number of slots subject to racial preferences in order to compensate for slow progress toward UT's racial composition goals.)

That UT claims its admissions officers do not track the racial balance of any given class during the admissions process, Pet. App. 32a-33a. does not mean they do not track the results of the previous years and the overall composition of the school. Knowing that their efforts the previous year fell short of the stated diversity goal, they will necessarily increase the weight accorded to race the following year. *See also*, Pet. App. 4a (discussing 5-year reviews addressing "an ever-present question of whether to adjust the percentage of students admitted under" UT's racial preference program). That they cannot track their results in real time, but only after the fact, only makes the process less efficient – it does not change the goal of a particular racial composition or the increased role of race when that goal is not reached.

and "diversity" value that different races bring to the table and are poor proxies for genuine diversity based on individual differences.

Once again, the Asian-American experience tellingly illustrates the fallacy of treating racial balancing as a proxy for diversity. While historically treated as either a faceless "yellow horde," or lately as a uniformly successful, though bland, "model minority" Asian Americans are in fact a highly heterogeneous group coming from numerous countries and widely varied ethnic, cultural, intellectual, economic, and political backgrounds.

The catch-all category of Asian Americans includes individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population. Glenn Ryan DeGuzman, *The Impact of the Model Minority Myth in Higher Education*, 7 J. STUDENT AFF. 85, 88 (1998). Many have been in the United States for generations. Others are recent immigrants or the first generation children of immigrants. Different people and families came to the United States to escape communism, authoritarianism, war, poverty, or simply to seek the greater opportunities available in this country. Some come from highly educated backgrounds, many others not so much. Golden, *The Price of Admission* at 204. Some come from cultures that aggressively promote education, others from cultures that take a less demanding approach (not every Asian child has a "Tiger Mom"). They are of a wide range of religions, including Christians, Muslims, Buddhists, Jews and many others. The only true commonality among Asian

Americans is that they are all now Americans, and are here because they, their parents, and their ancestors believed that the United States would afford them and their descendants a better life, greater opportunity, and the blessings of liberty.

Given the tremendous variation within the artificial category of Asian American, it is absurd even to discuss whether that catch-all group is "overrepresented" at UT or any other university. It is equally absurd to imagine that any given percentage of Asian Americans exhausts that group's contribution to the diversity of a university setting. As already noted, any true diversity depends on individuals, not the racial groups to which they belong. But even at the group level, surely the perspectives and experiences of Indian-American students may differ from those of Japanese-American students; Vietnamese-American students may have different perspectives from Chinese-American students; and even Chinese-American students from mainland China and from Taiwan, may have highly diverse viewpoints on geopolitical and socioeconomic issues. Using racial stereotypes to imagine that all Asian Americans are representative of the others, provide fungible contributions toward diversity, and hence may be treated as overrepresented and unnecessary additions to diversity is both inaccurate and offensive.[14]

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[14] It is likewise inaccurate to imagine that any and all Asian Americans are fungible when it comes to the goal of having a critical mass of minority students. One might reasonably wonder whether students of Korean and Japanese heritage would take comfort in each other's presence given the historic difficulties between those countries and peoples. Likewise with Indian

Such erroneous amalgamation of Asian Americans into a single stereotyped group also disserves the overwhelming portion of Asian Americans who, not surprisingly, do not in fact conform to the "model minority" stereotype. Most Asian Americans are not mechanistic overachievers. Many live in poverty. Golden, *The Price of Admission* at 204. Many do not have access to educational opportunities or have Tiger Moms to drive them. But the "model minority" stereotype of high-achieving Asians – particularly when used to raise the standards by which Asian-American applicants are judged – does an even greater disservice to such individuals by making it virtually impossible for an "average" or disadvantaged Asian American to compete with others who are held to a lower standard. Whatever discriminatory obstacle a several-hundred-SAT-point penalty creates for a gifted and academically successful Asian-American student, it poses a potentially insurmountable barrier for the many more Asian-American students who have the potential to do well, but may not reach the pinnacle of the academic curve.

Indeed, stereotype-driven barriers for Asian-American students hit particularly hard against the many Asian-American individuals and groups at the low end of the economic curve who will have their own set of perspectives that would differ considerably from others in their forced racial grouping. Grouping Asian Americans by race thus tends to disadvantage

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and Chinese students, or other disparate or even antagonistic pairings. In the end, students can and should find comfort in the common quality of individuality among their classmates, not in superficial or forced groupings based on race.

the economically poorer individuals within that group and make economically homogenous those Asian Americans admitted.

Because *racial* diversity inevitably substitutes superficial qualities and stereotypes for genuine consideration of individual diversity, it is a poor candidate for a compelling interest and a poor justification for the use of race in admissions.

C. Current Jurisprudence on Diversity Merely Encourages Universities to Be Disingenuous in Their Use of Race.

Apart from the intrinsic flaws in the very notion of racial diversity as a substitute for individual diversity, *Grutter*'s racial diversity interest and seeming dilution of traditional strict scrutiny of racial classifications create substantial incentives for school administrators to be disingenuous regarding the true scope and significance of race and racial preferences in admissions decisions and the need and rational for using race at all.

Thus, in this case, UT has gone out of its way to obfuscate the quantity or degree of preference that results from using race. It hides it in the guise of a holistic evaluation, never saying – and keeping no records regarding – whether any given student would have been accepted but for the use of race. Pet. App. 32a-33a. UT likewise goes to some effort to pretend that admissions decisions are not made with an eye toward – or even an awareness of – the racial composition of a particular admissions class. *Id.* But surely that claim obfuscates the role race actually plays in admissions. The express goal of the program is to increase the number and percentage of certain underrepresented races, and UT routinely measures its success or failure in advancing toward that goal.

The ill-defined nature of diversity and critical mass likewise encourages disingenuousness. As discussed above, where the total numbers of Hispanics seemed to be easily above a critical mass for UT as a whole, the University has adjusted its denominator to be that of individual classes and whether a critical mass has been achieved in those. We are not told what percentage of classes must be diverse in order to reach a critical mass, and that too may well be a moving target. In short, this Court's unwillingness or inability to objectively define the key concepts of diversity as a compelling interest simply invites universities to read whatever they want onto those concepts, so long as they provide lip service to the relevant buzz-words found in the cases.

The lack of well-defined and testable legal standards in an area as fraught with danger as the use of race by the government simply encourages and permits subterfuge and circumvention of the constitutional requirement of equality under the law. It damages this Court's jurisprudence and harms the credibility of our nation's educational and legal systems.

D. This Court Should Return to Genuine Strict Scrutiny and Reject Racial Diversity as a Compelling Interest.

Because the racial diversity rationale for race-based decisions is unworkable and harmful, this Court should overrule that aspect of *Grutter* and return to the strict scrutiny of cases such as *Adarand* and *Croson*. In *Adarand*, this Court correctly recognized that government use of race is always "suspect" and should be viewed with "hostility." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). And in *Croson* it correctly observed that the very purpose of applying strict scrutiny to government use of race "is to 'smoke out' illegitimate uses of race." 488 U.S. at 493. For those reasons this Court has repeatedly held that the burden of proving that the challenged program is narrowly tailored to address a compelling government interest rests firmly on the proponent of the race-based program. *See Johnson* v. *California*, 543 U.S. 499, 505 (2005).

The opinion in *Grutter*, and the broad application of that opinion by the court below, ill serves these fundamental principles and protections. Rather than being skeptical and hostile, the court of appeals' application of *Grutter* to UT's race-based program and justifications was accepting, uncritical, and deferential. As Judge Garza pointed out in his concurrence, Pet. App. 72a-73a, the fault lies as much in this Court's *Grutter* opinion as it does in the court of appeals' expansive application of that case. But one thing is certain from the decision below – neither *Grutter* nor that decision does justice to the personal nature of the right to Equal Protection, a right that vests solely in the individual, not in a group. *See Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948); *Adarand*, 515 U.S. at 227.

In addition, this Court should make clear that even assuming a well-meaning desire for diversity – which in its non-racial forms is both laudable and permissible – there is no equal protection exception for the "good motives" of a state actor and there are no "benign" racial classifications. *Adarand*, 515 U.S. at 226. Throughout history proponents of racial classifications routinely justified their restrictions with appeals to the public good and claims of the great benefits from or necessity for racial classifications. However, over time each of those claims has been rejected as contrived, overstated, or simply inadequate to warrant the use of race by the government.

In *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), the Court accepted the view of society that, even though all persons were equal before the law, the public good allowed the use of "distinctions based upon color." The lone dissenter, Justice John Harlan, wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. * * * In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case * * * ." *Id.* at 559. History proved Justice Harlan to be right.

In *Brown* v. *Board of Education*, 347 U.S. 483 (1964), this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia and South Carolina that black and white children learned better in a single-race environment, and for societal purposes could be kept separate by state mandate. Expressly rejecting any contrary findings regarding "psychological knowledge" made in *Plessy v. Ferguson*, the Court found that use of race produces a "sense of inferiority." *Brown*, 347 U.S. at 494-95.

Similar claims of public interest and necessity were used by the military to justify Japanese internment during World War II. and racial segregation of the armed forces. *Korematsu* v. *United States*, 323 U.S. 214 (1944); *see Watkins* v. *United States Army*, 875 F.2d 699, 729 (CA9 1989) (Norris, J., concurring in the judgment) ("As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale."), *cert. denied*, 498 U.S. 957 (1990). Those claims, too, proved overblown, unsupported, and inadequate to justify the racial policies of their day. *Hirabayashi* v. *United States*, 828 F.2d 591 (CA9 1987); *See Korematsu* v. *United States*, 584 F. Supp. 1406, 1416, 1420 (N.D. Cal. 1984).[15] This Court should bear firmly in mind that the vigorous, and perhaps even heartfelt, rationales for the use of race in every generation have been viewed far less favorably with the passage of time.[16] Rather than repeat history, we should learn from it and be skeptical from the outset of claims – whether by government, academics, or putative experts – that the latest interest offered up is finally important and genuine enough to justify the use of race. In time, *Grutter* will be seen as the *Plessy* of its generation. Rather than wait 58 years this time, this Court should expeditiously reject racial diversity as a compelling interest and overrule its holding in *Grutter* to the contrary.

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[15] Just as with the military's overblown justification for racial discrimination during World War II, so too the military's claim that racial preferences are needed to help the military today should be viewed with skepticism. *See Grutter*, 539 U.S. at 331. The military also once used military necessity to justify its efforts to continue segregation. The military's various claims regarding the use of race to enhance its operations have never stood the test of time, and there is no reason to believe that its more recent arguments in support of racial classifications will do so either.

[16] Indeed, some Asian Americans themselves believe that racial preferences – properly calibrated—can help Asian Americans. That view, however unlikely to bear fruit, is both shortsighted and unprincipled. Indeed, it is reminiscent of arguments by some African Americans that segregation benefited certain segments of African-American society and should be accommodated. That view was discredited then for African Americans and so too should it be now with Asian Americans. Re-

* * * * *

In case after case, the single historical truth that emerges from the Asian-American experience is that the rights of American citizens of Asian descent – and of all Americans – have been vindicated only by strict application of the Fourteenth Amendment's protection of individual rights, applying a "hostile" standard of "strict scrutiny" to the government's use of race. The Fifth Circuit's ready acceptance of UT's racial diversity rationale and application of a deferential "good faith" standard ignores what history has taught us, flies in the face of both the Constitution and this Court's seminal jurisprudence on race, and, if allowed to stand, will continue to result in unacceptable racial discrimination against Asian Americans and others.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

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gardless of the effect on admissions rates, racial classifications discriminate against Asian Americans and should not be tolerated. There is no benign racial discrimination.

Respectfully submitted,

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Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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INTEREST OF *AMICUS*[1]

Founded in 1900 to improve the legal profession through legal education, the Association of American Law Schools (AALS) is a non-profit association of 176 public and private law schools.[2] The core values of the AALS shape the efforts of the Association as well as define the obligations of its member schools. AALS Bylaw § 6-1. These values emphasize both excellent teaching (across a rigorous and dynamic curriculum) and scholarship, noting its relationship to the creation and dissemination of knowledge. The core values also embody other commitments, including diversity of viewpoints and of people. Member schools commit to support all of these objectives in an environment free of discrimination and rich in diversity among faculty, staff and students. The core values are framed by the idea that institutional autonomy should be honored whenever possible because wide latitude will encourage the development of strong and effective educational programs and learning communities. The core values combine to provide an environment where students have the opportunity to study law in an intellectually vibrant institution capable of preparing them for professional lives as lawyers instilled with a sense of justice and an obligation of public service. The AALS values and expects its member schools to value "selection of students based upon intellectual ability and personal potential for success in the study and practice of law, through a fair and non-discriminatory process designed to produce a diverse student body and a broadly representative legal profession." AALS Bylaw § 6-1.b.(v). Thus, among other things, the AALS requires that member schools "seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex." *Id.* § 6-3(c). Accordingly, the AALS filed an *amicus* brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003), explaining why law schools should be permitted to take race into account in their admissions decisions. This Court relied on that brief, *see id.* at 332, to hold that diversity in legal education "is a compelling state interest that can justify the use of race" in law school admissions. *Id.* at 325. Consistent with the guidance provided by *Grutter*, most AALS member institutions consider race in their admissions processes.

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[1] Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondent have filed a letter of consent with the Clerk of the Court.

[2] The AALS is a voluntary association with requirements for membership widely regarded as indicators of a law school's quality. The Association does not serve an accreditation function.

Although this case concerns undergraduate admissions, the outcome may affect law schools, both by shaping the composition of their applicant pool and by constraining how they admit applicants from within that pool. First, law schools draw their students from more than 2,000 colleges and universities across the United States,[3] many of them highly selective. Many of those undergraduate institutions now admit diverse classes, resulting in a diverse law school applicant pool. But if this Court announces a rule of law that substantially restricts the ability of colleges to enroll racially integrated student bodies, then law schools will no longer benefit from racially diverse applicant pools. Second, many law schools themselves take race into account in their admissions decisions. If the precedent set by this case forecloses consideration of race in higher education admissions, law schools will become less racially integrated.[4]

SUMMARY OF ARGUMENT

Although the University of Texas achieves some measure of racial diversity in its undergraduate student body through the nominally race-neutral means of a mechanical admissions formula, this Court should resist any temptation to announce a general rule foreclosing the use of race as one factor in a holistic admissions process. Such a rule would be counter-productive in many settings, especially law school admissions. In the law school context, a requirement of a mechanical admissions formula would be wildly impracticable, would not produce substantial racial diversity, and would undermine the ability of law schools to admit classes that are diverse along other dimensions.

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[3] A small number of students attend U.S. J.D. programs after receiving their prior education in other countries.

[4] Although the Equal Protection Clause binds only public institutions, this Court has long held that federal non-discrimination statutes such as Title VI of the Civil Rights Act of 1964 apply the same standards to all educational institutions that receive federal funds. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 286-87 (1978). Thus, a decision here would affect all members of the AALS, public and private.

Typical law school class sizes are more than an order of magnitude smaller than the class size of large public universities, and law schools draw their students from a wide range of undergraduate institutions. Guaranteeing admission to any percentage of the graduates of those institutions would result in vastly over-subscribed law school classes, even as it would exclude many better-qualified applicants.

To build excellent, diverse classes, law schools do not reduce any particular candidate to a number or a percentage. Instead, following this Court's guidance in *Grutter v. Bollinger*, 539 U.S. 306 (2003), law schools evaluate each applicant's record holistically, counting such academic factors as success in analytically demanding majors, intellectual curiosity and improvement over time, as well as such other factors as veteran status, work experience and hardships overcome. A mechanical admissions process would render such criteria irrelevant.

Moreover, a mechanical admissions process would undermine, rather than foster, racial diversity. The Texas Ten-Percent Plan produces some measure of racial diversity because it draws students from a secondary education system that exhibits a high degree of de facto segregation. The top ten percent of a virtually all-Latino school will be nearly all Latino. But with law schools drawing most of their applicants from integrated undergraduate institutions, the use of a mechanical admissions procedure would lead to fewer minority admissions because of persistent racial gaps in test scores.

Given the role law schools play in training our national, state and local leaders, a requirement that institutions of higher education use nominally race-neutral application procedures would undermine the ability of law schools to build racially diverse classes and hamstring the ability of law schools to "cultivate a set of leaders with legitimacy in the eyes of the citizenry." *Grutter*, 539 U.S. at 332. Whatever the merits of the Texas Ten-Percent Plan in the context of a large public university, restricting law schools to using mechanical admissions standards would be devastating.

ARGUMENT

For the reasons expressed in the respondents' brief, the University of Texas's admissions plan is fully consistent with the Equal Protection Clause. The plan has permitted the University to achieve racially integrated classes through individualized consideration of each applicant rather than fixed quotas or racial balancing, and is therefore constitutional under this Court's precedent.

While this case involves the use of race in undergraduate admissions decisions, law schools also have important and distinctive interests in enrolling racially integrated classes. Because no race-neutral method exists for achieving racial diversity in law schools while fulfilling law schools' other important goals, it is critical that law schools continue to be able to consider race as one factor within their holistic admissions processes.

I. Law Schools Now Use Holistic Admissions Processes Consistent With This Court's Precedent To Enroll Outstanding Incoming Classes.

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), this Court set clear guidelines for how educational institutions may permissibly consider race in making enrollment decisions. Law schools, like other institutions of higher education, have tailored their admissions processes accordingly. In reliance on the Court's precedent, law schools use their educational judgment in constructing the best possible class. To do so, they employ holistic admissions processes where an applicant's race is one among many factors considered in evaluating how candidates will contribute to the law school and to the legal profession.

A. Law Schools Use Holistic Admissions Processes To Enroll Highly Qualified And Racially Integrated Classes Whose Members Have A Broad Range Of Talents, Perspectives, And Interests.

To understand how race is taken into account in law school admissions, one must understand the admissions process more generally. American law schools vary with respect to nearly all aspects of their academic programs, including student admissions. Nonetheless, their admissions procedures share important features. Guided in part by this Court's rulings, law schools select their incoming classes by considering many aspects of candidates' applications in order to shape the best possible class. Rather than filling their classes solely in reliance on undergraduate GPAs and LSAT scores, law schools draw on a wealth of information about candidates' prior academic and work experience, their backgrounds, their professional goals, and their personal qualities. Schools use this information to determine whether a student is prepared for law school, will contribute to his or her classmates' education, and will succeed in the legal profession. In selecting candidates, law schools are not providing rewards to individual students for their past academic performance; rather, they are making educational judgments about how different applicants will interact with each other and contribute to the distinctive environment of the particular school and to the profession beyond. They recognize that the most promising class is not homogenous, but is diverse in many ways. Almost all law schools take an applicant's race into account in the context of this broader commitment to enrolling a diverse class.

1. The admissions process normally begins by determining whether an applicant has the ability to succeed at the particular law school. Even in evaluating a candidate's academic promise, law schools use a process that looks beyond a candidate's undergraduate GPA, class rank, and test scores.

To be sure, law schools do look at those measures. An applicant's class rank and undergraduate GPA provide evidence of capacity for legal study and enable law schools to compare students who attended the same institution. Standardized test scores are also relevant. They provide some evidence of a candidate's capacity to perform law school work, while also allowing comparison of students across different institutions. There are some students for whom GPA, class rank, and LSAT scores are largely determinative: their performance may be so impressive that, absent some disqualifying factor in their file, a school admits them on that basis alone, or their performance may place them so low in a school's applicant pool that no further review is warranted. A school may also care about its median GPA and LSAT score because they affect the school's placement in some ranking systems. But a median is not the same as a mean. Because most students' scores will not affect a school's median, schools have flexibility to use their educational judgment both in selecting individual applicants and in crafting a class.

Most schools have concluded that, standing alone, GPA and test scores alone are too crude a measure of the intellectual capacities they seek. Law schools therefore consider numerous other factors to gauge many candidates' academic abilities.[5]

Law schools consider applicants' undergraduate major and, where relevant, their graduate training. Some fields of study are especially likely to provide students with skills necessary to succeed in law school. For example, fields that require analytic or persuasive writing provide a good foundation for law school. And studying important aspects of American history, government, or economic life may also provide useful background. Some disciplines may be relevant to a particular area of legal study. For example, students who receive a science or engineering degree may be especially well qualified to pursue careers in intellectual property. Conversely, students who chose less demanding majors both may be ill prepared academically for law school and may be indicating a disinclination towards hard work.

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[5] *See How Law Schools Determine Whom to Admit*, Law Sch. Admissions Council, http://www.lsac.org/jd/apply/whom-to-admit.asp. (All websites in brief last visited June 6, 2012.)

Law schools additionally evaluate the individual classes that applicants have taken. A student who completes more than the number of classes required to graduate may demonstrate a healthy intellectual appetite. In evaluating an applicant's course-selection choices, context is critical. A transcript with a broad range of courses may indicate an intellectually curious mind, or a dilettante who flits from introductory class to introductory class. And a student who focuses only on a particular area of study may be indicating intellectual passion, or narrow-mindedness and risk aversion. Only a careful consideration of the transcript in light of other admissions materials will enable law schools to determine whether a student will excel or founder.

The trajectory of a candidate's performance may also be relevant. A candidate whose grades improved considerably over the course of her college career has indicated a capacity for intellectual growth and perseverance. That applicant may therefore be more impressive than a candidate who showed no academic improvement – even if the latter candidate's cumulative GPA is somewhat higher. And excellence in graduate study may compensate for a less impressive undergraduate record.

Finally, law schools look at the quality of applicants' undergraduate institutions. A college that offers a rigorous education will better prepare its students for the analytic challenges of law school. Moreover, a student who performs well at a college that attracts many high-achieving peers has demonstrated exceptional academic merit. And some schools instill their graduates with particular qualities relevant to legal education. For example, a graduate of West Point brings a perspective that may not be shared even by other applicants with military experience. Similarly, students who attended colleges with distinctive educational missions may have unique approaches to their legal studies – whether they attended Berea College, with its requirement that students perform manual labor; or Deep Springs College, with its intense ranching experience; or Wellesley College, which remains all-female; or any of the wide range of religiously-affiliated institutions. Because students who have received rigorous undergraduate educations are better prepared for law school, law schools have a vital interest in the admissions decisions of selective undergraduate institutions. If those institutions are not open to a wide variety of students, then law schools will face a constricted pool of applicants.

2. Even after narrowing their applicant pools to include only academically qualified students, many schools still have many more applicants than available seats. In choosing among these students, law schools recognize that success in the law requires more than book smarts. Schools therefore use their

educational judgment to shape classes that are outstanding in more respects than past academic achievement. They look at a variety of non-academic factors that bear on the kind of lawyer an applicant will become.[6] Moreover, at every point law schools are concerned not only with the qualifications of individual applicants but also with the overall composition of their entering classes. They seek to enroll classes where a broad array of backgrounds, interests, and future plans are represented, so that students will enrich each other's legal education.

Law schools look for qualities that suggest that students will become outstanding future attorneys. Among other things, law schools look for evidence that a candidate has good judgment, potential for leadership, a commitment to public service, integrity, and passion. A candidate's prior work experience, her extracurricular activities, her personal statement, and her letters of recommendation may all indicate that she possesses these important qualities. Further, law schools with academic specialties may seek students with skills or interests in a particular area of law. For example, George Mason University School of Law offers a patent track in its JD program; Southwestern Law School in Los Angeles bills itself as "*the* place to study Entertainment Law"; the University of Houston Law Center has a distinctive focus on health law; and Vermont Law School claims the "largest and deepest environmental program of any law school."[7] How schools assess a student's potential for excellence in the profession may therefore vary from school to school.

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[6] *See Additional Admission Decision Factors*, Law Sch. Admissions Council, http://www.lsac.org/JD/Apply/additional-decision-factors.asp.

Law schools also seek to represent a broad range of talents, perspectives, and interests within each class. They do so based on their judgment that students' educational experiences are improved in environments where each student "bring[s] to the classroom important and different perspectives." Association of American Law Schools, *Statement on Diversity, Equal Opportunity, and Affirmative Action* (1995). A student from the American West, for example, may bring a different approach to the study of water rights, property rights, or federalism than a student from the urban northeast. And a student who is herself a first generation American may have a different perspective on immigration issues than a student who is a Mayflower descendant. In attempting to enroll diverse classes, admissions officers consider many aspects of candidates' files – including their geographical and socioeconomic background, their extracurricular involvement, their prior professional experiences, and whether they have earned advanced degrees.

Among academically qualified applicants, no single factor is dispositive. Rigid quantitative values cannot capture the intellectual passion exhibited in a personal statement, or the wisdom attained through a prior career, or a history of adversity overcome. Moreover, law schools are concerned with constructing an excellent class rather than simply rewarding individual applicants for their past performance. Depending on the composition of the applicant pool, possessing a particular skill or background may make an applicant especially attractive one year to a degree unmatched in previous or subsequent years. And because each law school is unique, different schools will seek out different qualities in order to shape classes that will best contribute to the law school environment and the legal profession.

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[7] *Patent Law Track*, George Mason Univ. Sch. of Law, http://www.law.gmu.edu/academics/tracks/patent_law; Sw. Law Sch., http://www.swlaw.edu/; *Health Law and Policy Institute*, Univ. of Hous. Law Ctr., http://www.law.uh.edu/healthlaw/; *Environmental Law Center*, Vt. Law Sch., http://www.vermontlaw.edu/academics/environmental_law_center.htm.

3. Within this multi-factored admissions process, as amicus explains in more detail in the next section of this brief, law schools consider race as one aspect of the diversity they aim to achieve. Law schools never make race dispositive of a candidate's admission, nor are quantitative weights attached to a candidate's race. Candidates, and not schools, choose whether and how to provide racially identifying information. When a candidate identifies herself as a racial minority, schools consider whether that fact – in conjunction with other information in her application such as her community service, her extracurricular activities, and her personal statement – may give her distinct perspectives that would deepen the school's classroom interactions or suggest her potential to creatively advance the law as a practicing attorney. As this Court acknowledged in *Grutter*, law schools seek "to assemble a student body that is not just racially diverse, but diverse along all

the qualities valued by the university." *Grutter*, 539 U.S. at 340. Race is but one factor evaluated by law schools in their attempt to assemble classes that are academically outstanding and diverse across many characteristics.

B. The Constitution Permits Law Schools To Engage In Race-Conscious Holistic Review.

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court affirmed the view expressed by Justice Powell in his controlling opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. An admissions process will withstand constitutional scrutiny under *Grutter* so long as it is "flexible enough to ensure that each applicant is evaluated as an individual" and is not defined by his or her race. *Grutter*, 539 U.S. at 337. By contrast, the Court has made clear that a plan that assigns numerical weights to minority status and makes race "decisive" will fail constitutional scrutiny. *Gratz v. Bollinger*, 539 U.S. 244, 272 (2003) (citing *Bakke*, 438 U.S. at 317).

The Nation's institutions of higher education have heeded this Court's guidance. In particular, law school admissions plans involve exactly the kind of "nuanced, individual evaluation" within which this Court permits race to be used "as a component." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in the judgment). First, race is not determinative for any applicant. In contrast to the policies at issue in *Gratz* and *Parents*

Involved, race alone never determines whether a student will be granted or denied admission to a given school. No applicant can accurately say that he would or would not have been admitted "but for" his race. Instead, law schools "consider[] race as one modest factor among many others" in an individualized assessment of each applicant. *Grutter*, 539 U.S. at 392-93 (Kennedy, J., dissenting). For example, a black applicant with a solid but not exceptional academic record might not have been admitted had he not also served in leadership roles in community organizations. Similarly, had a rejected white applicant with superb test scores not written a fatuous personal statement, the result in his case would have been different. The difference between these two applicants was not their race alone; their applications were considered as a whole. The holistic process therefore "do[es] not lead to different treatment based on a classification that tells each student he or she is to be defined by race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

Second, rather than evaluating race superficially, law schools consider how an applicant's race may "contribute to the life and diversity of the Law School." *Grutter*, 539 U.S. at 315. Because a student's race is never a proxy for his perspective, law schools focus "on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved*, 551 U.S. at 722. Law schools consider many different aspects of candidates' applications in evaluating the outlooks and experiences they may bring to the law school. The role of race in this evaluation is often difficult to isolate. For example, schools may be particularly interested in an applicant who has suffered discrimination as a result of her racial identity. This applicant's prospects are not improved solely on account of her race; rather, it is her race in the context of her experience overcoming racial hostility that makes her a strong candidate who may bring a distinctive perspective about antidiscrimination law to classroom and lunchroom discussions. Similarly, a law school may admit a student who writes a compelling essay describing how his distant Hawaiian heritage has influenced his intellectual development. While his race may play a role in his admission, it is his race in conjunction with his writing skill and his self-reflection that make him an outstanding applicant. Because all aspects of students' applications are considered – including the nuances of their racial identities – the holistic process employed by law schools is fully compliant with *Grutter*.

Finally, law schools eschew the rigid racial quotas of the kind objected to by the *Grutter* dissenters. The majority and dissenting opinions in *Grutter* agreed that racial balancing is an impermissible means of achieving classroom diversity. Law schools accordingly do not seek a fixed proportion of racial minorities in each class; rather, they admit minority applicants in different numbers each year depending on the size and makeup of the applicant pool. At Yale Law School, for example, African-American, Native-American, and Latino students made up 20.1% of the first-year class in 2006. In 2008 this number dipped to 11% – a 45%

drop – before rising the following year to 18%. Similarly, the percentage of African Americans, Native Americans, and Latinos in Stanford Law School's 1L class grew from 18.5% in 2007 to 24.5% in 2011 – an increase of roughly a third. At the University of Virginia Law School, the proportion of African Americans, Native Americans, and Latinos in the first-year class fell by nearly one-half between 2008 and 2009 – from 13.4% to 7.4% – before doubling again in 2011 to 14.5%.[8] And at the City University of New York Law School, the proportion of African-American, Native-American, and Latino students dipped from 21.1% in 2006 to 12.1% in 2008, and then increased nearly two-fold to 23.6% in 2011.

Such fluctuation is to be expected from a process in which race is only one among many factors considered. Indeed, in his dissent in *Grutter*, Justice Kennedy approvingly cited enrollment numbers from Amherst College that showed comparable racial variation – from a minimum of 5.6% to a maximum of 11.5% over a period of ten years. *Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting). The variation in minority student enrollment from year to year thus refutes any suggestion that holistic review is racial balancing in disguise. These numbers undercut any "inference" that law schools "compromis[e] individual assessment" in favor of racial quotas. *Id.* at 390-91.

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[8] Enrollment data from every accredited law school from 2006 through 2012 is available at *Official Guide to ABA-Approved Law Schools Archives*, Law Sch. Admissions Council, http://lsac.org/LSACResources/Publications/official-guide-archives.asp.

II. Racially Diverse Law Schools Are Critical To American Democracy And To The Quality Of Legal Education.

Law schools are an indispensable gateway to careers in public life. Since the time of de Tocqueville, lawyers have held a uniquely influential position within the American political system. Alexis de Tocqueville, *Democracy in America*, Vol. I, ch. xvi (1st ed., 1835) (Vintage ed. 1945). As this Court recognized in *Grutter*, law schools are "the training ground for a large number of our Nation's leaders." 539 U.S. 306, 332 (2003). The legitimacy of governmental institutions and the quality of legal education depend on legal education remaining racially integrated. Racial diversity in law schools is therefore a "compelling state interest." *Grutter*, 539 U.S. 306 at 325.

1. Racial diversity is essential to preserving the legitimacy of American government. Our Nation's "historic commitment to creating an integrated society," *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J. concurring in part and concurring in the judgment), requires that we "cultivate a set of leaders with legitimacy in the eyes of the citizenry." *Grutter*, 539 U.S. at 332. Thus, "the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

Law school is the only gateway to leadership in one branch of the government. All federal judges and nearly all state judges are law school graduates. And although a law degree is not a prerequisite to elective office, many elected officials are lawyers as well. Four of the last eight U.S. Presidents, including the sitting Chief Executive, graduated from law school. A majority of U.S. senators are lawyers, as are 148 members of the U.S. House of Representatives. Cong. Research Serv., *Membership of the 112th Congress: A Profile* 2 n.8 (2011). Half of all state governors are lawyers, as, of course, are all state attorneys general. Lawyers are disproportionately represented in state legislatures and other state and local elected bodies as well. Law school is also the only path to the exercise of the state's coercive power by the Executive, through federal, state and local prosecutors. Indeed, many governmental lawyers also exercise tremendous power within the Executive branch in other contexts, such as administrative law judges and agency counsel.

All law schools – whether public or private and whether national, regional or local in the source of their student bodies or the placement of their graduates – contribute to the pool of lawyers visibly exercising power, whether in local communities, counties, states or the federal government. Lawyers from a wide range of law schools also serve as leaders of civic organizations.

Diversity is therefore critical for *all* law schools because they all can serve as a pathway to the exercise of state power and to public office. For example, the U.S. Court of Appeals judges and the Senators and Congressmen who hold law degrees attended 120 different law schools. Many local and regional law schools serve as pipelines into key positions in local prosecutors' offices and state governments.

At the same time, a small group of law schools produces a remarkable share of Congress and the federal judiciary. The most selective law schools include private schools such as the University of Chicago, Columbia, Cornell, Duke, Harvard, Georgetown, Northwestern, NYU, Penn, Stanford, and Yale, and public schools such as Berkeley, UCLA, and the Universities of Georgia, Michigan, North Carolina, Texas, and Virginia. These law schools alone account for 22 of the 100 senators and 44 of 436 members of the House of Representatives (including the nonvoting delegate from the District of Columbia). All nine members of this Court attended highly selective law schools, and 144 judges serving on the United States Courts of Appeals received an LL.B. or J.D. degree from one of this relative handful of law schools.[9]

Racially homogenous public bodies cannot maintain their legitimacy in an increasingly heterogeneous society. Members of the public – and members of minority groups in particular – will lose faith in organs of government that conspicuously fail to reflect our Nation's racial diversity. Just as all-white or all-Anglo juries lacked legitimacy in the eyes of many Americans, *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986); *see also Powers v. Ohio*, 499 U.S. 400, 412-13 (1991), so too a nearly all-white or all-Anglo judiciary would lack legitimacy in contemporary society. And when the institutions charged with creating or executing the law are racially homogenous, "the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice." Am. Bar Ass'n, *Diversity in the Legal Profession: The Next Steps* 9 (2010).

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[9] Data about lawyers in Congress were taken from the American Bar Association, Governmental Affairs Office, http://www.americanbar.org/publications/governmental_affairs_periodicals.html. Data about the educational history of Court of Appeals judges were compiled from each court or judge's website.

While the most selective members of the AALS accept only a small fraction of their applicants, and a majority of AALS members accept fewer than half their applicants, even the least selective members turn away roughly a third of the individuals who apply.

2. All lawyers, not just those exercising public power, operate in a multi-racial society and confront issues with racial implications. Lawyers frequently have to deal with clients, opposing counsel, judges, and government officials of different races and backgrounds. Working effectively across racial lines is critical to excelling as a lawyer in contemporary society. Legal education "better prepares students for an increasingly diverse workforce and society" if it occurs in racially integrated classrooms. *Grutter*, 539 U.S. 306 at 330 (quotation marks omitted).

Many law school courses are expressly concerned with questions of racial justice: constitutional law, employment discrimination and voting rights are just a few examples. Other courses, such as criminal procedure, immigration law and poverty law, are permeated with concerns about race. And racial issues arise even in classes where race is not a primary concern. For example, while much of property law is concerned with concepts like the rule against perpetuities and springing executory trusts, discussions of zoning or restrictive covenants can put race in the foreground.

Law school classrooms give students practice in discussing sometimes-charged issues with people of other races, backgrounds, and perspectives, as they will be called upon to do throughout their lives as lawyers. For many students of all races, college or law school represents their first opportunity to interact in substantive settings with members of other races. In a 1999 study on race relations within law schools, 50% of white law students reported having very little or no interracial contact while growing up. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools* 11 (1999). Furthermore, black and Hispanic students are more isolated in their primary schooling today than at any time in the past forty years; two out of every five attend a school with 90% or more minorities. Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 12 (2009). Law school, with its intensive focus on discussion and debate of controversial issues, therefore represents one of the first opportunities for many students of all races to engage substantively with members of other races. If this Court were to impose new restrictions limiting schools' ability to admit racial minorities, then law schools would not only fail to produce leaders that reflect society's diversity, they would also fail to prepare graduates to interact with the diverse society in which they will practice.

3. In addition to benefitting law students professionally, diverse student bodies also confer important pedagogical benefits. Law school prepares students for legal practice by exposing them to "the interplay of ideas and the exchange of views with

which the law is concerned." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). In such environments, students learn best by interacting with peers who have different views, backgrounds and life experiences. Educational pluralism encourages students to confront their assumptions and preconceptions. Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11 (2003). It also helps to foster critical thinking, as students become better problem-solvers when they bring different perspectives to bear on an issue. *See* P.L. McLeod, et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RESEARCH 248 (1996). Because law school classes are usually discussion-based, much of what students take out of their classes will depend on the contributions of their peers. "[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Grutter*, 539 U.S. at 330 (quotation marks omitted). Thus, non-homogenous environments will considerably improve students' classroom experiences and their learning. It will make students into better lawyers.

Law schools therefore seek to secure diversity across a broad spectrum of characteristics. Admissions officers attempt to enroll students who represent a wide array of socio-economic backgrounds, geographical regions, moral convictions, and professional experiences. A student with considerable work experience, for example, can offer a perspective not replicable by a student who enrolled in law school directly after college. Having made hiring and firing decisions may have given the small-business-owner-turned-law-student a distinct perspective on how motive should be shown in employment discrimination cases. And a student who grew up poor may offer insight about the benefits and failings of American welfare policy that an affluent student cannot.

Racial diversity can enrich a law school classroom as well. It remains inescapably true that members of racial minorities often possess experiences and perspectives not shared by their white peers. "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333. Although the effect of racial diversity may be subtle in any given classroom, it cannot be doubted that a single-race (or nearly single-race) community, like a single-gender community, "is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables." *Ballard v. United States*, 329 U.S. 187, 193-94 (1946).

Token minority representation will not produce the kind of learning environment that fosters an excellent legal education. Diversity among minority students is itself important. Without it, minority students will face the burden of serving as standard-bearers for their race. True racial diversity will improve the classroom experience not because minorities "express some characteristic minority viewpoint," but because diversity will "diminish[] the force of such stereotypes" by demonstrating that all students, even students of the same race, have differing outlooks and experiences. *Grutter*, 539 U.S. at 333 (quotation marks omitted). Students will also learn from the fact that their discussions across racial lines expose commonalities, even at times where they are least expected.

III. Texas's Top Ten Percent Plan And Similar Mechanistic Processes Will Not Work For Law Schools.

A holistic admissions process is the only way for most law schools – and indeed, most educational institutions – to achieve racial diversity and meet their pedagogical objectives. The University of Texas's top ten percent admissions plan – or any class rank-based admissions plan – cannot work at the law school level, or for most undergraduate institutions either. While an admissions plan that relies solely on students' class rank may achieve a semblance of racial diversity at some large public undergraduate universities, this success could not be replicated for law schools. Rather, law schools that admitted students based solely on class rank would fail to achieve racial integration and would sacrifice along the way many of the interests holistic admissions processes serve.

Furthermore, a top ten percent plan cannot be rendered suitable for law schools through the addition of other easily quantifiable factors such as GPAs and test scores. The adoption of an entirely mechanistic admissions process – and the rejection of holistic review – would undercut law schools' considered judgment about how to produce excellent lawyers.

A. The Texas Ten Percent Plan Would Be Impossible For Law Schools To Administer, And Any Other Mechanical Admissions Plan Would Sacrifice Important Pedagogical Values.

The Texas ten percent plan originated as a political response to the Fifth Circuit's decision in *Hopwood v. Texas*, forbidding the University of Texas from engaging in any race-conscious affirmative action. 78 F.3d 932 (5th Cir. 1996). "[A] large, if not primary, purpose" of the Texas legislature's requirement that Texas state universities accept Texas high school seniors in the top ten percent of their class was to increase the number of minority students at those schools. *Fisher v. University of Texas*, 631 F.3d 213, 224 (5th Cir. 2011). While this plan – in conjunction with a holistic review process for some class seats – achieves some level of racial integration for the University of Texas, the same would not be true for law schools.

1. It would be logistically impossible for law schools to use a top ten percent plan as the University of Texas does for undergraduate admissions. The largest entering law school classes in the country have fewer than 600 students, and many law schools, including state universities, enroll far smaller cohorts. To fill these classes, law schools draw their applicants from a nationwide pool of more than 2000 degree-granting undergraduate institutions. For example, at the University of Texas Law School, where state law mandates that 65% of

students be Texas residents, 143 undergraduate institutions are represented in a class of approximately 400 students.[10] In 2011, the University of Montana School of Law's incoming class of 84 students represented 50 undergraduate colleges and universities.[11] Therefore, unlike large state undergraduate programs in Texas, California, and Florida, no law school enrolls a class large enough to guarantee admission even to the top student graduating from each undergraduate university that might send it an applicant.[12]

Of course, a top ten percent plan would be even more impracticable. The U.S. Department of Education estimated that more than 1.7 million bachelor's degrees will be awarded in 2012.[13] If the University of Texas School of Law employed a ten percent plan it would be required to guarantee admission to approximately 172,000 candidates, including students whose undergraduate course of study has left them completely ill-suited for law school. Even a top one percent plan would guarantee admission to 17,200 candidates. Naturally, not all students at the top of their class would choose to attend law school. However, even with the vast majority of qualifying applicants opting out, law schools would still be faced with inestimably large entering classes.

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[10] *UT Law Admissions: Quick Facts*, Univ. of Texas L. Sch., http://www.utexas.edu/law/admissions/jd/quickfacts.php.

[11] *Admissions*, Univ. of Montana Sch. of L., http://www2.umt.edu/law/admissions/default.htm.

[12] For example, Yale Law School normally accepts around 250 applicants every year to fill a class of approximately 200 students. If it were to automatically admit any valedictorian who applied, it would have to increase its class size dramatically, and would have to reject many of the students it now accepts.

[13] National Center for Education Statistics, *Table 279: Degrees Conferred By Degree-Granting Institutions*, http://nces.ed.gov/programs/digest/d10/tables/dt10_279.asp.

2. Besides being logistically impossible, any plan that automatically admits students based on class rank, or any other unidimensional quantitative measure, would undermine the academic quality of law school classes. These measures capture only one aspect of an applicant's academic promise and do virtually nothing to capture the remaining abilities an applicant might have. For example, it is only by considering class rank in conjunction with undergraduate institution, major, and transcript that law schools are able to determine which students are most academically prepared for the rigor of law school classes. Variations in the academic strength of different colleges and universities mean that class rank cannot serve as a consistent measure of relative academic achievement. Further, differences within courses of study, even at the same institution, can make class rank a poor proxy for academic achievement. Kevin Rask, *Attrition in STEM Fields at a Liberal Arts College: The Importance of Grades and Pre-Collegiate Preferences*, 29 ECONOMICS OF EDUCATION REVIEW 892 (2010) (showing a gap of up to .58 points in GPA between majors at a single college). A student at College X with a 3.3 GPA who majored in chemistry, for example, may have a far lower class rank than the accounting major with a 3.8, but the chemist may actually be a far more

promising law student. Finally, rote examination of class rank, GPA, or test scores fails to capture positive grade trajectory, a willingness to take challenging classes, and breadth and depth in class selection – all indicators relied on by law school admissions officers when making educational judgments about which applicants to accept and reject.

3. Academic excellence is not the only quality that a class rank plan or similar mechanical reliance on purely academic factors would sacrifice. Law schools also seek to over-represent certain types of students in their entering classes, such as individuals with advanced academic degrees, a strong commitment to public service or military experience. Under mechanical plans, law schools would no longer be able to accept these students unless they happen to satisfy a formula that ignores these qualities. Indeed, because mechanical admissions plans rely on academic metrics to the exclusion of other relevant admissions factors, such plans would prevent law schools from admitting whole categories of students who may be strong candidates despite having somewhat less impressive academic records.

Financially Disadvantaged and First Generation College Students: Mechanical admissions plans handicap financially disadvantaged and first-generation college students. Students who can afford to attend college only by working part-time or putting in extra hours to keep athletic or ROTC scholarships may struggle to match the GPAs of wealthier college students without these time commitments. Furthermore, students without a family history of college often struggle in the first few years; plans that focus on class rank or GPA would make it far harder to overcome this early adversity, regardless of success the student afterwards achieved. *See* Ernest T. Pascarella et al., *First-Generation College Students: Additional Evidence on College Experiences and Outcomes*, 75 JOURNAL OF HIGHER EDUCATION 249 (2004). Because mechanical admissions plans ignore these factors, law school classrooms could lose the insight these students bring.

Military Veterans: Many law schools value military experience for a number of reasons. First, military experience can signal traits important for success in law schools and as lawyers: professionalism, discipline and character. Additionally, veterans, particularly those who have served in combat zones, may bring a unique perspective to the classroom when discussing legal issues such as detainee rights or the rule of law in Afghanistan or Iraq.[14] Finally, many law schools now recognize the importance of providing legal resources to veterans. For example, a number of law schools, including John Marshall Law School, Yale Law School and Widener Law School have established veterans law clinics.[15] These projects may have special relevance to veteran law students.

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[14] *See* Tim Hsia, *An Ex-Soldier Writes*, N.Y. Times At War Blog (Jan. 10, 2011), http://atwar.blogs.nytimes.com/2011/01/10/an-ex-soldier-writes/ (discussing his experience as a veteran 1L).

[15] *Veterans Legal Support Center*, John Marshall Law School, http://www.jmls.edu/veterans/; *Veterans Legal Services Clinic*, Yale Law School, http://www.law.yale.edu/academics/

However, despite being equally qualified, some military veterans may be disadvantaged by a strict mechanistic admissions process. The grading at service academies is strict and includes physical fitness and leadership. Enlisted military men and women often balance obtaining undergraduate degrees with jobs and families. Furthermore, many military members study for or take the LSAT while deployed, often to combat zones. These distractions and difficulties mean that numbers may under-represent a veteran's academic potential, and the process itself ignores the unique perspective and experience that veterans can bring to a law school. Currently, law schools consider applications in light of the applicants' circumstances; adoption of a strict mechanistic process may cripple law schools' ability to accept veterans.

Late Bloomers: Strict class rank or GPA comparisons exclude students who mature or grow into their academic potential later than average. Some students simply have learning styles that do not enable them to show their full potential in undergraduate classes. For example, students who learn experientially rather than theoretically may be disadvantaged in some majors, such as math or economics. *See* Alice Y. Kolb & David A. Kolb, *Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education*, 4 ACADEMY OF MANAGEMENT LEARNING & ED. 193, 196-97 (2005). Other students are not emotionally

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veteranslegalservicesclinic.htm; *Veterans Law Clinic*, Widener Law School, http://law.widener.edu/vetclinic/.

mature during their college years, which may affect their college performance. But both of these groups may have post-graduate experience indicating that they will make excellent law students and lawyers.

A class rank or GPA metric will fail to capture these candidates' abilities. In contrast to a holistic system, a mechanical admissions plan would prevent law schools from admitting students whose lower GPA or class rank are offset by the wisdom and experience they acquired in the real world. Because people with many learning styles can make good lawyers, and law schools benefit from a mix of learning styles in the classroom, admissions officers should be able to consider these students.

Prodigies: It is not just late bloomers who would be excluded by mechanical admissions plans. These plans tend to overlook applicants with extraordinary abilities and achievements but comparatively less college success. For example, looking strictly to class rank could dramatically diminish the number of Olympic medalists, award-winning novelists and dorm room entrepreneurs that law schools can enroll. These achievements might be relevant to assessing a student's application in two ways. First, some deficiencies on a transcript may be excusable if the applicant was pursuing her other talent at the time. Second, some achievements show hard work, dedication or other qualities relevant to a law school classroom and to performance in the profession. For example, a student who built his own business may have shown initiative, imagination and persistence, and might also have experiences that would enrich a classroom discussion of venture capital.

Academically Adventurous Students: Mechanical admissions plans punish students who have taken intellectual risks, for example, by enrolling in demanding classes or classes outside their areas of expertise. The practice of law values understanding or experience in multiple fields and the ability to engage and struggle with difficult material. However, learning these skills often comes at the cost of lower grades in unfamiliar fields. Mechanical admissions plans do not reward students for this engagement – indeed, they punish students for it.

Plans that focus exclusively on class rank or GPA create perverse incentives for applicants. They discourage students from attending competitive undergraduate institutions and from taking difficult classes or majors. *See Gratz*, 539 U.S. at 304 n.10 (Ginsburg, J., dissenting). Students might hesitate to take classes outside of their comfort zone, and might avoid extracurricular involvements that risk deflecting time and energy away from studying. College students would only be harmed by passionate extracurricular interests; students might avoid taking on responsibilities or leadership positions, particularly if these positions could harm their grades.

B. Mechanical Admissions Plans Would Reduce Racial Diversity In Law Schools.

Not only would mechanical admissions plans at the law school level diminish the quality of legal education and the lawyers it produces, but they would actually reduce racial diversity.

Whatever racial diversity the Texas ten percent plan produces comes from a distinctive and unfortunate characteristic of primary and secondary education in Texas. Texas high schools exhibit high degrees of de facto racial segregation. Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. LAW ECON. REV. 312 (2006); *see also Fisher v. University of Texas*, 631 F.3d 213, 240-41 (2011). The ten percent plan produces diversity at the university level because the top ten percent of students from an all-Latino high school will all be Latino. By contrast, the vast majority of universities and colleges from which law schools draw their students are integrated. It would be impossible to assure racial diversity among the group of top graduates from these schools. Therefore, even if it were feasible to accept law school applicants based on class rank, adopting such a plan would do little to promote racial diversity in law schools.

And although they would be counterproductive with respect to preserving racially integrated legal education, adoption of such plans in the hopes that they will produce racial diversity without race being expressly taken into account would not even serve the value of color-blindness. Government policies that are ostensibly race neutral but "unexplainable on grounds other than race" must undergo the same scrutiny as explicitly race-conscious policies. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *see also Shaw v. Reno*, 509 U.S. 630, 643-44 (1993). A "top x percent" plan adopted for the purpose of enrolling more minority students is no less race-conscious than the holistic admission plans that law schools use today – only less effective.

IV. A Race-Blind Holistic Admissions Process Is Not A Realistic Alternative To The Existing Form Of Holistic Review.

If law schools are to achieve racial diversity, a race-blind holistic admission process is not a reasonable alternative to the current system. Such a process would not produce racially integrated classes; further, a holistic process is inherently race-conscious.

1. Large racial disparities in quantitative selection criteria make it impossible for a race-blind process to produce an integrated class. It remains an unfortunate fact that there are substantial gaps between the LSAT scores and GPAs of African-American and Latino students and those of their peers. *See* Sarah E. Redfield, *Diversity Realized: Putting the Walk With the Talk for Diversity in the Legal Profession* 49 (2009).

These disparities are often the product of differences in family wealth, differential access to educational opportunities or "stereotype threat."[16] As a result, they often do not accurately capture a candidate's potential to become an excellent lawyer. An admissions process that forbids any consideration of race will be unable to accurately assess a minority candidate's qualifications.

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[16] *See* Wayne J. Camara & Amy Elizabeth Schmidt, *Group Differences in Standardized Testing and Social Stratification*, College Board Report No. 99-5 (1999), *available at* http://professionals.collegeboard.com/profdownload/pdf/rr9905_3916.pdf; Joshua Aronson et al., *The Effects of Stereotype Threat on the Standardized Test Performance of College Students*, *in* Readings About the Social Animal 400, 402-403, 411 (Elliot Aronson ed., 2004).

At many law schools, the pool of academically qualified applicants is larger than the size of the incoming class. Racial differences in GPAs and test scores mean that this pool may be disproportionately non-minority. If a school cannot take race into account at all, its admitted class will tend to reflect the racial composition of this non-diverse pool. Therefore, to achieve racial integration, law schools must be able to oversample for minority students within the pool of qualified applicants, just as law schools admit more than a proportionate number of veterans and students with advanced degrees, for example, in order to produce a class with significant enrollments of these students.

2. In addition to failing to produce racial diversity, a race-blind holistic admissions process would be unadministrable. A holistic admissions process by its very nature conveys racial information to law school decision-makers. Many factors in the admissions decision are therefore inextricably intertwined with race. For example, a student may write an essay about his desire to attend law school due to his history confronting racial discrimination. Another student may draw on the leadership experience he gained as the president of his college's Latino Students Association, in a discussion of his career goals. A student may discuss her experience growing up in an immigrant household, or her capacities to build upon her native language skills, or reflect upon the lessons she gleaned from her cultural heritage. Law schools cannot meaningfully evaluate this information as part of a holistic admissions

process while ignoring that it is related to the applicant's race. As this Court has recognized in the electoral redistricting context, the most that can be realistically achieved is that race will not "predominate[]" in government decision-making. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Shaw v. Reno*, 509 U.S. 630, 646 (1993). And, as with redistricting cases – where race is one consideration along with "age, economic status, religious and political persuasion, and a variety of other demographic factors," *Shaw v. Reno*, 509 U.S. 630, 646 (1993) – the use of race as one factor among many in law school admissions is constitutionally permissible.

If the nuanced use of race that law schools currently employ in compliance with this Court's precedents – from *Bakke* through *Grutter* to *Parents Involved* – is held impermissible, the only true alternative would be to strip away every indication of race from candidates' applications. But stripping applications of all evidence of extracurricular activities, geography, recommendations, essays, background, passions, and community service is anathema to a holistic process and to the goal of producing excellent lawyers who can function effectively in our society.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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United States Court of Appeals
for the Fifth Circuit**

BRIEF FOR AMICI CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES ET AL. IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR AMICI CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES ET AL. IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The **Association of American Medical Colleges** ("AAMC") is a nonprofit educational association whose members include all 138 accredited U.S. and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems; and 90 academic and scientific societies.[1] Through these institutions and organizations, the AAMC represents 128,000 faculty members, 75,000 medical students, and 110,000 resident physicians. Founded in 1876, the AAMC, through its many programs and services, strengthens the world's most advanced medical care by supporting the entire spectrum of education, research, and patient care activities conducted by its member institutions.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a

AAMC is joined in this brief by eleven organizations whose members include schools, residency programs, and other institutions involved in educating and training health care providers and administrators: the **American Association of Colleges of Nursing, American Association of Colleges of Osteopathic Medicine, American Dental Education Association, Associated Medical Schools of New York, Association of Academic Health Centers, Association of American Veterinary Medical Colleges, Physician Assistant Education Association, Association of Schools of Allied Health Professions, Association of Schools of Public Health, Association of University Programs in Health Administration, and National Association of Hispanic-Serving Health Professions Schools, Inc.**; fourteen organizations whose members include physicians and other health care providers: the **American Medical Association, American Dental Association, American Nurses Association, American Academy of Family Physicians, American Academy of Pediatrics, American Academy of Physician Assistants, American College of Obstetricians and**

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monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Gynecologists, **American College of Physicians**, **American Psychiatric Association**, **American Public Health Association**, **Association of American Indian Physicians**, **National Hispanic Medical Association**, **National Medical Association**, and **Society of General Internal Medicine**; three organizations that represent the interests of medical school students: the **American Medical Student Association**, **National Medical Fellowships, Inc.**, **Student National Medical Association**; and **The ASPIRA Association, Inc.**, a non-profit organization that is dedicated to improving the health of underserved communities. Additional information regarding these organizations is provided in the Addendum to this brief.

SUMMARY OF THE ARGUMENT

At its best, the quality of medical care in the United States is unmatched throughout the world, in large part because of its unparalleled medical education institutions. As the gatekeepers to the medical profession, medical schools have obligations that extend beyond their individual students to society at large. Those obligations include redressing current disparities in health care, where minority patients tend to receive less and lower quality care than others. The Nation's medical schools must ensure not only that graduating physicians will be able to practice medicine at the highest levels, but also that competent medical care in different practice areas will reasonably be available to all who need such care.

Medical schools have learned over many decades of experience that these goals cannot be accomplished unless physicians are educated in environments that reflect the ever-increasing diversity of the society they serve. As a result, access to medical education has never been determined solely by metrics such as test scores and grades. Rather, admission has historically been based on a holistic evaluation process—including personal interviews of applicants—in which an applicant's background is taken into account along with myriad other factors.

In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), the Court approved of this holistic evaluation process, with Justice Powell providing the deciding rationale. As he explained:

> Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Id. at 314 (Powell, J.). Twenty-five years later, the Court specifically endorsed Justice Powell's rationale, after observing that "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views." *Grutter* v. *Bollinger*, 539 U.S. 306, 307 (2003). *See also id.* at 387 (Kennedy, J., dissenting) ("The opinion by Justice Powell, in my view, states the correct rule for resolving this case.").

Justice Powell's words ring as true today as they did thirty-five years ago. Indeed, the need to train the next generation of physicians in a diverse educational environment is even more important now, as our society has become even more heterogeneous. Research shows that when physicians understand more about the diverse cultures of their patients, physician decision-making is better informed, patients are more likely to follow their physicians' advice, and medical outcomes improve. Thus, preventing medical educators from continuing to value diversity will not merely impoverish the educational experience of all future doctors; it will diminish their ability "to render with understanding their vital service to humanity." *Bakke*, 438 U.S. at 314 (Powell, J.).

In the nearly thirty-five years since *Bakke*, medical schools throughout the Nation have been refining and implementing holistic methods for evaluating applicants of the type approved by Justice Powell and later endorsed by the Court. In evaluating an applicant's ability to contribute to and benefit from an enriching educational environment, race is considered merely as one of a multitude of factors, none of which is dispositive standing alone. Whereas petitioner focuses on test scores and grades as the almost exclusive barometer of merit, those factors have never been independently determinative in medical school admissions. The goal is not mechanically to admit students based on numerical criteria or to mirror the country's demographics, but rather to produce a class of physicians that is best equipped to serve *all* of society.

There is no proven substitute for this individualized, holistic review that may consider an applicant's race and ethnicity along with all other factors that make up his or her background. As this Court recognized in *Grutter*, 539 U.S. at 340, for medical schools and other graduate institutions there is nothing akin to respondent's "Top 10%" plan, which achieves a degree of diversity only because of underlying residential segregation in Texas. Medical school administrators have found no other proxy that could substitute for individualized consideration of an applicant's entire background.

Dating to *Bakke* and continuing through *Grutter*, the Nation's medical schools have relied on this Court's approval of the legal framework supporting their holistic, individualized evaluation process, which furthers the schools' societal obligation to ensure that physicians will be competent to serve their increasingly diverse patients. Accepting petitioner's invitation to overrule these decisions, or to remove the deference to expert educators that underlies them, would effectively prevent medical schools from fully carrying out that obligation, to the detriment of patient health. Accordingly, amici urge this Court to take no action that would disrupt the admissions processes that have been carefully crafted in reliance on these longstanding precedents.

ARGUMENT

I. DIVERSITY IS A VITAL COMPONENT OF THE EDUCATIONAL MISSION OF THE NATION'S MEDICAL SCHOOLS.

A. Physicians Must Understand How To Serve Diverse Communities.

The current picture of health in America is simultaneously bright and bleak. While we are better equipped than ever with biomedical knowledge and technology to both avoid disease and prevent early death, certain segments of the population are slow to benefit from these advancements.

Significant health disparities exist along lines of socio-economic status, urban or rural residence and, most notably, race and ethnicity. *See* Bruce G. Link, *Epidemiological Sociology and the Social Shaping of Population Health*, 49 J. of Health & Soc. Behav. 367 (2008). Minority populations continue to disproportionately suffer from numerous health conditions. In some areas, such as maternal death and the diagnosis of advanced-stage breast cancer, the disparities have increased. *See* Centers for Disease Control and Prevention, *CDC Health Disparities and Inequalities Report—United States* (2011) (www.cdc.gov/mmwr/pdf/other/su6001.pdf); HHS, Agency for Healthcare Research & Quality, *National Healthcare Disparities Report* (2011) (www.ahrq.gov/qual/nhdr11/nhdr11.pdf). When new technologies emerge to fight a disease, minority populations experience substantially slower and fewer benefits than non-minorities. *See* Link, *supra*. While some of these disparities are due to lower levels of health care in minority communities, the disparities persist even in systems where access is universal, such as in veterans' care. *See* H.P. Santry & S.M. Wren, *The Role of Unconscious Bias in Surgical Safety and Outcomes*, 92 Surg. Clin. N. Am. 137 (2012).

Moreover, minority communities are both medically underserved and served disproportionately by physicians of their own race or ethnicity. Communities with high proportions of African-American and Hispanic residents are far more likely to have a shortage of physicians, regardless of income. *See, e.g.*, J.S. Weissman et al., *Residents' Preferences and Preparation for Caring for Underserved Populations*, 78 J. Urban Health 535 (2001); *see also* Karen Odom Walker et al., *The Association Among Specialty,* *Race, Ethnicity, and Practice Location Among California Physicians in Diverse Specialties*, 104 J. Nat'l Med. Assoc. 46 (2012). Underserved residents also rely heavily on underrepresented minority physicians for their care, because relatively few non-minority physicians practice in those areas. *See* Somnath Saha & Scott A. Shipman, *Race-Neutral Versus Race-Conscious Workforce Policy To Improve Access To Care*, 27 Health Aff. 234 (2008); William T. Basco Jr. et al., *Assessing Trends in Practice Demographics of Underrepresented Minority Pediatricians, 1993–2007*, 125 Pediatrics 460 (2010).

These disparities cannot continue. It is estimated that by 2015 there will be a shortage of 63,000 physicians in the United States, a number that is projected to rise to 130,000 by 2025. *See* AAMC, *The Impact of Health Care Reform on the Future Supply and Demand for Physicians: Updated Projections Through 2025* (2010) (www.aamc.org/download/158076/data/updated_projections_through_2025.pdf). This demand for providers is true of the nursing profession as well. It is expected that the number of employed nurses will grow from 2.74 million in 2010 to 3.45 million in 2020, an increase of 712,000 or 26%. Bureau of Labor Statistics, *Employment Projections 2010-2020* (2012) (www.bls.gov/news.release/pdf/ecopro.pdf) (Table 6). In 2012, only 15% of students in U.S. medical schools and 23% of nursing students are underrepresented minorities, while such minorities comprise 36% of the total U.S. population, with that number expected to increase. *Compare* AAMC, *Total Enrollment by U.S. Medical School and Race and Ethnicity, 2011* (www.aamc.org/download/160146/data/table31-enrll-race-sch-2011.pdf), *with* William H. Frey, *America's Diverse Future: Initial*

Glimpses at the U.S. Child Population from the 2010 Census (Brookings 2011), *and* Congressional Research Service, *The Changing Demographic Profile of the United States* 18-22 (2011); Amer. Assoc. of Colleges of Nursing ("AACN"), *2011-2012 Enrollment and Graduations in Baccalaureate and Graduate Programs in Nursing* 21 (2012). It is therefore plain that health professionals of all races and ethnicities must learn to better serve the country's diverse patient population in order to reduce disparities in health outcomes.

The Nation's medical schools believe that the key to eliminating the health disparities described above is to develop a workforce of people from all backgrounds to bridge the current differences between providers and patients. In addition to graduating physicians with the highest medical skills, medical schools also seek to train physicians with high levels of "cultural competence." These are physicians who are familiar with the connection between sociocultural factors and health beliefs and behaviors and who have the tools and skills to manage these factors appropriately to help eliminate socio-cultural barriers to care. Joseph R. Betancourt et al., *Defining Cultural Competence: A Practical Framework for Addressing Race/Ethnic Disparities in Health and Health Care*, 118 Pub. Health Rep. 293, 298 (2003).

Nursing programs across the country have also placed greater importance on educating a culturally competent workforce. The objective is to educate and train students to provide patient-centered care that identifies, respects, and addresses differences in patients' values, preferences, and expressed needs. *See* AACN, *Cultural Competency in Baccalaureate Nursing Education* (2008) (www.aacn.nche.edu/

leading-initiatives/education-resources/competency.pdf); AACN, *Establishing a Culturally Competent Master's and Doctorally Prepared Nursing Workforce* (2009) (www.aacn.nche.edu/education-resources/CulturalComp.pdf). These efforts also further the profession's objective of eliminating health disparities that nurses must address in a global environment, in partnership with other healthcare disciplines. HHS, National Committee of Vital and Health Statistics, *Eliminating Health Disparities: Strengthening Data on Race, Ethnicity, and Primary Language in the United States* (2005) (www.cdc.gov/nchs/data/misc/EliHealthDisp.pdf).

Medical schools strongly believe that diversity in the educational environment is integral to instilling in new physicians the cultural competence necessary to more effectively serve a diverse society. Contrary to petitioner's contention, medical educators are not prohibited from valuing diversity in order "to advance the general welfare of society." Pet. Br. 29. Medical schools are committed to creating a diverse educational environment because they believe that a diverse student body produces educational outcomes that ultimately benefit public health. "[M]uch of the point of education is to teach students how others think and to help them understand different points of view—to teach students how to be sovereign, responsible, and informed citizens in a heterogeneous democracy." Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1774 (1996). For medical schools, the educational benefits of diversity are fundamentally necessary to improve health outcomes throughout the United States. A diverse classroom "provide[s] a unique contribution to learning, discussion, and understanding that is not necessarily attainable elsewhere." Lisa Tedesco, *The Role of Diversity in the Training of Health Professionals*, in *The Right Thing to Do, The Smart Thing to Do: Enhancing Diversity in the Health Professions* at 36, 50 (Inst. of Medicine 2001). Furthermore, opportunities for mentoring of students by diverse medical leaders are also essential to an inclusive learning environment. David A. Thomas, *The Truth About Mentoring Minorities: Race Matters*, 79(4) Harv. Bus. Rev. 98 (2001).

Just as Justice Powell recognized more than three decades ago, amici remain convinced that because "[p]hysicians serve a heterogeneous population" they must be educated in a medical school that includes students of *all* backgrounds, who bring "outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Bakke*, 438 U.S. at 313 (Powell, J.). As discussed further below, medical schools continue to carry out that societal obligation by employing the holistic admissions process approved by Justice Powell and later endorsed by the Court, which properly considers an applicant's entire background without predetermined quotas or outcomes.

B. The Benefits Of Diversity Are Indispensable To Achieving Core Educational Goals.

Diversity in medical school admissions is not an end goal in itself, but rather a means to achieving the core educational goals defined by the institution. *See* Amy N. Addams et al., *Roadmap to Diversity: Integrating Holistic Review Practices into Medical School Admission Processes* ("*Integrating Holistic Review Practices*") at ix (2010) (www.aamc.org/

publications). While diversity may include race, ethnicity, and gender, it is a "student-specific, multidimensional concept" that "may encompass other dimensions of experiences and attributes" including, among other things, an applicant's having overcome hardships or cultural barriers, languages spoken, socioeconomic status, and geography. *Id.*

This flexibility means that diversity is not a "one-size-fits-all" concept. Just as it can encompass a variety of factors within a single school, it may have different meanings from one school to the next. Depending on the "institutional mission, educational goals, the kind of students a medical school wants to educate, and the kind of physicians it wants to graduate," the diversity interests of one medical school may be markedly different from those of another. *Id.* While their practices will likely share common elements, each school must individually determine how best to apply principles of diversity in pursuit of its goals as an institution. "The key to success for any medical school seeking to enroll and graduate a broadly diverse class is the connection the school makes between the diversity it seeks and the educational, mission-driven goals to which it aspires." Arthur L. Coleman et al., *Roadmap to Diversity: Key Legal and Educational Policy Foundations for Medical Schools* at vi (2008) (www.aamc.org/publications).

For most medical schools, these goals include producing culturally-competent physicians who are well-adapted to serve patients from across the varied racial and ethnic makeup of the Nation. As this Court recognized in *Grutter*, "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" 539 U.S. at 330 (citation omitted). Business skills "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332. These fundamental benefits of diversity have not changed since the Court recognized them nearly a decade ago.

In the medical education environment, these benefits are particularly important because public health is at stake, not just business interests. A diverse student body helps to promote the empathy, emotional intelligence, and cultural competence required of physicians and other health care professionals. Medical students who are educated in a diverse student body report that they are better able to work with patients of diverse backgrounds. Gretchen Guiton et al., *Student Body Diversity: Relationship to Medical Students' Experiences and Attitudes*, 82 Acad. Med. 51 (2007); *see also* Somnath Saha et al., *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in US Medical Schools*, 300 JAMA 1135 (2008) (finding that non-minority students attending more racially diverse medical schools exhibited greater confidence in their preparedness to care for minority patients and stronger attitudes about equitable access to health care). The benefits are even greater when students engage in informal discussions about course materials with peers from diverse backgrounds, Guiton, *supra*, at 54, and when medical schools actively promote student engagement and perspective-sharing across diverse backgrounds. Saha et al., *supra*, at 1141.

It is a reality that "minority patients tend to receive better interpersonal care from practitioners of their own race or ethnicity." HHS, Bureau of Health Professionals, *The Rationale for Diversity in the Health Professions: A Review of the Evidence* 3 (2006) (bhpr.hrsa.gov/healthworkforce/reports/diversityreviewevidence.pdf) (reviewing 55 publicly available studies addressing diversity in health care). One goal of valuing diversity in medical education is to change that reality. One contributor to this disparity is unconscious bias on the part of physicians. Studies have shown that this bias exists and negatively impacts clinical decision making, which leads to negative treatment decisions and outcomes.[2] There is also a connection between the unconscious bias of the physician and the patient's negative response to that behavior. *See* Lisa A. Cooper, et al., *The Associations of Clinicians' Implicit*

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[2] *See, e.g.*, Santry & Wren, *supra*; A.R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. Gen. Internal Med. 1231 (2007); Janice A. Sabin et al., *Physicians' Implicit and Explicit Attitudes About Race by MD Race, Ethnicity, and Gender*, 20 J. Health Care for Poor & Underserved 896 (2009); L.M. Bogart et al., *Factors Influencing Physicians' Judgments of Adherence and Treatment Decisions for Patients with HIV Disease*, 21 Med. Decision Making 28 (2001); Michelle van Ryn et al., *Physicians' Perceptions of Patients' Social and Behavioral Characteristics and Race Disparities in Treatment Recommendations for Men with Coronary Artery Disease*, 96 Am. J. Pub. Health 351 (2006); Michelle van Ryn & Jane Burke, *The Effect of Patient Race and Socio-Economic Status on Physicians' Perceptions of Patients*, 50 Soc. Sci. & Med. 813 (2000).

Attitudes about Race with Medical Visit Communication and Patient Ratings of Interpersonal Care, 102 Am. J. Pub. Health 979 (2012). And it has been shown that patients are more likely to make appointments and adhere to a physician's prescribed treatment when the physician and patient share characteristics such as age, sex, education, and race. *See* R.L. Thornton, et al., *Patient-Physician Social Concordance, Medical Visit Communication and Patients' Perceptions of Health Care Quality*, 85 Patient Educ. & Counseling 201 (2011).

Only by producing a workforce of health care professionals who are well-adapted to working in a diverse environment, with patients from all backgrounds, can health professional schools hope to alleviate some of these disparities in patient care.

Increased exposure to diverse perspectives may also increase an individual's ability to understand, accept, and ultimately value disparate viewpoints. Research among college students indicates that this ability can increase after engaging in even a single discussion with an individual expressing a minority viewpoint. Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 Psychol. Sci. 507 (2004). And prolonged exposure to diverse viewpoints may have a cumulatively stronger impact on complex thinking skills. *Id.* at 509. For a physician or other health professional attempting to properly diagnose and design treatment plans for patients with different cultures, backgrounds, belief systems, and support networks, the ability to consider and integrate other perspectives is an essential skill.

In turn, the ability to work with individuals having diverse perspectives can improve outcomes. Studies have indicated that groups of people with diverse backgrounds and ways of viewing the world outperform groups of people who have similar backgrounds and perspectives, even when the latter group is composed of those deemed to be the best individual performers. *See* Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (2007). In the health care arena, "[d]iverse teams working together and capitalizing on individuality and distinct perspectives outperform homogenous teams. This is particularly true when teams address complex problems, such as those that characterize biomedical and behavioral research, technology, and health." NIH, *Draft Report of the Advisory Committee to the Director Working Group on Diversity in the Biomedical Research Workforce* ("*NIH Draft Report*") at 11 (2012) (acd.od.nih.gov/Diversity%20in%20the%20Biomedical%20Research%20Workforce%20Report.pdf) (citing L. Hong & S.E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 Proc. Nat'l Acad. Sci. USA 16385 (2004) and Valerie I. Sessa & Jodi J. Taylor, *Executive Selection: Strategies for Success* (Ctr. for Creative Leadership 2000)).

Recognition of this phenomenon has led to fundamental changes in medical education. To capture the proven benefits of team-based, patient-centered care using a team of professionals with diverse perspectives, medical schools increasingly require students to work in teams and train alongside students in other fields. This inter-professional education can help future health care providers learn to work in a collaborative environment that considers all aspects of health, lifestyle, and background to provide the best care for the patient. In a similar fashion, medical school students whose classmates represent diverse perspectives will be more prepared and capable of working collaboratively alongside others with diverse perspectives. "A workforce that brings the full power of diversity to pursue biomedical and behavioral research problems that address the needs of underrepresented racial and ethnic minorities is an important component of reducing these health inequities." *NIH Draft Report*, *supra*, at 11 (citing D.M. Stoff et al., *Introduction: The Case for Diversity in Research on Mental Health and HIV/AIDS*, 99 Am. J. Pub. Health S8 (Supp. 1 2009)). As indicated by a former Surgeon General, "a diverse team of researchers will be more likely to ask and pursue the most appropriate questions in the most appropriate manner—whether in basic and clinical research, or in health services and behavioral research." *Id.* (citing David Satcher, *Embracing Culture, Enhancing Diversity, and Strengthening Research*, 99 Am. J. Pub. Health S4 (Supp. 1 2009)).

In order to select candidates who embody these diverse viewpoints, medical schools consider factors that can include rural or urban backgrounds, bachelor's degrees in the sciences or liberal arts, unusual life experiences or journeys, and disparate racial and economic backgrounds, among others. A richly diverse class can contribute to a dynamic, multi-dimensional educational environment where classroom and study-group discussions add insight and texture to course materials.

These benefits of diversity in health professional education have been recognized by Congress, *see* 42 U.S.C. § 300u-6 note ("diversity in the faculty and student body of health professions schools enhances the quality of education for all students attending the schools") (Congressional finding (12)), and by students, *e.g.*, Dean K. Whitla et al., *Educational Benefits of Diversity in Medical School*, 78 Acad. Med. 460, 466 (2003) (medical school students overwhelmingly report that contacts with diverse peers greatly enhanced their educational experience). "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 314 (Powell, J.) (citation omitted).

Efforts to promote the inclusion of racial and ethnic minorities are vital to the institutional goals of medical and other health professional schools. While diversity in medical and other health professional school admissions is not itself an end goal, it is an essential mechanism for helping to produce a culturally aware workforce of future health care professionals. A diverse student body can have a lasting impact on the way that physicians and other health care professionals will serve the public in the future. As a consequence, amici have concluded that greater diversity in the educational environment is essential to addressing the health care needs of an increasingly diverse population. This educational judgment warrants deference. *See Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer," in keeping with the Court's "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits").

The bodies that are responsible for accrediting medical schools likewise recognize the important role that student diversity plays in the effective delivery of health care. In its *Standards for Accreditation*, the Liaison Committee on Medical Education ("LCME") affirms that "aspiring future physicians will be best prepared for medical practice in a diverse society if they learn in an environment characterized by, and supportive of, diversity and inclusion." LCME, *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the M.D. Degree* ("*Standards for Accreditation*") at 5 (2012) (www.lcme.org/functions.pdf) (requirement IS-16). As of 2009, an accredited medical school in the United States "must have policies and practices to achieve appropriate diversity among its students, faculty, staff, and other members of its academic community, and must engage in ongoing, systematic, and focused efforts to attract and retain students, faculty, staff, and others from demographically diverse backgrounds." *Id.* Importantly, however, the *Standards for Accreditation* do not define diversity, but instead defer to each individual school for what types and levels of diversity are best suited to achieve the mission and goals of the institution.

Other bodies responsible for the accreditation of health professional programs have adopted similar standards. The Commission on Osteopathic College Accreditation advises: "A diverse student body provides the richness necessary for osteopathic medical education. A [school] should make every effort to recruit students from a diverse background to foster that richness while meeting its mission and objectives." Commission on Osteopathic College Accreditation, *Accreditation of Colleges of Osteopathic Medicine: COM Accreditation Standards* *and Procedures* 21 (2012) (www.osteopathic.org/inside-aoa/accreditation) (guideline to Rule 5.3.2).

The Commission on Dental Accreditation has similarly recognized that "the demographics of our society are changing," and that "[d]iversity in education is essential to academic excellence." Commission on Dental Accreditation, *Accreditation Standards for Dental Education Programs* 9, 13 (2010) (www.ada.org/sections/educationAndCareers/pdfs/predoc_2013.pdf). Echoing the importance of cultural competence in the medical profession, the most recent standards emphasize the role of classroom diversity in achieving this goal:

> A significant amount of learning occurs through informal interactions among individuals who are of different races, ethnicities, religions, and backgrounds; come from cities, rural areas and from various geographic regions; and have a wide variety of interests, talents, and perspectives. These interactions allow students to directly and indirectly learn from their differences, and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. Cultural competence cannot be effectively acquired in a relatively homogenous environment. Programs must create an environment that ensures an in-depth exchange of ideas and beliefs across gender, racial, ethnic, cultural and socioeconomic lines.

Id. at 13.

In 2004, following the 2002 Institute of Medicine Report entitled *Unequal Treatment: Confronting the*

Racial and Ethnic Disparities in Health Care, the American Medical Association ("AMA"), the National Medical Association, and the National Hispanic Medical Association established the Commission to End Health Care Disparities ("CEHCD"). The CEHCD focuses on four major areas: (1) educating and training professionals on ethnic disparities and cultural competencies; (2) increasing workforce diversity in medical and allied health care professions; (3) advancing policy and advocacy initiatives that improve the quality of care provided to minority and multicultural populations and health outcomes; and (4) improving the collection of data and research in order to identify and eliminate health care disparities. *See* CEHCD, *Bylaws* (2012) (www.ama-assn.org/resources/doc/public-health/cehcd-bylaws.pdf).

None of these organizations has promoted a specific form of diversity, and yet all emphasize the vital role that it plays in educating and training health care professionals. Prohibiting medical educators from valuing and achieving diversity would harm both students and the broader society that they are being trained to serve.

II. MEDICAL SCHOOLS HAVE LONG RELIED ON HOLISTIC REVIEW FOR ADMISSIONS DECISIONS.

In order to look beyond grades and test scores during the admissions process, most medical schools have adopted a holistic review process similar to that upheld by this Court in *Grutter*. Holistic review is a flexible, highly-individualized consideration of the multiple ways in which medical school applicants can demonstrate merit. "Under a holistic review framework, candidates are evaluated by criteria that are institution-specific, broad-based, and mission-driven and that are applied equitably across the entire candidate pool." *Integrating Holistic Review Practices*, *supra*, at ix. Since well before the *Grutter* decision, most medical schools have used at least some form of highly-individualized review in the admissions process that considers the many dimensions of merit, and potential contributions to the learning environment, of each candidate.

A. Medical Schools Have A History Of Highly Individualized Admissions Practices.

The qualities that contribute to a successful health care professional are impossible to measure with grades and test scores alone. "Medical educators agree that success in medical school requires more than academic competence; it also requires integrity, altruism, self-management, interpersonal and teamwork skills, among other characteristics." Dana Dunleavy et al., *Medical School Admissions: More than Grades and Test Scores*, 11 Analysis In Brief, No. 6, at 1 (Sept. 2011). To assess these qualities, medical schools have a long history of highly individualized admissions processes, including personal pre-admission interviews for every accepted applicant.

Although these processes vary with the educational mission and goals of each school, all medical schools consider a range of non-academic factors. *Id.* Medical schools have never exclusively relied on numerical criteria to select their student bodies. *See* Filomeno Maldonado, *Rethinking the Admissions Process: Evaluation Techniques That Promote Inclusiveness in Admissions Decisions*, in *The Right Thing to Do, The Smart Thing to Do: Enhancing Diversity in Health Care Professions* at 305-07 (Inst. of

Medicine 2001). While undergraduate GPA and MCAT scores are usually high on the list of considerations in determining which applicants to interview, medical schools rank the personal interviews and letters of recommendation as the most important considerations in making final acceptance decisions. Dunleavy, *supra*, at 2. In fact, between 2009 and 2011, 8.5% of applicants with the highest combined GPAs and MCAT scores were *rejected* by *all* of the medical schools to which they applied. *See* AAMC, *MCAT and GPA Grid for Applicants and Acceptees to U.S. Medical Schools, 2009-2011* (2011) (www.aamc.org/download/270906/data/table24-mcat pagridall0911.pdf) (Table 24).

Holistic review precludes any single criterion from becoming the uniform deciding factor for interviewing and selecting candidates for admission. Serious consideration is afforded to the ways in which each applicant might uniquely contribute to a diverse educational environment. Each candidate is able to communicate his or her potential as more than a set of numbers, and, through holistic review, medical schools are able to consider these factors in light of the institutional goals for the classroom, clinical practice, and biomedical research. *See Integrating Holistic Review Practices*, *supra*, at x. This holistic consideration of applicants is precisely the reason that individual interviews are so vital to the medical school admissions process.

For some medical schools, the range of factors considered during holistic review may include race, ethnicity, and gender. However, these factors are only considered to the extent necessary to achieve clearly articulated mission-driven benefits. *Id.* at 6. To the extent that race is considered, it is never considered in isolation. Instead, it is considered flexibly as just one of the many characteristics and pertinent elements of each individual's background. Characteristics that make an individual particularly well-suited for the medical profession, such as resilience or the ability to overcome challenges, may in some cases be intertwined with an individual's race or ethnicity. When candidates have overcome great race-related challenges, obscuring or denying the realities of these challenges will hinder a full appreciation of the applicant's potential contributions.

For most schools, there is no substitute for the consideration of an individual's racial identity and ethnic background as part of holistic review intended to ensure that health professionals are educated in a diverse environment. As the Court indicated in *Grutter*, "percentage plans," such as the one used by respondent for undergraduate admissions, do not translate to the professional school environment. *See Grutter*, 539 U.S. at 340 ("The United States does not * * * explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."). Most medical schools draw from a nationwide (and often worldwide) applicant pool that makes it impossible to make simple comparisons based on grade point averages. And as noted, such comparisons do not begin to capture the range of qualities that schools have always considered.

Moreover, medical schools have expressly relied on this Court's pronouncements in crafting their holistic review procedures. After the Court's decision in *Grutter*, the AAMC convened an Advisory Committee on Holistic Review, a constituent working group representing a number of health disciplines, to address how to increase diversity among health professional students in alignment with the framework upheld in *Grutter*. The Advisory Committee began developing tools and resources, such as the *Roadmap* guidance documents discussed above, that medical schools could adopt or adapt to create and sustain student diversity through the use of holistic review in the admissions process. Using these tools, the AAMC has conducted cross-country workshops with dozens of medical schools each year, and in 2012 will expand into Osteopathic schools. The AAMC's commitment to assisting medical schools in crafting institution-specific diversity policies in the context of a legally-sound holistic review process is ongoing, with two additional publications anticipated in 2012: a white paper on institutional alignment and a third *Roadmap* guidance document on self-evaluation of admissions practices and policies.

Medical schools do not use the Court's approved holistic review framework as a substitute for merit-based consideration of medical school applicants. Rather, it is a process through which medical schools are better able to appreciate the individual merits of each candidate to be a successful student and, ultimately, physician. Indeed, as a group, underrepresented minority students perform extremely well in medical school, with 95.5% graduating and 98% passing the first medical licensing examination. *See* AAMC, *Using MCAT Data in Medical Student Selection: A Supplement to* *the March 2012 Report with Results for Racial and Ethnic Groups* 7-14 (2012).

B. Although Other Initiatives Have Shown Some Success, It Remains Necessary For Medical Schools To Consider Applicants' Full Backgrounds In Order To Achieve The Schools' Educational Goals.

In accordance with the requirements of narrow tailoring, direct consideration of race is not intended to continue indefinitely. Medical schools are implementing a host of initiatives outside of the admissions context to help achieve a diverse and culturally-competent student body and physician workforce. Those initiatives have had some success in increasing the diversity of the medical school applicant pool. But they are not the complete answer. In order to discharge their obligations to produce well-trained health professionals who are prepared to serve all of society, many medical schools continue to find it necessary to consider an applicant's entire background, including race or ethnicity as one factor among many.

As recognized by the LCME, medical schools must "recognize [their] collective responsibility for contributing to the diversity of the profession as a whole." *Standards for Accreditation*, *supra*, at 17 (requirement MS-8). In carrying out this responsibility, schools are encouraged to "make admission to medical education programs more accessible to potential applicants of diverse backgrounds," including through "the development and institutionalization of pipeline programs, collaborations with institutions and organizations that serve students from disadvantaged backgrounds, community service activities that heighten awareness of and interest in the profession, and academic enrichment programs for applicants who may not have taken traditional pre-medical coursework." *Id.*

"Pipeline" programs, which seek to encourage underrepresented minorities to pursue a medical education at a young age, have had promising preliminary results. A study of one such program, the Stanford Medical Youth Science Program, indicated that 52% of program participants had either already completed or were currently enrolled in medical or graduate school. *See* Marilyn A. Winkleby, *The Stanford Medical Youth Science Program: 18 Years of a Biomedical Program for Low-Income High School Students*, 82 Acad. Med. 139, 143 (2007). Programs of the University of California designed to help individuals displaying predictors of future service to vulnerable communities enroll in medical school helped participants not only become physicians but also reach the communities that they aspire to serve. Kevin Grumbach & Eric Chen, *Effectiveness of University of California Postbaccalaureate Premedical Programs in Increasing Medical School Matriculation for Minority and Disadvantaged Students*, 296 JAMA 1079, 1082-85 (2006). Another recent study of similar programs concluded that among students matriculating into medical school, "postbaccalaureate premedical program participants were demographically diverse and, at medical school graduation, were more likely than nonparticipants to plan to practice in underserved areas." Dorothy A. Andriole & Donna B. Jeffe, *Characteristics of Medical School Matriculants Who Participated in Postbaccalaureate Premedical Programs*, 86 Acad. Med. 201, 201 (2011). Similarly, the AMA developed the *Doctors Back to School*

Program in 2002 to enable minority physicians to visit with elementary, middle, and high schools nationwide and promote careers in medicine. *See* AMA, *Doctors Back to School* (www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/minority-affairs-section/doctors-back-school.page)

Medical schools have also invested in recruitment and outreach strategies that are designed to increase the number of underrepresented minority applicants. For example, the University of Chicago Pritzker School of Medicine found that having a focus in the medical school curriculum on health disparities among underrepresented minorities correlated with a significant increase in accepted underrepresented minorities deciding to matriculate. Monica B. Vela et al., *Improving Underrepresented Minority Medical Student Recruitment with Health Disparities Curriculum*, 25 J. Gen. Intern. Med. S82, S83-85 (2010). At the University of New Mexico School of Medicine, initiatives to target recruitment and increase academic, personal, and cultural support for Native American students, through efforts such as creating a Native American student center, contributed to increases in the number of Native American matriculants. *See Native American Enrollment Doubles at School of Medicine*, UNM Today (July 22, 2009) (www.unm.edu/~market/cgi-bin/archives/2009_07.html).

Systemic changes are also being made in the medical education system to address concerns about cultural competence in health care. For example, the AAMC and the Association of Schools of Public Health ("ASPH") have published joint recommendations for training medical and public health students to become more culturally competent practitioners. *See* AAMC & ASPH, *Cultural Competence Education for Students in Medicine and Public Health* (July 2012) (members.aamc.org/eweb/upload/Cultural%20Competence%20Education_revisedl.pdf). AAMC has also worked to develop a new MCAT exam to be introduced in 2015, designed in part to measure how well an applicant understands the cultural, social, and socio-economic differences that can influence health.

While many of these programs and efforts are helpful, on their own they are insufficient. Due to a multitude of factors outside of medical schools' influence or control, including economic forces, the past decade has not shown an overall increase in the percentages of underrepresented minorities nationwide that apply to medical school. *See* AAMC, *Race and Ethnicity Responses of Applicants to U.S. Medical Schools, 2002-2011* (2011) (www.aamc.org/download/161198/data/table13.pdf) (Table 13). That disparity cannot be rectified by assessing applicants based on proxy criteria such as economic disadvantage. For example, simply focusing on statistical information that correlates with disadvantage—such as low socio-economic status—will in all likelihood reduce rather than increase the number of underrepresented minority applicants accepted for admission. Ann Steinecke et al., *Race-Neutral Admission Approaches: Challenges and Opportunities for Medical Schools*, 82 Acad. Med. 117, 123 (2007); William G. Bowen & Derek Bok, *The Shape of the River* 270-71 (1998).

Medical educators continue to find that a deliberate focus on fostering diversity in medical education is essential if medical schools are to fulfill their responsibility to effectively serve all of society. It is hoped that such actions will no longer be necessary in the future, but that future has not yet arrived.

III. ALTERING *GRUTTER* WOULD DISRUPT ADMISSIONS PRACTICES CRAFTED IN RELIANCE UPON THE COURT'S PRECEDENTS.

Petitioner invites the Court to either overrule the central holding in *Grutter* or to "clarify" that holding by removing the deference to school administrators in determining how best to achieve the compelling interest of fostering educational diversity. *See* Pet. Br. 53-57. The Court should reject that invitation. For more than thirty years, the Nation's medical schools have utilized the kind of holistic admissions process approved by the Court's holdings in *Bakke* and *Grutter*. In the schools' expert judgments, such practices are necessary to train physicians and other leaders in the health professions who can effectively serve an increasingly diverse society. Administrators have faithfully abided by the Court's guidance, and amici urge the Court not to disrupt that reliance by withdrawing its imprimatur from those longstanding practices.

The Court's commitment to *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood of SE Pa.* v. *Casey*, 505 U.S. 833, 854 (1992) (citing Lewis F.

Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. Sup. Ct. Hist. 13, 16 (1991)).

Accordingly, the Court will adhere to precedent except in the rare circumstances where a prior rule has proven "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986). The Court looks to whether an established rule "has proven to be intolerable simply in defying practical workability," whether it "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," whether it is "no more than a remnant of abandoned doctrine," and whether changed facts "have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854-55 (citations omitted). Finally, the Court requires "the most compelling reason to reexamine a watershed decision"—and there is little question that *Grutter* was such a decision—because to do otherwise "would subvert the Court's legitimacy beyond any serious question." *Id.* at 867.

None of these considerations warrants departing from *Grutter*. Far from "defying practical workability," the holistic admissions process approved in *Grutter* and *Bakke* continues to be the predominant mode of decision making employed by universities and graduate schools across the Nation. Those schools, moreover, have expressly relied on this Court's precedents in doing so. As the Court remarked in *Grutter*, "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views." *Grutter*, 539 U.S. at 307. That reliance has only grown in the nearly ten years since the full Court endorsed Justice

Powell's reasoning. *See supra* at 26. And there are no new facts that "have robbed [*Grutter's*] rule of significant application or justification." *Casey*, 505 U.S. at 854-55. Quite the opposite, the need for educators to value diversity in education has increased as our Nation has become more diverse.

It is petitioner's approach, not the *Grutter* rule, that is unworkable and that would have deleterious consequences if applied in the medical school context. In petitioner's view, judges and juries must continually scrutinize every admissions program to determine whether consideration of race or ethnicity is unnecessary because the school is "already enrolling [a] critical mass of minority students" without regard to that consideration. Pet. Br. 20. Under that rule, any use of race or ethnicity as part of a holistic review process is unnecessary, and thus unconstitutional, whenever a court determines that a critical mass of diverse students can be achieved without it. Under *Grutter*, by contrast, the "concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce" and the Court will defer to a school's "assessment that diversity will, in fact, yield educational benefits." *Grutter*, 539 U.S. at 328, 330. Contrary to petitioner's contention that *Grutter* requires courts to examine any consideration of race under an "absolute necessity" standard, Pet. Br. 51, the Court should instead continue to defer to the judgment of expert educators, provided that they engage in a "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339.

It is impossible for administrators to know in advance whether a judge or jury would find that the consideration of race or ethnicity in a particular admissions decision meets petitioner's test of "absolute necessity." It is difficult, if not impossible, to insulate consideration of an applicant's race or ethnicity from consideration of the rest of that individual's background. Where an admissions process includes reliance on personal statements, for example, ignoring race and ethnicity "might not even be possible," since "to read the file in a 'colorblind' way, the admissions officer would likely have to ignore highly relevant information, without which the applicant's personal statement might literally not make sense." Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 Cal. L. Rev. 1139, 1146-47, 1149 (2008). Similarly, requiring applicants to exclude any references to their race or ethnicity "create[s] an incentive for applicants to suppress their racial identity and to adopt the position that race does not matter in their lives," which "is likely to be particularly costly to applicants for whom race is a central part of their social experience and sense of identity." *Id.* at 1148.

The problem is compounded for medical and other health professional schools. Unlike most undergraduate institutions, medical and other health professional schools have always considered and highly value personal interviews in order to learn what the applicant's background would contribute to a culturally competent workforce. Requiring such consideration to proceed under the constant threat of judicial second-guessing would result in an admissions process that is very different from the one that has existed throughout modern history, and that would fail to meet the schools' obligations to both students and society at large. Removing the ability of medical schools to consider applicants' race and ethnicity as one of many personal attributes would undermine their ability to assess the entirety of each individual's background, thus frustrating the goal of best serving the public's health. At a time when our Nation is becoming more diverse, and health disparities remain so stark, constraining a medical school's ability to consider a student's entire background would negatively impact not only the classroom, but also patients, who would be deprived of a pipeline of physicians better equipped through personal experience and a diverse learning environment to provide the treatment and discover the cures for diseases that disproportionately impact minority populations.

Holistic review in medical school admissions is not a static concept. Rather, continuously "[e]valuating the effectiveness of admission policies, processes, and criteria in producing outcomes that reflect a medical school's mission is a core element of holistic review." *Integrating Holistic Review Practices*, *supra*, at 21. In furtherance of that principle, medical schools constantly re-evaluate their admissions processes to align them with the fundamental objectives of producing physicians of the highest caliber who can meet the health needs of the entire population. Given the persistence of health disparities among minority communities and the unconscious bias that contributes to that problem, amici strongly believe that it remains necessary in 2012 for institutions to continue to take action to ensure diversity in the admissions process. Amici believe that it would be a grave mistake for this Court to upset decades of precedent by precluding or significantly reducing the ability of expert medical educators to ensure that the next generation of physicians and other health professionals is educated and trained in an environment that will prepare them to address the Nation's critical health needs.

CONCLUSION

For the foregoing reasons, and those in respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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ADDENDUM

AMICI CURIAE

Association of American Medical Colleges—represents all 138 accredited U.S. medical schools, nearly 400 teaching hospitals and health systems, and 90 academic societies.

American Academy of Family Physicians—represents over 100,000 physicians, residents and medical students.

American Academy of Pediatrics—represents 62,000 primary care pediatricians, pediatric medical subspecialists, and surgical specialists who are committed to the attainment of optimal physical, mental and social health and well-being for all infants, children, adolescents, and young adults.

American Academy of Physician Assistants—represents over 97,000 physician assistants and physician assistant students.

American Association of Colleges of Nursing—represents 700 institutions offering university and four-year college education programs in nursing.

American Association of Colleges of Osteopathic Medicine—represents the Nation's 29 osteopathic medical schools, offering instruction at 37 locations in 28 states. Osteopathic medical schools currently educate more than 20 percent of all U.S. medical students.

American College of Obstetricians and Gynecologists—represents more than 45,000 obstetrician-gynecologists.

American College of Physicians—represents 115,000 internal medicine physicians and medical students.

American Dental Association—represents the interests of over 156,000 ADA members from all 50 states, the District of Columbia and Puerto Rico.

American Dental Education Association—represents 65 U.S. dental schools and 10 Canadian dental schools.

American Medical Association—the largest professional association of physicians, residents and medical students in the United States.

American Medical Student Association—represents 32,000 physicians-in-training.

American Nurses Association— represents the interests of 3.1 million registered nurses, has more than 140,000 members through both state associations and individual membership, and has 30 national organizational affiliates that collectively represent approximately 300,000 RNs in specialty areas.

American Psychiatric Association—represents over 38,000 psychiatric physicians from the U.S. and around the globe.

American Public Health Association— the oldest and most diverse organization of public health professionals in the world representing a broad array of health providers, educators, environmentalists, policy-makers and health officials at all levels working both within and outside governmental organizations and educational institutions.

Associated Medical Schools of New York—represents the 14 medical schools in New York State.

Association of Academic Health Centers—represents more than 100 institutions, including the Nation's primary resources for education in the health professions, biomedical and health services research, and many aspects of patient care.

Association of American Indian Physicians—represents 368 American Indian/Alaska Native ("AI/AN") physicians dedicated to improving the health of AI/AN people and the recruitment and retention of AI/AN students into health careers.

Association of American Veterinary Medical Colleges—represents all 27 accredited colleges and schools of veterinary medicine in the U.S.

Association of Schools of Allied Health Professions—represents 115 institutions which have a wide variety of allied health programs.

Association of Schools of Public Health—represents the deans, faculty, and students of the 32 accredited schools of public health (SPH), as well as programs seeking to become accredited SPH.

Association of University Programs in Health Administration—represents more than 230 colleges, universities, and health care organizations, as well as faculty and individuals, which are dedicated to the improvement of health care delivery through excellence in health administration education.

National Association of Hispanic-Serving Health Professions Schools, Inc.—represents 21 medical schools and 7 public health schools to improve the health of Hispanics through academic development, research initiatives, and training.

National Hispanic Medical Association—represents the interests and concerns of 45,000 licensed physicians committed to the mission to improve the health of Hispanic populations with affiliated Hispanic medical societies, resident and medical student organizations and other public and private partners.

National Medical Association—represents and promotes the interests of physicians and patients of African descent.

National Medical Fellowships, Inc.— provides scholarships for underrepresented minorities in medicine and the health professions.

Physician Assistant Education Association—represents 162 of the Nation's accredited physician assistant educational programs.

Society of General Internal Medicine—represents over 2,800 members as an international organization of physicians and others who combine caring for patients with education and/or research.

Student National Medical Association—represents more than 6,000 medical students, pre-medical students, residents, and physicians.

The ASPIRA Association, Inc.—promotes the education and leadership development of Puerto Rican and other Latino youth; works with over 50,000 youth and their families each year.

AMICUS
CURIAE
BRIEF

RECORD
AND

No. 11-345

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IN THE

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ABIGAIL NOEL FISHER,

Petitioner,

—v.—

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

The Association of the Bar of the City of New York (New York City Bar), founded in 1870, is a voluntary association of lawyers and law students. Today the New York City Bar has over 23,000 members. Among its purposes are: "cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice."

The New York City Bar has 150 committees that focus on legal practice areas and issues. Through testimony, reports, amicus briefs, statements, and letters drafted by committee members, the New York City Bar comments on legal issues and public policy. This brief was prepared by the Committee on Education and the Law. This Committee addresses issues surrounding education from pre-K through higher education, including education finance, governance, legislative proposals, and special education. The New York City Bar has a long-standing interest in protecting civil rights and has submitted a number of amicus curiae briefs to this Court in cases addressing education and civil rights.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

SUMMARY OF ARGUMENT

The University of Texas admissions policy is fully consistent with constitutional requirements, as set forth in Supreme Court jurisprudence, because it gives holistic, individualized attention to each applicant and does not permit race to be a single or predominant factor in determining whether to review. Indeed, the role of race in the University of Texas admissions process is even more modest than it was in the Harvard University or the University of Michigan Law School procedures approved by prior decisions of this Court.

The effort of the University of Texas to increase the diversity of its student body is not only commendable but is essential to increase the number of students of color who go on to professional careers and thus take leadership roles in society. We write to stress the importance of an undergraduate institution's promotion of diversity from the perspective of the legal community, specifically the New York City legal community. The legal profession recognizes the importance of diversity and has made major efforts to foster it. Over one-third of the nation's population is comprised of African American, Latino, Asian and other people of color. And as law practice becomes increasingly globalized, the world it is servicing is overwhelmingly comprised of people of color. In order to serve these individuals, and the businesses, institutions and organizations they lead, lawyers must have a range of cultural experiences and insights and a keen understanding of those they represent.

Despite the diversity efforts that have been undertaken and the progress that has been made to date, lawyers of color are still underrepresented in the legal community. The New York City Bar has helped the lawyers in New York City focus on diversity, has obtained commitments from firms to improve it, and has been tracking the progress of law firms in achieving it. Nevertheless, the latest data still show that only 16.6 percent of lawyers in the law firms that have signed our Statement of Diversity Principles, and only 6.3 percent of law firm partners, are lawyers of color.

If these numbers are to improve, there must be a broader pool of students of color at the undergraduate level who are interested in pursuing a legal career: students who have the ability to negotiate and mediate, to exercise leadership, to persevere and to see a matter through to its conclusion; in other words, students who some day would be effective in understanding and serving clients' legal needs.

In the context of undergraduate admissions, these are the kinds of skills and attributes that may not necessarily be reflected in grades and standardized test scores, but which may instead be identified by examining the totality of an applicant's background and experience. Understanding the context of an applicant's circumstances, including race, can be a valuable indicator for a college as to what the applicant has achieved and whether the applicant can use the college degree and experience to be a productive member of his or her community.

It is essential that colleges be able to consider these attributes, and to view them in the context of an individual's race and attendant circumstances, in making admissions decisions. From the perspective of the legal profession, this individualized approach can give increased opportunities to students whose skills will be well matched to ultimately serve an increasingly diverse population that has a vast array of legal needs.

ARGUMENT

I. THE ADMISSIONS PROCESS OF THE UNIVERSITY OF TEXAS INCLUDES AN INDIVIDUALIZED ASSESSMENT OF EACH CANDIDATE, IN WHICH RACE IS NOT A PREDOMINANT FACTOR, AND IT THUS COMPORTS WITH CONSTITUTIONAL REQUIREMENTS

In a series of three cases, *Regents of University of California v. Bakke*[2], *Gratz v. Bollinger*[3], and *Grutter v. Bollinger*[4], this Court described the acceptable use of race in the university admissions process. In these cases, the Court barred universities from conferring discrete benefits based solely on race but permitted universities to consider the race of applicants on an individualized, holistic basis, so long as race is not considered in a way which insulates minorities from competition with all other candidates. *Bakke*, 438 U.S. at 317; *Grutter*, 539 U.S. at 334.

In *University of California v. Bakke*, the Court held that setting aside a certain number of seats in a class for minority students violated the Equal Protection Clause. In *Gratz v. Bollinger*, the Court barred a university from giving candidates twenty points, one-fifth of the points needed to earn admission, just for being a minority. This automatic award assured admission for virtually every minimally qualified minority applicant. *Id.* at 266, 272.

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[2] 438 U.S. 265 (1978).

[3] 539 U.S. 244 (2003).

[4] 539 U.S. 306 (2003).

While the holdings in *Bakke* and *Gratz* specified what a university could not do when considering an applicant's race, these decisions also made it clear that universities *can* constitutionally use race as an aspect of the admissions process. *Bakke*, 438 U.S. at 317; *Gratz*, 539 U.S. at 244. Indeed, the Court upheld just such an approach in *Grutter v. Bollinger* because consideration of race among other factors is critical to a school's right to assemble a heterogeneous student body. The *Grutter* Court held that universities cannot "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." 539 U.S. at 334 (citing *Bakke*, 438 U.S. at 315); *see also Gratz*, 539 U.S. at 276 (O'Connor, J., concurring, noting that what made the Michigan undergraduate admissions process unconstitutional was its lack of "meaningful individualized review"). An admissions program is constitutional where it "treats each applicant as an individual in the admissions process." *Bakke*, 438 U.S. at 318. "The importance of this individualized consideration in the context of a race-conscious admissions program is paramount." *Grutter*, 539 U.S. at 337.

Bakke and *Grutter* map out constitutionally acceptable race-conscious admissions processes which do not isolate minorities from meaningful competition and, more fundamentally, do not consider applicants' race in a vacuum. Rather, race is used to contextualize the background of a candidate. In *Bakke*, Justice Powell cited Harvard College as an example of a constitutional race-conscious admissions process. At Harvard, admissions officials were allowed to consider racial and ethnic background among other factors that would help contribute to a diverse student body, the definition of "diversity" being necessarily fluid. 438 U.S. at 316. Race could "tip a decision" just as "geographic origin" or a "life spent on a farm." *Id.* In such an admissions process, being a member of a minority group does not necessarily become "decisive" to a disposition. 438 U.S. at 317. An Italian-American would still be chosen over an African-American if the Italian-American had overall qualities that would be more likely to promote "educational pluralism." *Id.* No goals or quotas existed for the number of racial minorities to be admitted, but Harvard did keep some track of the numbers of students in various categories that it was admitting. *Id.* at 316-17.

The Harvard system also was used as a model of acceptable race-conscious admissions in *Gratz*, as compared with the University of Michigan's undergraduate admissions program. *Gratz*, 539 U.S. at 270-73. The unconstitutionality of the undergraduate Michigan program was rooted in its formulaic approach to reaching a pre-determined measure of diversity at the school. *See id.* at 271 (stating that the Harvard plan did not assume that a person's race "automatically ensured a specific and identifiable contribution to a university's diversity.").

In her concurring opinion in *Gratz*, Justice O'Connor emphasized that what made the University of Michigan's process unconstitutional was its lack of "meaningful individualized review" and that the award of twenty points was given to *every* minority *automatically*. *Id.* at 276 (emphasis in original).

In contrast, the Michigan Law School admissions program held constitutional in *Grutter* essentially adopted the Harvard model by engaging in "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment....Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Grutter*, 539 U.S. at 337 (internal citations omitted).

The University of Texas affords all of its candidates individualized review similar to that conducted at Harvard College and Michigan Law School. Its admissions process has been fashioned to assure that "individual assessment is safeguarded through the entire process."[5] An applicant's race is one of many factors considered in a broad assessment called a "personal achievement score," which is used to assess candidates whose merit as applicants is not fully reflected by their academic achievement. *Fisher v. University of Texas*, 631 F.3d 213, 228 (5th Cir. 2011). The "personal achievement score" includes an "applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service." *Id.* at 228. Additionally, "the personal achievement score includes a 'special circumstances' element that may reflect the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school, and—beginning in 2004—the applicant's race." *Id.* The use of race at the University therefore fits the basic parameter for a constitutional use of race because it requires individualized review and does not award candidates any discrete benefit based solely on race.

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[5] *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting). Justice Kennedy, in his dissent in *Grutter* expressed concern that race was "likely outcome determinative" in the decisions about who would fill the seats in the bottom 15% to 20% of the class. 539 U.S. at 389. This concern arose because admissions officials monitored the racial composition of the incoming class on a "day-to-day" basis and could "recalibrate the plus factor given to race depending on how close they were to achieving the Law's School's goal of critical mass." *Id.* at 392. The monitoring of racial composition and the concurrent failure to limit the size of the plus factor created a likelihood that

Perhaps most importantly, the University does not keep a running tally of the racial composition of its incoming class. 631 F.3d at 236 ("[D]emographics are not consulted as part of any individual admissions decision, and UT's admissions procedures do not treat certain racial groups or minorities differently than others when reviewing

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"individual consideration" was not preserved at the end of the admission season. *Id.* at 390.

individual applications."). As the admissions season comes to a close, admissions officials will not alter the admissions in an effort to meet a particular racial goal. The University of Texas procedure thus does not raise the concern that candidates at the bottom of the admitted class were being selected solely, or almost solely, based on their race.

By carefully confining the role that race can play in any particular admissions decision, the University of Texas admissions process comports with constitutional requirements.

II. DIVERSITY IS NECESSARY FOR THE LEGAL PROFESSION AND IS DEPENDENT UPON A RACIALLY-MIXED PIPELINE OF STUDENTS WITH THE QUALITIES TO BE SUCCESSFUL LAWYERS

A. Diversity is Essential to an Effective Legal Profession

The legal profession has to adapt to a changing country and a changing world. People of color comprise 36 percent of this nation's population and contributed 92 percent of the nation's population growth over the past decade.[6] Not only more people of color, but more businesses, institutions and governmental bodies with diverse leadership, are seeking legal professionals who have an understanding of their viewpoints and needs. In addition, the profession is more global, with a growing number of U.S. law firms providing services in parts of the world dominated by people of color, such as Asia, Africa and Latin America, whose inhabitants comprise over 80 percent of the world's population.[7]

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[6] Center for American Progress, *Prosperity 2050: Is Equity the Superior Growth Model* (2011), http://www.americanprogress.org/issues/2011/04/prosperity_2050.html.

By contrast, lawyers of color comprised only 11 percent of the nation's legal profession as of 2011.[8] As a result, there are too many American legal teams that do not have the benefit of diverse perspectives and experiences in serving this changing client base.

The need for a diverse pool of lawyers has not been lost on the business community. In 1999, approximately 500 chief legal officers of major companies signed "Diversity in the Workplace: A Statement of Principle," reinforced in a 2004 "Call to

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[7] U.S. Census Bureau, *Statistical Abstract of the United States: 2011.*

[8] Nalty, Kathleen & Aris Reeves, Center for Legal Inclusiveness, *Beyond Diversity: Inclusiveness in the Legal Workplace* at 40 (Jan. 2012).

Action."[9] Many companies have made it their stated policy to have diverse legal teams handle their matters.[10] To this end, there are increasing efforts to evaluate and rank major law firms on the basis of their diversity efforts,[11] and these rankings go beyond the standard measures of the percentage of lawyers of color at various positions in the firm to consider more broadly their diversity and inclusion practices. In addition, law students are increasingly expecting law firms to have strong diversity policies and a diverse workforce.[12]

Beyond the business community, there are myriad other areas of the legal profession that are in need of more lawyers of color to broaden the perspectives that are brought to bear, and to create more racially mixed legal teams. More lawyers of color, for example, are needed in government agencies, including law enforcement, policy making and administration; in community lawyering; in educational settings and as judges. In short, there is a heavy demand in all corners of the profession for more lawyers of color.

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[9] *See* http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074. *See also* Shields, Allison, *Are Today's Law Firms Committed to Diversity?*, Law Practice Today (April 2010).

[10] *See, e.g.*, New York Times, *Pushed by Clients, Law Firms Step Up Diversity Efforts* (July 21, 2006), http://www.nytimes.com/2006/07/21/business/21legal.html?pagewanted=all); Wall Street Journal Blog, *Clients Demand Diversity at Law Firms* (December 28, 2006), http://blogs.wsj.com/law/2006/12/28/clients-demand-diversity-at-law-firms/.

[11] *See, e.g.*, Vault.com, *And the Best Law Firms for Diversity Are...* (July 31, 2012), http://blogs.vault.com/blog/workplace-issues/and-the-best-law-firms-for-diversity-are-/.

[12] *See, e.g.*, The Stanford Daily, *Student group works to educate students about diversity in law firms* (2010), http://www.stanforddaily.com/2010/11/16/student-group-works-to-educate-law-students-about-diversity-in-firms/.

B. Law Firms Have Worked to Respond to the Need for Diversity

Law firms have long recognized the importance of having diverse groups of lawyers working on their clients' matters. In 1990, the New York City Bar formed a committee, chaired by former Association President and former Secretary of State Cyrus Vance and comprised of major law firm leaders, to coordinate diversity efforts among the City's major firms. Over the years, the committee has developed various policies and statements, including a Statement of Diversity Principles[13] signed by 108 firms and 18 corporations. The Statement acknowledges the importance of diversity in the legal profession:

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[13] The Association of the Bar of the City of New York, *Statement of Diversity Principles*, http://www2.nycbar.org/pdf/diversity_principles2.pdf.

> With greater diversity, we can be more creative, effective and just, bringing more varied perspectives, experiences, backgrounds, talents and interests to the practice of law and the administration of justice. A diverse group of talented legal professionals is critically important to the success of every law firm, corporate or government law department, law school, public service organization and every other organization that includes attorneys.

The signatory law firms also participate in an annual Diversity Benchmarking Survey to evaluate various statistical categories of diversity, and the aggregated results are made public.

The Statement of Principles recognizes that achieving diversity in the profession is "an evolutionary process." As has been well documented, progress has been notable but slow; people of color are underrepresented in the profession, especially in the higher levels of law firms. According to the last published benchmarking survey the Association conducted, covering the year 2010, lawyers of color comprised only 16.6% of law firm associates and 6.3% of partners in the surveyed firms.[14]

The profession widely acknowledges that its ongoing diversity efforts have not been as successful as desired, and in large part this is due to an insufficient pipeline of students of color in law school.[15] To overcome this challenge, there obviously needs to be a more diverse pipeline of undergraduate students, and for that to happen, undergraduate institutions, in their admissions evaluations, must be allowed to consider race in the overall context of an individual applicant's circumstances and experiences. In other words, a more diverse undergraduate student body is ultimately a prerequisite for a more diverse legal profession, and the key to achieving this lies with the undergraduate admissions process.

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[14] The Association of the Bar of the City of New York, *2010 Law Firm Diversity Benchmarking Report* (2011) at 8, http://www.nycbar.org/images/stories/pdfs/diversity/2010report.pdf.

[15] *See generally* American Bar Association, *Diversity in the Legal Profession: The Next Steps* (April 2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/diversity/041511_aba_nextsteps.authcheckdam.pdf.

C. Holistic Evaluations of Undergraduate Applicants' Credentials Can Best Identify the Skills Needed to be an Effective Lawyer

When lawyers enter the profession, they must call upon many skills that are not necessarily reflected in their law school grade performance. They must learn how to understand clients, identify what they need and consider how to find solutions, many of which require creative problem-solving and consensus-building. Lawyers seeking to establish a private practice must learn how to attract clients, develop contacts within the profession, manage a law practice and generally make their way in the legal world. Lawyers need leadership ability, strong interpersonal skills, perseverance, resilience and the appropriate temperament for law practice. Few of these attributes are tested in law school courses or on the bar exam. Yet they are necessary both to succeed as a lawyer and to serve clients effectively.

These skills are developed over many years, beginning in one's youth, and by high school many are apparent. They can be reflected in a student's participation in or captaining an athletic team, leading a school club or performing community service. They also can be reflected in how a student copes with his or her environment, deals with family stresses or poverty, and handles peer pressure. From the vantage point of the legal profession, a college or university must be able to identify and nurture students who have these skills, as they ultimately will be of great importance in addition to academic preparation. Therefore, these institutions must have the necessary flexibility to make individualized, holistic determinations of high school applicants that look beyond pure numerical measures of academic success if they are to identify effectively students of color who will become successful professionals in the future.

It is especially important to permit this type of holistic evaluation because many of the students who have the skills to succeed as a professional grow up in circumstances which can put them at a disadvantage in presenting themselves effectively to admissions officers, and because some might be overlooked in a process which considers grades and test scores alone. To address this disadvantage, the New York City Bar, like many other professional organizations, has established a "diversity pipeline" program to reach back to high school for high school students in the City's inner-city neighborhoods, most of whom are students of color, and who have the interest and potential to become good lawyers. In conducting this program, we learned much about how different their circumstances are in looking ahead to college and a career.

The Program is run by a Diversity Pipeline Committee. Reflecting the commitment to this issue from major New York City legal employers, the committee consists of representatives of 10 law firms, 4 corporations, 6 law schools and 11 nonprofit and government agencies. The committee operates the Thurgood Marshall Summer Law Internship Program,[16] which places inner-City high school students in summer positions with legal employers. The purpose of the program is to expose these students to the possibility of a legal career. This summer, the program placed over 50 students with employers, about a third of the number that applied. Entrance to the program is based partially on grade point average, but also on teacher recommendations, a resume and an in-person interview where the candidate's qualifications and experiences are explored, in order to provide a more complete picture of whether the student is poised to succeed in the program.

To help these students develop their skills, the Pipeline Committee conducts resume and interview training, including one-on-one counseling; provides workshops regarding preparing for the workplace; and presents sessions on college admission and preparation. To provide a connection with older students, the program uses staff and alumni volunteers who are in frequent contact with the students throughout the course of the program.

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[16] *See* http://www.nycbar.org/index.php/diversity/student-pipeline-program/programs/185-thurgood-marshall-summer-law-internship-program.

Over the years, we have found that our holistic approach to admission into the program, and to the preparation of individual students, has been effective. The performance of the interns in the summer employment settings has been outstanding, and it is not uncommon for an employer to ask the student to continue the employment during the year or return the next summer. Most of the students attend college and many continue their involvement with the program, serving as volunteers and mentors. In order to maintain their focus on a legal career, the Pipeline Committee has established a mentoring program connecting college students with law students.

The Diversity Pipeline Program is one of a number of programs that reflect the determination of the legal profession to identify students of color whose potential can be recognized by the totality of their skills and experiences. Legal employers of all kinds have become involved in these programs, recognizing the necessity of finding potential lawyers who reflect the diversity of the population, and nurturing them through the pipeline to what hopefully will be a successful legal career. If programs like this are to succeed, however, undergraduate admissions departments must have the ability to mirror this approach of identifying and nurturing a broad and diverse pool of students through a holistic, individualized assessment which takes race into account as one factor in the context of an admissions evaluation. A contrary process which precludes such an assessment of race and other contextual factors will inevitably exclude promising candidates, like many in our Diversity Pipeline Program, to the ultimate disadvantage of the legal profession and our society as a whole.

CONCLUSION

For the foregoing reasons, the Court should rule in the University of Texas's favor and hold its admission process constitutional.

Respectfully submitted,

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August 2012

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No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF LT. GEN. JULIUS W. BECTON, JR., GEN. JOHN P. ABIZAID, ADM. DENNIS C. BLAIR, GEN. BRYAN DOUG BROWN, LT. GEN. DANIEL W. CHRISTMAN, GEN. WESLEY K. CLARK, ADM. ARCHIE CLEMINS, GEN. RONALD R. FOGLEMAN, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici, listed in the accompanying Appendix, are former senior officers and civilian leaders of the Armed Forces, including military-academy superintendants and a former member of the U.S. Senate.[1] They are keenly interested in this case because its outcome could affect racial and ethnic diversity in the military's officer corps and hence the military's effectiveness as an institution. *Amici*'s submissions are based on decades of experience and service to this country, including at the highest levels in our Nation's military. *Amici*'s short biographies listed in the Appendix only begin to describe their distinguished service to our country.

SUMMARY OF THE ARGUMENT

For the United States military, a highly qualified and racially diverse officer corps is not a lofty ideal. It is a mission-critical national security interest. The submissions in the military *amicus* brief filed in *Grutter v. Bollinger*, 539 U.S. 306 (2003) ("*Grutter* military brief") remain true today and *amici* embrace them: Based on decades of experience, the modern United States military regards a highly qualified and racially and ethnically diverse officer corps as vital to military effectiveness.

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[1] This *amicus* brief is filed with the consent of the parties. Counsel for the petitioner and respondents have granted blanket consent for the filing of *amicus* briefs in this case, in accordance with this Court's Rule 37. Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case or their counsel authored this brief in whole or in part, and that no person other than *amici* and their counsel paid for or monetarily contributed toward the preparation or submission of this brief.

Unlike many other institutions, the military operates on a closed personnel system with its top leaders chosen not from outside, but rather, promoted from the lower ranks. As a consequence, the demographic composition of initial officer accessions is critical to the achievement of a diverse military officer corps. The Reserve Officers' Training Corps ("ROTC"), which is comprised of students already admitted to participating civilian colleges and universities, and the service academies operated by each of the military branches, continue to serve as the primary sources for the Nation's military officers. To achieve diversity in military leadership, both the service academies and ROTC engage in extensive minority outreach and recruiting as well as limited consideration of race as a part of their individualized, whole-person review of admissions applicants. As was the case when *Grutter* was decided, these race-conscious policies are vital to increasing and maintaining the pool of highly qualified minority military officers. And as was true when *Grutter* was decided, there are at present no race-neutral means for the military to fulfill its critical need for a highly qualified and diverse officer corps.

In addition to its own need to employ modest race-conscious admissions policies, the constitutionality of such policies at the Nation's universities is important to the military for another reason. The military is heavily dependent on ROTC for officers, and ROTC, in turn, is wholly dependent on participating civilian universities for its officer candidates. The class compositions at ROTC-participating universities, including the University of Texas at Austin ("UT"), determine the pool from which ROTC may draw officer candidates. Accordingly, admissions policies of universities including UT matter considerably to the military.

Thus, while this case focuses on university admissions, its impact dramatically transcends academia. In evaluating the constitutionality of respondents' limited consideration of race in admissions decisions, *amici* respectfully submit the Court should consider the military's interests. Fulfillment of the national security interest in officer corps diversity must not be imperiled by a sweeping ruling against race-conscious admissions.

Nor should the Court in its constitutional analysis embrace a race-neutral class-rank approach to admissions to the exclusion of race-conscious admissions conducted in the context of individualized, holistic review. An exclusively one-dimensional approach to admissions like Texas's Top 10% Law would seriously disrupt the military. Under the law, all Texas applicants who rank in the top ten percent of their high school class automatically are admitted to UT. That approach alone, to the exclusion of limited race-conscious admissions policies, cannot ensure the highly qualified *and* racially diverse officer corps the military has concluded, based on many years of experience, it must have. An exclusively class-rank admissions approach is also undermining because it does not allow the military to assess in applicants character-related qualities it has determined its future leaders must possess. Academics, while important, is not invariably a proxy for the spectrum of leadership and other qualities that round out a leadership corps charged with, for example, inspiring collaboration and unit cohesion among our racially diverse enlisted ranks and leading them in combat. Discerning whether an applicant possesses qualities of a likely military leader requires *individualized*, holistic review that automatic admission based on class-rank alone cannot provide. The ability to employ that holistic approach, including limited consideration of race as a part of the overall inquiry, remains critical to our military leadership and respondents alike.

In *Grutter*, the Court validated the military's long-standing compelling interest in both selectivity and diversity at its commissioning institutions. *Grutter*, 539 U.S. at 331. Recognition of that national security interest enabled the Court to take the next step and validate the interest in selectivity and diversity for other major segments of our society, including institutions of higher learning. *Id.* at 330-31, 343. At bottom, the Court recognized that,

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

Id. at 332.

The same reasoning and conclusion apply here. The military should be permitted to continue to employ race-conscious policies to educate and train a highly-qualified and diverse officer corps to further the compelling governmental interest in an effective military. It also should be permitted to continue to draw from institutions of higher learning, such as UT, highly qualified minority applicants, and applicants of all backgrounds who have been educated in a diverse environment. UT's carefully crafted admissions policy should not be constitutionally invalidated. Nor should the constitutional parameters to race-conscious admissions policies be changed. The military and educational institutions including UT must continue to be permitted to pursue selectivity and diversity.

ARGUMENT

I. Growing and Maintaining a Highly Qualified and Diverse Officer Corps Remains Critical for Military Effectiveness and Thus Our National Security.

As the *Grutter* military brief explained, and as further demonstrated below, growing and maintaining a highly qualified *and* racially diverse officer corps is for the military a commitment and undertaking on which nothing less than the effectiveness of our military as an institution depends. In the modern military's view, it is simply a must-have for our national security.

A. The modern U.S. military commitment to racial diversity in military leadership was born out of many decades of experience.

The military learned the importance of racial diversity in its leadership the hard way. After President Truman integrated the military in 1948, *see* Executive Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948), the military became one of America's most integrated institutions. But through the 1960s and 1970s, minorities' presence was almost entirely in the enlisted ranks; the officer corps remained almost exclusively white. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al., in *Grutter v. Bollinger*, S. Ct. Nos. 02-241 & 02-516 (filed Feb. 21, 2003) ("*Grutter* military brief") at 13-14 (noting, for example, "In 1962, a mere 1.6% of all commissioned military officers were African-American," in stark contrast to the much larger percentages in the enlisted ranks). As described in some detail in the *Grutter* military brief (at 13-17), which *amici* fully embrace and underscore here, in the context of the Vietnam conflict, a nearly all-white officer corps leading enlisted ranks heavily comprised of minorities proved to be a recipe for intense racial strife; hundreds of racial incidents and race-based violence erupted throughout the military. *Id.* at 15-17. "In 1969 and 1970 alone, the Army catalogued more than 300 race-related internal disturbances, which resulted in the deaths of seventy-one American troops." Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 Yale L.J. 1093, 1111 (2004) (citing Bernard C. Nalty, *Strength for the Fight: A History of Black Americans in the Military* 309 (1986)). *See Nalty, supra*, at 309 ("These attacks came to be grouped under the category of 'fragging,' because the fragmentation grenade was a favorite tool of assassination.").

Bereft of minority officers as support and as a visible proof of overall fairness and that our Armed Forces recognized them as valuable contributors, many black troops lost confidence in the military as an institution. *Grutter* military brief, at 16 & n. 5; Nalty, *supra*, at 309. As the Military Leadership Diversity Commission ("MLDC"), an independent body commissioned by Congress in 2009 to assess diversity in military leadership, recently explained in its final report to Congress and the President,

> During the Vietnam War, the lack of diversity in military leadership led to problems that threatened the integrity and performance of the Nation's military. This is because servicemembers' vision of what is possible for their career is shaped by whether they see individuals with similar backgrounds excelling and being recognized in their Service.

From Representation to Inclusion: Diversity Leadership for the 21st-Century Military, Final Report xvi (2011) (*"MLDC Report"*) (internal citation omitted).[2]

By the 1970s, racial tensions in the military ran so high that they actually caused the Armed

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[2] *Available at* https://www.hsdl.org/?view&did=11390.

Forces to teeter "on the verge of self-destruction." *Grutter* military brief, at 16 (quoting Charles C. Moskos & John Sibley Butler, ***All That We Can Be: Black Leadership and Racial Integration the Army Way*** 142 (1996)).[3] Years later, the U.S. Department of Justice reported to the President in its review of federal affirmative action programs that "[r]acial conflict within the military during the Vietnam era was a blaring wakeup call to the fact that equal opportunity is absolutely indispensable to unit cohesion, and therefore critical to military effectiveness and our national security."[4] This trying experience, stretching over many years, shaped the military leadership's modern view that "success with the challenges of diversity is critical to national security." *Presidential Report*, at § 7.1. As one senior Pentagon official put it, "[d]oing affirmative action the right way is deadly serious for us—people's lives depend on it." *Id.*

That view persists in full force today. Ongoing concern about the diversity in the military's leadership recently prompted Congress to establish what became the Military Leadership Diversity Commission, an independent body comprised of current and former military officers (including *amicus* Lt. Gen. Julius W. Becton, Jr. who served as its Vice Chairman) and senior enlisted personnel of all the Armed Forces as well as civilians such as senior executives of major corporations, civil servants, and a law school chancellor. After many months of analysis including interviews with military officials, it submitted its final report to the President of the United States in 2011, in which it underscored that "[c]urrent and former military leaders have long argued that developing and maintaining qualified and demographically diverse leadership is critical for mission effectiveness." *MLDC Report*, at 39.

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[3] *See also* Leach, *supra*, at 1110-11 ("Lieutenant General Frank Petersen, Jr., recalled the state of race relations within the Marine Corps during the Vietnam War, saying, 'In Vietnam, racial tensions reached a point where there was an inability to fight . . . . We were pulling aircraft carriers off line because there was so much internal fighting. . . . Platoons that were 80 percent minority were being led by lieutenants from Yale who had never dealt with ghetto blacks.' ").

[4] Dep't of Justice, *Review of Federal Affirmative Action Programs, Report to the President* § 7.5.1 (1995), *available at* http://clinton2.nara.gov/WH/EOP/OP/html/aa/aa07.html. ("*Presidential Report*").

The post-September 11, 2001 world has heightened the drive for military leadership diversity described above and in the *Grutter* military brief. In addition to military cohesion and perceptions of institutional legitimacy, both enhanced by a demographically diverse officer corps, *see, e.g.*, *Grutter*, 539 U.S. at 332, the modern military recognizes that the U.S. population's heterogeneity offers the military a rich mix of skills and experiences that is needed for modern warfare. It has fueled military pursuit of other kinds of diversity in military leadership, all *in addition to* pursuing demographic diversity. As the MLDC reports, "[i]ncluding a broad range of men and women from different backgrounds can increase the likelihood that the U.S. military 'knows the enemy' and is better able to work with international partners by adding to the cultural and linguistic knowledge base from which U.S. forces may draw." ***MLDC Report***, at 17. *See also* Dep't of Defense, ***Defense Language Transformation Roadmap*** 3 (Jan. 2005) ("Conflict against enemies speaking less-commonly-taught languages and thus the need for foreign language capability will not abate. Robust foreign language and foreign area expertise are critical to sustaining coalitions, pursuing regional stability, and conducting multi-national missions especially in post-conflict and other than combat, security, humanitarian, nation-building, and stability operations.")[5]. Diversity of skills, including foreign language skills, and knowledge of other cultures, as well as the ability to collaborate and even culturally empathize with different kinds of people, all are critical to an optimally effective modern military leadership.[6] The Army explains,

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[5] *Available at* http://www.defense.gov/news/mar2005/d20050330roadmap.pdf.

[6] Examples abound of the Department of Defense ("DOD") efforts to harness the ethnic, cultural and linguistic diversity of its personnel, so as to maximize its ability to work collaboratively in myriad settings. Spanish and Portuguese fluency have always been highly valued in the U.S. Southern Command, just as Arabic, Farsi and Pashtu knowledge is vital to mission success in current U.S. Central Command Operations. *Amicus* Commanding General John P. Abizaid's unique background and fluency in Arabic brought a powerful dimension to his relations with coalition nations and his knowledge of the "human terrain" in the Persian Gulf theater of operations in 2004-06. In 2009, the Secretary of Defense invoked § 329 of the Immigration and Naturalization Act, 8 U.S.C. § 1440, (sometimes called the "wartime naturalization" provision) to authorize the military services to recruit certain legal aliens whose skills are considered vital to national security. Known as the Military Accessions Vital to National

> We must be prepared to recruit, develop and retain the best of America's diverse talent pool. Our increasingly complex global responsibilities require that we not only attract personnel from diverse backgrounds, but also be knowledgeable of what our Soldiers and Civilians bring to the Army and how to integrate their attributes, experiences and backgrounds into decision-making and problem-solving processes.

Dep't of the Army, *United States Army Diversity Roadmap* 1 (Dec. 2010).[7] [8]

Interest ("MAVNI") program, this legal authority has been used to recruit qualified applicants with vitally needed language skills and cultural knowledge. MAVNI program recruits have made crucial contributions to the success of U.S. military operations in Afghanistan, Iraq, and in the global effort to combat international terrorist organizations.

[7] *Available at* http://www.armydiversity.army.mil/document/Diversity_Roadmap.pdf.

[8] General James Mattis, then-Commander of U.S. Joint Forces Command, is reported saying in 2010,

> In this age, I don't care how tactically or operationally brilliant you are, if you cannot create harmony—even vicious harmony—on the battlefield based on trust across service lines, across coalition and national lines, and across civilian/military lines, you really need to go home, because your leadership in today's age is obsolete. We have got to have officers who can create harmony across all those lines.

MLDC Report, at xiv.

B. The military remains committed to and has made major strides in growing a highly qualified and racially diverse officer corps, but considerable work remains.

Spurred by the difficult lessons of the Vietnam era, the military remains strongly committed to achieving racial diversity in its officer corps. At the service academies and ROTC—the primary sources of military officers—that ongoing commitment is demonstrated by race-conscious initiatives which seek both to expand the pool of qualified minority applicants to the officer corps *and* to increase the number of minority participants. Those efforts have produced notable results. However, the military emphasizes that significant work remains to secure a steady stream of highly qualified and racially and ethnically diverse officers.

By way of background, the academies provide tuition-free, four-year undergraduate education and prepare entrants to be officers of the U.S. military services. Graduates are commissioned as officers for a minimum of five years of military service. Each service academy annually admits 1,100 to 1,350 entrants, and this has remained consistent over time and across the academies. Sheila Nataraj Kirby, et al., *Diversity of Service Academy Entrants and Graduates* (RAND Corp. 2010) xvii ("*Diversity of Service Academy Entrants*").[9] In fiscal year 2010,

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[9] *Available at* http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG917.pdf.

DoD reported that 18.1% of all officers came from the service academies.[10]

ROTC programs are offered at over 1,000 colleges and universities,[11] including UT.[12] ROTC provides military education and training and, for a subset of all ROTC participants, also scholarships to candidates admitted to host colleges or universities. The scholarships include full tuition for up to four years in exchange for a five-year post-graduation commitment to serve in the military. Military regulations govern how many scholarships are available at each participating college and university. In fiscal year 2010, the DoD reported that 36.7% of its officers came from ROTC.[13] Notably, ROTC provided 49.7% of the officer corps of the Army (the largest of the services) and 42.6% of the Air Force's officers in 2010. *Id.*

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[10] Dep't of Defense, *Population Representation in the Military Services: Fiscal Year 2010 Summary Report* ("*Population Representation 2010*"), App. B, p. 64 (2012), *available at* http://prhome.defense.gov/RFM/MPP/ACCESSION%20POLICY/PopRep2010/appendixb/appendixb.pdf.

[11] Army ROTC: Legacy & Value, U.S. Army, http://www.goarmy.com/rotc/legacy-and-value.html (last visited Aug. 12, 2012); Learn About AFROTC, U.S. Air Force, http://afrotc.com/learn-about/ (last visited Aug. 12, 2012).

[12] UT has been a ROTC-participating university for decades; in particular, the Army ROTC program at the university has been in place for over 50 years.

[13] *Population Representation 2010*, App. B, p. 64, *available at* http://prhome.defense.gov/RFM/MPP/ACCESSION%20POLICY/PopRep2010/index.html.

1. The military's ongoing commitment to officer diversity is manifest in its many race-conscious initiatives to increase minority applications and accessions to officer commissioning institutions.

Building on the *Grutter* military brief, contemporary examples demonstrating the military's ongoing dedication and efforts to achieve officer diversity abound. Although each service has its own unique programs and practices to achieve and maintain a highly-qualified and racially diverse officer corps, the services share a number of strategies. *See MLDC Report*, at 53. Those efforts include all-important initiatives to retain and support minorities into the officer corps upper ranks, *see, e.g.*, *id.* at 75-88. However, this brief focuses on the initial accessions: the efforts to expand the pool of minority officer applicants to the military's commissioning institutions and to increase minorities' presence in the officer ranks.

a. Outreach and Recruiting. With regards to outreach and recruiting of minority officer candidates, the military is engaged in a myriad of initiatives. Each service branch has organizational divisions or offices specifically devoted to recruiting members of demographic groups underrepresented in the military officer corps. *Id.* The services pursue connections with community leaders and affinity groups and participate in affinity group events that include highly qualified minority candidates, such as events by the National Society of Black Engineers and the Society for Advancement of Chicanos and Native Americans in Science. *Id.* at 53. They strategically establish ROTC programs and academic scholarships at Historically Black Colleges and Universities ("HBCUs") and Minority-Service Institutions. *Id.* at 54. They also conduct targeted advertising, such as at HBCUs and Minority-Serving Institutions, and use media channels directed at diverse audiences such as Telemundo and Black Entertainment Television. *Id.* at 53.

Taking the Army as a more specific example, as described in the *Grutter* military brief (at 18), the U.S. Military Academy at West Point ("USMA" or "West Point") was the first of the service academies to have a program that succeeded in increasing minority representation. In 1968, there were 30 African-Americans cadets at USMA; that number grew to almost 100 by 1971. *Id.* The most recent DoD-commissioned study on the subject reports that the percentage of minorities at West Point increased from 16% in the 1992-94 class to 23% in the 2007-2009 class. *Diversity of Service Academy Entrants*, at 28-29.

Today, one of West Point's primary minority recruitment tools is Project Outreach. Project Outreach seeks to identify and nurture through the admissions process talented minority candidates with the ultimate goal of matriculating them to West Point. *Diversity of Service Academy Entrants* at 85-86. Under this program, recent West Point graduates spend a 13-month tour traveling extensively throughout selected U.S. regions to identify and nurture candidates. *Id.* Other major recruiting programs include a visitation program for prospective recruits who visit West Point and the United States Military Academy Prep School; "metropolitan blitzes," bringing outreach and minority admissions officers to one city; representatives visit with the Congressional Black and Hispanic Caucuses to set up academy days and place cadets as interns in local and Washington, D.C., offices; activating minority cadets for hometown and academy visits; and the Cadet Calling Program, whereby current cadets connect with candidates by phone. *Id.*

The U.S. Naval Academy ("USNA") also remains keenly focused on racial and ethnic diversity. It lists one of its strategic objectives to "[s]trengthen the Academy's outreach and recruiting efforts to attract and admit individuals of diverse backgrounds with potential for success at USNA and in the Fleet and Marine Corps." U.S. Naval Academy, *Leaders to Serve the Nation: U.S. Naval Academy Strategic Plan 2020* 8 (2010).[14] As a recent DoD-commissioned study reports, "[t]he Superintendent of the Naval Academy stated that his number one goal for his tenure is to improve diversity." *Diversity of Service Academy Entrants* at 88. *See also Naval Academy Wooing Minorities*, Wash. Times (Aug. 23, 2008),[15] (quoting the USNA

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[14] *Available at* http://www.usna.edu/StrategicPlan/docs/overview.pdf

[15] *Available at* http://www.washingtontimes.com/news/2008/aug/23/naval-academy-wooing-minorities/.

Superintendant saying, "I don't need more applications, just to get more applications. I need more applications from underrepresented geography of America...and I need more from what I consider underrepresented ethnic and racial minorities."). Towards that end, the academy has created a new diversity office, led by a senior naval officer, to coordinate all diversity efforts. *Diversity of Service Academy Entrants*, at 88.

The Air Force too provides a wealth of examples demonstrating the military's ongoing commitment to diversity. Its current diversity plan provides among its guiding principles to "[e]stablish self-sustaining programs that identify diverse candidates" and to "[a]ttract highly qualified, diverse candidates to the cadet wing." *Id.* at 86-87.

While recognizing the importance of outreach and recruiting, the services also recognize that most often, more is needed to secure the highly qualified and racially diverse officer corps the military must have. As DoD reinforced just this year, "[a]n all-volunteer force *must represent the country it defends*," Dep't of Defense, *Diversity and Inclusion Strategic Plan 2012-2017* 4 (2012)[16] (emphasis in original), where 2010 Census data show the U.S. population as 72.4% self-identifying as white; 16.3% as Hispanic; 12.6% as black; 4.8% as Asian; 0.9% as American Indian; and 0.2% as Native Hawaiian and

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[16] *Available at* http://diversity.defense.gov/docs/DoD_Diversity_Strategic_Plan_%20final_as%20of%2019%20Apr%2012[1].pdf.

Other Pacific Islander.[17] As the MLDC noted, "[i]n a democracy, it is believed that a broadly representative military force is more likely to uphold national values and to be loyal to the government—and country—that raised it." *MLDC Report*, at 15 n. 2 (internal quotation omitted). *See also* U.S. Gov't Accountability Office, GAO-07-224, *Strategic Plan Needed to Address Army's Emerging Officer Accession and Retention Challenges*, at 35 (Jan. 2007)[18] ("The services want to retain a diverse, experienced officer corps to reflect applicable groups in the nation's population.").

b. Limited Use of Race-Conscious Admissions. Our Armed Forces' steadfast commitment to diversity is also manifest in its continued use of modest race-conscious admissions policies to increase minority enrollment at the service academies and in ROTC.

Similar to respondents' admission's policy, the service academies employ an individualized, "whole person" approach to evaluate applicants. In the most recent detailed government report on the subject, the Government Accountability Office ("GAO") describes the process, in part, as follows:

> The academies do not grant waivers from academic criteria but do not have absolute minimum scores for admission. Under the

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[17] Karen R. Humes et al., *2010 Census Briefs, Overview of Race and Hispanic Origin: 2010*, at 4 (Mar. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

[18] *Available at* http://www.gao.gov/new.items/d07224.pdf.

> whole person approach, the academies can admit some applicants whose academic scores are lower than might normally be competitive for admission, but who in their totality (academics, physical aptitude, and leadership potential) are deemed an acceptable risk and qualified to attend an academy. This admissions approach is consistent with the intent of the academies to admit students who also demonstrate leadership and initiative characteristics, which cannot be quantified by purely objective scoring methods.... The subjective nature of this approach is consistent with the intent of the whole person concept, by which the academies want to admit students who also demonstrate leadership characteristics that cannot be quantified by purely objective scoring methods. Academy officials do not consider these judgments to constitute a waiver of academic standards, but rather a judicious assessment of the whole person.[19]

More recent statements from the academies confirm their ongoing use of this approach. For example, the USMA notes that "[a]dmission to West Point is open to all students. There are no appointments, vacancies, or nominations designed exclusively for minority groups. However, cultural and socio-economic backgrounds are given appropriate consideration while evaluating all applicants." USMA, FAQ-Admissions, *available at* http://www.westpoint.edu/admissions/SitePages/FAQ_Admission.aspx (last visited Aug. 12, 2012). The U.S. Naval Academy describes their admissions process similarly. *See* Daniel de Vise, *Naval Academy Professor Challenges School's Push for Diversity*, Wash. Post (July 3, 2009)[20] ("Admissions Dean Bruce Latta said admissions is 'a single process,' with every applicant considered as an individual. A star student from a low-income community might get credit for overcoming adversity. 'It's a whole-person assessment on every person,' Latta said.").

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[19] U.S. GAO, GAO-03-1000, *Military Education: DOD Needs to Enhance Performance Goals and Measures to Improve Oversight of Military Academies*, at 19-20 (Sept. 2003), *available at* http://www.gao.gov/assets/240/239612.pdf.

And the Air Force's current diversity plan affirms that one of its strategic goals is to "[c]ontinue an admissions program that gives individualized consideration to constitutionally permissible diversity factors and ensures the collection of the diversity-factor data necessary to analyze the effectiveness of diversity recruiting efforts." *Diversity of Service Academy Entrants* at 86-87. The U.S. Air Force Academy defines "diversity" to include "race" and "ethnicity" among a large composite of many other individual characteristics such as personal life experiences, geographic background, and cultural and foreign language knowledge. *See USAFA Diversity Plan*, at 3 (June 2009).[21] The Air

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[20] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/02/AR2009070202588.html.

[21] The Academy's full definition of diversity is as follows:

Force Academy also reportedly seeks "gains in the number of black and Hispanic cadets on the campus, who make up a combined 16 percent of the student body, well below their share of the national population. But the Air Force is staying away from quotas." Tom Roeder, *AFA Gets an Extra $1 Million to Tackle Diversity Issues*, Gazette (July 15, 2011).[22] [23]

> For Air Force Academy purposes, consistent with the Air Force approach to diversity, "Diversity" is defined as a composite of individual characteristics that includes personal life experiences (including having overcome adversity by personal efforts), geographic background (e.g., region, rural, suburban, urban), socioeconomic background, cultural knowledge, educational background (including academic excellence, and whether an individual would be a first generation college student), work background (including prior enlisted service), language abilities (with particular emphasis on languages of strategic importance to the Air Force), physical abilities (including athletic prowess), philosophical/spiritual perspectives, age (cadet applicants must be within statutory parameters for academy attendance), race, ethnicity and gender.

USAFA Diversity Plan, at 3, *available at* http://www.usafa.af.mil/shared/media/document/AFD-110316-012.pdf.

[22] *Available at* http://www.gazette.com/articles/million-121639-diverse-academy.html#ixzz1STPBQIXN.

[23] Although the Air Force requires its academy admissions decisions to be "made without regard to religion, race, ethnicity, or gender," Air Force Instruction 36-3501 at 2.18.2.1.2 (Apr. 28, 2008), reading that instruction together with the academy's strategic goal on diversity in admissions detailed above (with its inclusion of race and ethnicity among the many diversity

ROTC also employs the whole person approach of individualized, subjective review of its scholarship applicants (who are already admitted students at ROTC-participating colleges and universities), assessing academic aptitude, physical fitness, and leadership abilities. *See, e.g.*, Anny Wong et al., *The Use of Standardized Scores in Officer Career Management and Selection* 13 (RAND Corp. 2012),[24] (DoD-comissioned report noting ROTC "[a]dmission boards consider the candidate's qualifications broadly using the whole-person concept, which includes a combination of test scores, academic background, athletic accomplishments, field of study in college, and other personal qualities.").

2. Results to date of the military's race-conscious initiatives.

Our military's various initiatives have yielded higher minority participation at both the service academies and in ROTC. However, a significant gap remains between those who serve in active duty and those who are officers.

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factors considered), suggests that the academy may be interpreting this instruction as requiring that its admissions criteria "not provide for 'pluses' or other admissions benefits based on race, ethnicity or gender." *USAFA Diversity Plan*, at 3, n. 5.

[24] *Available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR952.pdf.

Overall, about 1.4 million enlisted serve in our active duty forces today, of whom 70% self-identify as white, 17% as African-American, 3.7% as Asian, and 1.7% as Native American.[25] Approximately 10.8% self-identify as being of Hispanic ethnicity. *Id.* From the Vietnam era when minorities were almost nowhere to be found in the officer ranks, *see Grutter* military brief, at 5, 6 n. 2, 17, by fiscal year 2010, of the total office corps, American Indians comprised 0.54%; Asians, 3.9%; blacks, 8.8%; Hispanics, 5.3%; and Native Hawaiian and Pacific Islanders, 0.21%. *Population Representation 2010*, at App. B, p. 48.[26] *See also* Nelson Lim et al., *Officer Classification and the Future of Diversity Among Senior Military Leaders: A Case Study of the Army ROTC* ("*Officer Classification*"), at 1 (RAND Corp. 2009) ("Between 1967 and 1991, the Pentagon almost quadrupled the minority representation in the ranks of its newly commissioned officers.... From 1986 to 2006, minority officer representation increased nearly 5 percent; at the highest levels..., minority representation increased 9 percent." (citations omitted)).

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[25] Dep't of Defense, *Demographics 2010: Profile of the Military Community*, at 20 ("*Demographics 2010 Report*"), *available at* http://www.militaryhomefront.dod.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Reports/2010_Demographics_Report.pdf. The report notes that consistent with Office of Management and Budget Directives, it did not consider Hispanic as a minority race designation beginning in 2009 and used only active duty members' race to determine minority status in this report. *See id.* at 24 note.

[26] *Available at* http://prhome.defense.gov/RFM/MPP/ACCESSION%20POLICY/PopRep2010/index.html.

A look at minority participation at the academies shows the increases even more dramatically. The most recent classes to enter the Naval Academy were the most racially diverse in history, with more than 28-percent minority enrollment. De Vise, *supra*. Indeed, the Naval Academy reported that of the class of 2016, 34 percent are minorities. U.S. Naval Academy, *Class of 2016 Statistics* (June 28, 2012).[27] Similarly, the Air Force Academy class of 2014 boasted 350 minority enrollees or approximately 27.4 percent of the entire class. John Van Winkle, *Acad. Says 'Hello' to Class of 2014*, 50 No. 25 Academy Spirit, at 1 (June 25, 2010).[28] Of the West Point class of 2016, approximately 27 percent were minorities. USMA, *Class of 2016 to Enter West Point* (June 28, 2012).[29]

These advances are important, but military leadership recognizes that significant challenges remain. "Although military accessions of women, blacks, Asians, Hispanics, and persons of other racial backgrounds have increased over time, the proportions of these groups in the senior officer corps remain relatively low." Beth J. Arsch et al., *A New Look at Gender and Minority Differences in Officer Career Progression in the Military* ("*RAND Career Progression*") at ix (RAND Corp. 2012) (a DoD-commissioned study).[30] *See also Officer Classification*, at xi ("Still, while the enlisted ranks of the U.S. military exhibit a high level of demographic diversity, the leadership of the military has remained demographically homogenous."). As the MLDC reports, "*military officers today are less demographically diverse than both the enlisted troops they lead and the broader civilian population they serve.*" *MLDC Report*, at 39 (emphasis in original). The MLDC concluded, "Despite undeniable successes, however, the Armed Forces have not yet succeeded in developing a continuing stream of leaders who are as diverse as the Nation they serve." *Id.* at vii.

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[27] *Available at* http://www.usna.edu/PAO/pressreleases/063-12_Class_of_2016_Statistics.htm.

[28] *Available at* http://www.usafa.af.mil/shared/media/document/AFD-100806-083.pdf.

[29] *Available at* http://www.usma.edu/news/SitePages/Class%20of%202016%20to%20Enter%20West%20Point.aspx.

These shortcomings are considered serious. As discussed above, *supra* at 5-9, and in the *Grutter* military brief (at 13-18), "[t]he importance of increasing racial/ethnic and gender representation within the military has also been a specific priority of senior military leaders and is argued to be critical to mission effectiveness." *MLDC Report*, at 39 (citation omitted). The problem is of "ongoing concern within the Department of Defense." *RAND Career Progression*, at 1. A DoD-commissioned study reports that in response to a 2005 directive from then

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[30] *Available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1159.pdf.

Secretary of Defense Donald Rumsfeld to "put much more energy into achieving diversity at senior levels of services," a diversity summit was convened between private and public sector diversity experts with DoD representatives. *Officer Classification*, at 3 (internal quotation omitted). The summit participants concluded that:

> [A]s an organization that promotes from within, DoD's top leadership is dependent upon the pipeline of junior officers. Looking at this pipeline, they found no prospect for an increase in the representation of minorities or women in the higher ranks (flag officers and Senior Executive Service [SES] members) for the next decade. In other words, labor force trends will not cause an increase in minority senior leaders without some kind of policy intervention, and the divergence between the general population and those in charge of the military is likely to worsen if nothing is done.

Id. at 3. MLDC summed up the gravity of the problem as follows: "One need only remember the popular perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders in Vietnam to understand how important ethnic, racial, and gender representation is to the psychological well-being and reputation of the U.S. military." *MLDC Report*, at 15 (citation omitted). Indeed, the MLDC has recently provided detailed and robust policy recommendations for DoD leadership to address this threat to military effectiveness. *See id.* at 117-18, 125-30.

The military's efforts to achieve a highly qualified and racially diverse officer corps should be permitted to continue in order to preserve the military's effectiveness as an institution and its ability to protect the Nation's security. As was the case when *Grutter* was decided, there is not as yet a race-neutral means for the military to fulfill its mission to achieve selectivity and officer diversity. The military commissioning institutions' race-conscious policies remain vital to the fulfillment of its selectivity and diversity mission.

II. Invalidating UT's Modest Race-Conscious Admissions Policy Would Seriously Disrupt the Military's Efforts to Maintain Military Cohesion and Effectiveness.

A. Because of ROTC, the military has a strong interest in the admissions policies of civilian universities.

While this case focuses on university admissions, its impact dramatically transcends academia. Separate and apart from the military's own race-conscious policies discussed above, which should be preserved, because of ROTC's structure, proscribing civilian colleges and universities' modest consideration of race in admissions would seriously disrupt the military's efforts at developing a racially diverse officer corps to lead a diverse fighting force and protect our national security. ROTC far and away remains one of the military's primary sources of officers. *Supra* at 13. And again, students must already be admitted to a college or university to be eligible to gain admission into ROTC. The military therefore *entirely* depends on civilian colleges and universities for its pool of ROTC officer candidates. Invalidation of modest race-conscious admissions policies such as UT's will necessarily affect the composition of the pool of eligible ROTC candidates.

As a threshold matter, and in large measure unrelated to academics, "statistics released by the Pentagon show that 75 percent of young people ages 17-24 are currently not eligible to enlist." *MLDC Report*, at 47 (citing a 2009 study). Indeed, "***[t]he shrinking pool of qualified candidates for service in the Armed Forces is a threat to national security.***" *Id.* at 49 (emphasis in original). What is more, the eligibility requirements tend to exclude minorities disproportionately. *See id.* at 47-48 (explaining how racial and ethnic minorities "tend to meet these eligibility requirements at lower rates than whites"). In this context, ending modest race-conscious admissions policies at our Nation's top universities such as UT, which currently guarantee a stream (if not yet a critical mass) of highly-qualified minority students, necessarily risks diminishing the pool of highly-qualified minorities who otherwise would be available to apply to ROTC.

This is no small matter. In fiscal year 2010, ROTC was the source for 49.7% of the Army's officers,[31] with the Army being the largest of our service branches.[32] Moreover, ROTC is currently overwhelmingly the primary source for *minority* officers in the Army: 49.8% of all black officers, 46.5% of Native Americans officers, 46% of all Hispanic officers, and 42.9% of Asian officers obtained their commission through ROTC in 2010. *Population Representation 2010*, at App. B, p. 64. Put bluntly, our Army, the largest of the service branches, is dependent on ROTC for fielding *almost half* of its officers and *almost half* of its minority officers. Invalidating race-conscious admissions at ROTC-participating colleges and universities such as UT and ending the critical mass of highly-qualified minority candidates they seek to assemble, would capsize an effort that has been ongoing since the Truman Administration. It would also compound the existing recruiting problem of service men and women of all background that already threatens our national security.

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[31] *Population Representation 2010*, at App. B, p. 64, *available at* http://prhome.defense.gov/RFM/MPP/ACCESSION%20POLICY/PopRep2010/appendixb/appendixb.pdf.

[32] "The Army has the largest number of Active Duty members (561,979) followed by the Air Force (329,640), the Navy (323,139), and the Marine Corps (202,612)." *Demographics*

What is more, the post-September 11, 2001 world has inculcated in the military recognition that the ability to lead diverse groups of people and facilitate unit cohesion as well as collaborate well with people of different cultures are invaluable military leader attributes. *Supra* at 9-11. *See also MLDC Report*, at 17 (noting skills needed for modern warfare, including ability to work with international partners). As the Army explains in its *Diversity Roadmap*,

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2010 Report, at iii. "There are also 41,327 Active Duty members of the [Department of Homeland Security's] Coast Guard." *Id.*

> Today's security environment demands more from our military and civilian leaders than ever before.... The unconventional and asymmetrical battlefields of the future mean we must understand people and the environments where they live. A more adaptive and culturally astute Army will enhance our ability to operate in these environments. Training, educating and preparing culturally adaptive leaders, able to meet global challenges because of their ability to understand varying cultures, will continue to help the Army achieve mission readiness.

Dep't of the Army, *United States Army Diversity Roadmap*, at 3 (Dec. 2010).[33] The Army further explains:

> We derive strength from the cultures, perspectives, skills and other qualities of our personnel. The 21st-Century Army is transforming into a versatile, agile Force where knowledge of the battle space is crucial. Soldiers and Army Civilians must now add to our toolboxes not only a cultural understanding of the populations in which we may be deployed, but also a better grasp of the many characteristics and backgrounds in our own formations.

Id. at 1.

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[33] *Available at* http://www.armydiversity.army.mil/document/Diversity_Roadmap.pdf.

Colleges and universities whose student bodies are diverse across various matrices, including race and ethnicity, are more likely to produce graduates who possess these modern military leader skills. The experiences of having been educated in a diverse environment and having been exposed to different kinds of people in one's formative years facilitate the development of the ability to work collaboratively with others notwithstanding racial, cultural, linguistic or other differences. Justice Powell's view in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), embraced by the Court in *Grutter*, is particularly true for the military: "[N]othing less than the 'nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter*, 539 U.S. at 324 (quoting *Bakke,* 438 U.S. at 313 (Powell, J.) (internal quotation omitted)). Removing the security of a pool of college graduates—of all demographic backgrounds—educated in a diverse environment jeopardizes the number of such desirable candidates available—and thus the potential for a "visibly open" pathway, *Grutter*, 539 U.S. at 332,—for such candidates into the officer corps through ROTC.

B. The Court embracing a class-rank cut-off approach to admissions, such as Texas's Top Ten Percent Law, to the exclusion of race-conscious admissions policies conducted in the context of individualized review would seriously disrupt the military.

It goes without saying that a sweeping ruling from this Court that race-conscious admissions and recruiting cannot be justified in the face of or coexist with a class rank plan such as Texas's Top 10% Law would affect other selective institutions far beyond UT. The existence of such a race-neutral admissions plan does not obviate the need for modest race-conscious policies in admissions. As a threshold matter, as respondents explain, the racial and ethnic diversity achieved by the Texas law is mostly a product of the fact that Texas public high schools remain highly segregated by race. Thus, embracing this race-neutral admissions approach under these facts would create "damaging incentives." App. 58a. Moreover, should the Court embrace an exclusively one-dimensional approach like a class-rank cut-off for admissions, such a ruling would be dangerously counterproductive to the military's selective institutions (if even administratively feasible, in light of the military academies' nominations process[34]). As the *Grutter* military brief foreshadowed:

> It is no answer to tell selective institutions, such as the service academies or the ROTC, automatically to admit students with a specified class rank, even if such a system were administratively workable. This lone criterion mandates the admission of students

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[34] In addition to meeting basic eligibility requirements, to apply, potential service academy applicants must secure nomination from the President, the Vice President, or a Member of Congress. Statutes govern the nominations process. *See* 10 U.S.C. §§ 4342, 6954, 9342.

> unable to satisfy the academic, physical, and character-related demands of the service academies or the officer training curriculum.

Grutter military brief, at 29. This Court recognized this point: "[E]ven assuming such [class rank] plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340.

As to academic qualifications, not all high schools possess the same degree of academic rigor. A top ten percent performer at one high school may not rank even in the top fifty percent at another high school. What is more, not all high schools (*viz* many private schools) even rank their students according to academic performance. Thus, a class rank approach to admission could well compel admission of students of widely varying academic aptitude. Further, it would likely foreclose highly qualified candidates, including minorities, from non-ranking schools. It would also exclude candidates from competitive high schools whose academic performance is objectively outstanding, but because of the overall superlative performance of all students at the competitive school, might have just missed the top ten percent cut-off.

Even if a class-rank approach somehow assured a consistent level of academically high-achieving applicants and enabled our military to reach these desirable candidates, the Court embracing a pure class-rank approach to admissions at the expense of individualized review, including consideration of a candidate's race as a factor, of a factor, of a factor, would still undermine the military's institutional needs. Strong academics are important, but are only one of the many criteria military judgment deems essential to military leadership, as the whole person approach in admissions, *supra* at 18-22, suggests. Beyond the numerous basic eligibility requirements for military service such as height, weight, physical fitness, overall health, and, for officers, U.S. citizenship, other attributes are also important—attributes such as leadership potential and moral conduct. *MLDC Report*, at 47. These character-related aspects of an admissions application simply cannot be assessed under a rule where admission is guaranteed based only on class-rank. These attributes by definition require subjective, individualized assessment to discern.

An exclusively class-rank approach would be seriously undermining for another reason: Contemporary warfare challenges such as the increased engagement of U.S. military in multinational operations and nation-building are spurring our military to regard possession of additional intangible skills as prerequisites for its leaders. These skills require heightened ability to work collaboratively, including with different governments and cultures, foreign language capabilities and regional expertise, and the like. *MLDC Report*, at 30 (identifying competencies needed in military leadership based on reports such as the *Quadrennial Defense Review Report*). *See supra* at 11, n. 8 (quote from General James Mattis). The cookie-cutter approach of the race-neutral Top 10% Percent Law cannot, alone, enable our military to identify young potential officers who would enrich and strengthen our military leadership with these other multi-faceted and much-needed attributes.

III. Respondents' and the Military's Race Conscious Policies Are Constitutional.

This Court has recognized that racial and ethnic diversity is a compelling state interest of public colleges and universities. *Grutter*, 539 U.S. at 328. In *Grutter*, the Court also consciously upheld its tradition of giving a degree of deference to universities' academic decisions, within constitutionally prescribed limits, finding that a university's "educational judgment that such diversity is essential to its education mission is one to which we defer." *Id.* Relying in part on the military experience detailed in the *Grutter* military brief, the *Grutter* Court agreed that like selective military institutions, elite civilian institutions also "must remain both diverse and selective." *Id.* at 331.

The analysis is no different here. As explained in the *Grutter* military brief and again here, the military, based on decades of experience, has determined that a highly qualified and racially diverse leadership is mission-critical. Its overall effectiveness as an institution and thus its ability to protect our Nation's security hinge on it fulfilling a highly qualified and diverse officer corps. While "military interests do not always trump other considerations, and we have not held that they do," the Court does "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24-26 (2008) (internal quotation omitted). The military's sustained view, learned the hard way from decades of rueful experience, is that a highly-qualified *and* racially diverse officer corps is critical to military effectiveness and indispensable to our Nation's security. *Amici* respectfully submit that this military judgment deserves deference from the Court. This is particularly so where, as here, the military interest is inextricably tied to the ability to protect the Nation. As this Court has recognized, "[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981) (internal quotation omitted).

Currently, no alternative yet exists to the military's limited use of race-conscious recruiting[35] and admissions policies to fulfill its compelling need for selectivity and diversity in its officer corps. For a myriad of reasons, a class-rank approach alone cannot work for the military as the military requires individualized, subjective, holistic review of its officer candidates.

Nor is it any answer to tell the military to try harder in its recruitment efforts to achieve its diversity goals. As detailed above and in the *Grutter* military brief, the military has made and continues to make *extensive* investments of energy and resources to expand the pool of highly qualified minority officer applicants. However, outreach and recruiting alone are most often not enough for the military to achieve its national security interest. Race-conscious admissions policies play an important role. The military needs the flexibility to engage in race-conscious efforts that go beyond outreach and recruiting to achieve critical officer diversity.

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[35] Race-conscious outreach and recruiting initiatives may not be subject to strict scrutiny at all. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) (doubting that race-conscious programs such as targeted recruiting and allocation of resources trigger strict scrutiny).

Race-conscious admissions policies are key for another reason. Because ROTC continues to be a primary source for military officers, and one may be admitted to ROTC only after being admitted to a ROTC-participating civilian university, there is a national security interest in limited consideration of race in admissions by ROTC-participating civilian universities, including UT.

UT's carefully crafted, modest race-conscious admissions policy should not be ruled unconstitutional and the constitutional parameters of race-conscious admissions more generally should not be changed. As *Grutter* affirmed, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332. Our military should be permitted to continue to fulfill its compelling need for a highly-qualified and diverse officer corps for military effectiveness and our national security. *Amici* respectfully urge the Court to once again take that "small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." *Id.* at 331.

CONCLUSION

The court of appeals correctly confirmed the constitutionality of UT's race-conscious admissions policy under existing precedent, including *Grutter*. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 2012

APPENDIX

APPENDIX

Short Biographies of *Amici Curiae*

Lieutenant General Julius W. Becton, Jr., 40-year U.S. Army veteran; Superintendent, Washington, D.C. Public Schools (1996-98); President, Prairie View A&M University in Texas (1989-94).

General John P. Abizaid, retired 4-star U.S. Army, Commander, U.S. Central Command (2003-07); Distinguished Chair, Combating Terrorism Center at the U.S. Military Academy at West Point (2007-present).

Admiral Dennis C. Blair, retired 4-star, Director of National Intelligence (2009-10); Commander in Chief, U.S. Pacific Command (1999-2002).

General Bryan Doug Brown, retired 4-star, Commander, all U.S. Special Operations Forces (2003-07).

Lieutenant General Daniel W. Christman, Superintendent, U.S. Military Academy at West Point (1996-2001), overall responsible for admission criteria.

General Wesley K. Clark, retired 4-star U.S. Army, Supreme Allied Commander, Europe (1997-2000); Commander in Chief, U.S. Southern Command (1996-97).

Admiral Archie Clemins, retired 4-star, Commander in Chief, U.S. Pacific Fleet (1996-99), the world's largest combined-fleet command.

General Ronald R. Fogleman, retired 4-star, Air Force Chief of Staff (1994-97); Commander in Chief of U.S. Transcom (1992-94).

Admiral Edmund P. Giambastiani, Jr., retired 4-star, Seventh Vice Chairman of the Joint Chiefs of Staff (2005-07); NATO Supreme Allied Commander, Transformation (2003-05); Commander, U.S. Joint Forces Command (2002-05).

General Ronald H. Griffith, retired 4-star, Vice Chief of Staff, U.S. Army (1995-97); Army Inspector General (1991-95).

General Richard D. Hearney, retired 4-star U.S. Marine Corps, Assistant Commandant (1994-96).

General James T. Hill, retired 4-star U.S. Army, U.S. Southern Command (2002-04).

General Joseph P. Hoar, retired 4-star U.S. Marine Corps, Commander in Chief, U.S. Central Command (1991-94).

Admiral Bobby R. Inman, retired 4-star, University of Texas at Austin LBJ Centennial Chair in National Policy (2000-present); Deputy Director, Central Intelligence Agency (1981-82).

Gen. John ("Jack") M. Keane, retired 4-star, Vice Chief of Staff, U.S. Army (1999-2003); currently Chairman of the Board, Institute for the Study of War.

Senator Joseph Robert ("Bob") Kerrey, Congressional Medal of Honor recipient, U.S. Navy SEAL, special forces; President of New School University (2001-11); U.S. Senator (1989-2001); Nebraska Governor (1983-87).

Admiral Charles R. Larson, retired 4-star, Commander in Chief, Pacific Fleet (1990-91); Commander in Chief, U.S. Pacific Command (1991-94); Superintendent, U.S. Naval Academy (1983-86; 1994-98).

Lieutenant General William J. Lennox, Jr., Superintendent, U.S. Military Academy at West Point (2001-06).

General William R. Looney, III, retired 4-star, Commander, Air Education and Training Command (2005-08); Commandant Armed Forces Staff College (1996-98).

General Lester L. Lyles, Jr., Commander, Air Force Materiel Command (2000-03); Vice Chief of Staff, U.S. Air Force (1999-2000).

General David M. Maddox, retired 4-star, Commander in Chief, U.S. Army Europe (1992-94); Commander, NATO Central Army Group (1992-93).

General Robert Magnus, retired 4-star, Assistant Commandant, U.S. Marine Corps (2005-08); Chairman, U.S. Marine Corps Scholarship Foundation (2009-11).

Admiral Michael G. Mullen, retired 4-star, 17th Chairman of the Joint Chiefs of Staff (2007-11); 28th Chief of Naval Operations (2005- 07).

General Carl E. Mundy, Jr., retired 4-star, Commandant, U.S. Marine Corps (1991-95).

Admiral John B. Nathman, retired 4-star, Commander U.S. Fleet Forces (2005-07); Vice Chief of Naval Operations (2004-05).

Lieutenant General Tad J. Oelstrom, Director, National Security Program, Kennedy School of Government, Harvard University (1998-present); Superintendant of the U.S. Air Force Academy (1997-2000).

General Colin L. Powell, retired 4-star U.S. Army, 65th U.S. Secretary of State (2001-05); Chairman of the Joint Chiefs of Staff (1989-1993); Commander, U.S. Army Forces Command (1989); National Security Advisor (1987-89).

Admiral Joseph W. Prueher, retired 4-star, U.S. Ambassador to China (1999-2001); Commander in Chief, U.S. Pacific Command (1996-99); 73rd Commandant of Midshipmen, U.S. Naval Academy (1989-1991).

Honorable Joc R. Reeder, the 14th Under Secretary of the Army (1993-97), had oversight responsibility for admissions criteria for the U.S. Military Academy and all university Reserve Officers' Training Corps ("ROTC") programs.

Lieutenant General John F. Regni, Superintendent, U.S. Air Force Academy (2005-09); Commander, Air University (2004-05); Commander, 2nd Air Force (2000-04).

Vice Admiral Ann E. Rondeau, President National Defense University (2009-12); Commander, Navy Personal Development Command (2004-05); Commander, Naval Services Training Command (including all ROTC programs) (2001-04); 2d Battalion Officer Naval Academy & Member, Board of Admissions (1990-93).

Vice Admiral John R. Ryan, Chancellor, State University of New York (2005-07); Superintendent U.S. Naval Academy (1998-2002).

General Henry H. Shelton, retired 4-star, 14th Chairman of Joint Chiefs of Staff (1997-2001); Commander in Chief, U.S. Special Operations Command (1996-97).

General Gordon R. Sullivan, retired 4-star, Army Chief of Staff (1991-95), overall responsible for organizing and training over 1 million active duty, Guard, Reserve and civilian members; President, Association of the United States Army ("AUSA") (1998-present).

General John H. Tilelli, Jr., retired 4-star, Commander in Chief, United Nations Command and Combined Forces Command, Republic of Korea (1996-99); Commanding General, U.S. Army Forces Command (1995-96); Army Vice Chief of Staff (1994-95).

General Johnnie E. Wilson, retired 4-star, Commanding General, United States Army Materiel Command (1996-99).

General Anthony C. Zinni, retired 4-star U.S. Marine Corps, Special U.S. Peace Envoy to the Middle East (2002); Commander in Chief, U.S. Central Command (1997-2000); endowed-chair professor at eight universities (2000-present).

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE BLACK STUDENT ALLIANCE AT THE UNIVERSITY OF TEXAS AT AUSTIN, THE BLACK EX-STUDENTS OF TEXAS, INC., AND THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI[1]

Amici Black Student Alliance at the University of Texas at Austin (BSA) and the NAACP Legal Defense & Educational Fund, Inc. (LDF) have participated in this litigation from the outset and presented oral argument in the court of appeals. JA 7a, 10a, 14a; Pet. App. 116a, 118a. Amici also include the Black Ex-Students of Texas, Inc. (BEST), many of whose participants were undergraduates in the period pertinent to this case.

Founded during the 1980-81 school year, the BSA serves as the leadership voice for African-American students at the University of Texas at Austin (hereinafter UT or the University). BSA members have a strong interest in preserving the University's efforts to promote diversity through the inclusion of race as one factor among many in UT's holistic review process. Although they recognize that the campus is more inclusive than it has been in the past, many BSA members still experience racial isolation in their classes, extracurricular activities, and other informal settings across the campus.

Founded in 1998, BEST brings together UT alumni to assist in recruiting, retaining, and supporting African-American students at UT. BEST also aims to increase awareness of issues facing African-American students, faculty, and staff at the University, and provides networking opportunities for its alumni members. Many BEST participants experienced firsthand significant racial isolation as UT students during the period between 1997 and 2004 when the University did not consider race in its admissions policies. All too often they were the only, or one of a very few, African-American students in their classes. Professors and fellow students frequently looked to them to give the "Black perspective" on particular issues. Some experienced acute incidents of racial hostility, which undermined their sense of belonging within the campus community. Accordingly, BEST participants aspire to help create an educational environment at the University in which African-American students no longer bear the crushing burden of tokenism and racial stereotypes and where they no longer struggle to develop and define themselves as individuals on their own terms.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

LDF is a non-profit legal organization that has worked for more than seven decades to dismantle racial segregation and ensure equal educational opportunity for all students. In groundbreaking cases, LDF has represented African-American students and applicants, as parties and amici, seeking to expand access and opportunity—both at UT, *see, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and at other universities throughout the nation, *see, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *United States v. Fordice*, 505 U.S. 717 (1992); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex* *rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983); *Geier v. Bredesen*, 453 F. Supp. 2d 1017 (M.D. Tenn. 2006). In addition, while he was in private practice prior to becoming LDF's sixth President and Director Counsel, the late John Payton served as counsel to the University of Michigan in *Grutter* and *Gratz* and argued the latter case before this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court has repeatedly stressed, diversity's educational benefits go to the heart of our democracy: "[N]othing less than the 'nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (internal citation and quotation marks omitted)). The educational benefits that flow from diverse colleges and universities are no less apparent today than they were three decades ago when Justice Powell cast the deciding vote in *Bakke*, nine years ago when the Court decided *Grutter*, or five years ago, when it reaffirmed this *Grutter* principle in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 722-23 (2007).

The Court's conceptualization of the educational benefits of diversity did not spring from whole cloth. It arose out of a particular historical context in which UT played a significant and distinctive role. *See, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950) (mandating admission of Heman Marion Sweatt, whose application to UT Law School had been denied based solely on his race). This "[c]ontext matters," *Grutter*, 539 U.S. at 327, in the nation's ongoing efforts to transcend its exclusionary past and chart a more socially cohesive and racially inclusive future. To ensure continued progress in these efforts, colleges and universities must be free to create environments where people of diverse backgrounds can come together in ways that foster respect for the distinctive talents and contributions that each offers. This is particularly significant in light of the special role that higher education plays in opening pathways to civic, political, and economic leadership and opportunity. *See id.* at 331-32.

Fully realizing the educational benefits of diversity, however, depends on another important predicate. There must be a "meaningful representation"—or, to use *Grutter*'s shorthand, "a critical mass"—of underrepresented minority students. *Id.* at 329-30. Such a critical mass is necessary because "[b]y virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to [a university's] mission, and less likely to be admitted in meaningful numbers [based] on criteria that ignore those experiences." *Id.* at 338.

Amici write separately to highlight several reasons why critical mass is essential to the full realization of diversity's educational benefits. First, critical mass promotes individual dignity by creating an educational environment that encourages both underrepresented minority students and their fellow students to explore and define their own unique identities. Second, critical mass facilitates students' exposure to diversity *within* and *among* the racial groups that are underrepresented in classrooms and across the university campus. Third, because colleges and universities open pathways to leadership and opportunity in the larger sphere of public life, the critical mass inquiry must pay some attention to whether the University is fulfilling its mission of serving the broader community.

While petitioner purports to accept both the educational benefits of diversity and the importance of a critical mass of underrepresented minority students to achieve those benefits, Pet. Br. 26, her arguments, if accepted, would turn established precedent upside down. Distorting beyond recognition the Court's prohibition on racial quotas, petitioner proposes to cap enrollment of underrepresented minority students at the level achieved prior to *Grutter* through race-neutral means alone. Petitioner's unduly rigid conception of critical mass, Pet. Br. 26-30, is both inconsistent with this Court's teachings and would severely impair UT's ability to achieve its educational mission.

There is no need to speculate about the devastating impact that petitioner's proposed cap would have on the enrollment of African Americans and other underrepresented minority students. Between 1997 and 2004, a ban on race-conscious admissions was in place, as a result of the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). During that period, UT took full advantage of race-neutral measures, including expanded outreach, scholarships, and a state law guaranteeing admission for all Texas residents ranked at the top of their high school graduating class. *See* Tex. Educ. Code § 51.803 (1997) (amended 1999, 2007 & 2009) [hereinafter the Top Ten Percent Plan]. UT also instituted individualized review for applicants not admitted through the Top Ten Percent Plan. *See* JA 374a-381a. From 1997 through 2004, that whole-file review included the socioeconomic status of applicants' families, extracurricular activities, community service, leadership qualities, and multiple other factors—but it did not consider race. *Id.*

Despite all of these race-neutral efforts, African-American student enrollment remained unacceptably low. Only 3.4% of the students in the freshman class that entered UT in 2002—shortly before *Grutter* was decided—were African Americans, and at no point between 1997 and 2004 did African-American students comprise more than 4.5% of the entering first-year class. Pet. App. 20a; JA 127a.[2]

In June 2003, *Grutter* overturned *Hopwood*. Thereafter, the University Board of Regents "authorized institutions within the University of Texas system to examine whether to consider an applicant's race and ethnicity in admissions in accordance with the standards enunciated in *Grutter*." Pet. App. 21a (internal quotation marks and citation omitted). UT then conducted an extensive review of its admissions policies and ultimately concluded that it had failed to achieve a critical mass of African Americans and other underrepresented minority students using only race-neutral measures. SJA 1a-39a.

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[2] This brief primarily focuses on the detrimental consequences of petitioner's arguments for African Americans, but amici also believe that UT's consideration of race as one factor in its holistic review of all applicants, including other underrepresented minority students, is similarly constitutional.

The University's educational judgment is fully supported by the results of its multi-year experiment with race-neutral alternatives and the review that it conducted of its admissions policies in 2003-04. Resp. Br. 41. In addition, amici highlight other contemporaneous evidence—specifically the proceedings of the University's Task Force on Racial Respect and Fairness, which developed recommendations (including necessary admissions reforms) to address notable incidents of racial hostility that occurred on campus during the same period that UT was reviewing its admissions policies.

Contrary to petitioner's claims, the modest race-conscious component that UT added to its admissions process, beginning with its review of applicants for the 2005 freshman class, is an essential supplement to the Top Ten Percent Plan. The vast majority of UT students are admitted through the Top Ten Percent Plan, but race-conscious holistic review has resulted in meaningful increases in the overall level of African-American enrollment. Equally critical, holistic review provides flexibility to enhance diversity *among* UT's African-American students.

Petitioner's proposal to eliminate race from the holistic review process could, if accepted, send a message to minority students that a critical element of their identity is irrelevant to, or even unwelcome at, UT. "The enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). Pretending that race plays no role in students' construction of their own identities does not make it so. For African-American students, especially at UT, racial isolation, tokenism, the ever-present threat of racial stereotypes, and even overt prejudice can profoundly alter their experiences in ways that have a lasting and, often damaging, impact. UT's pursuit of broader diversity and the educational benefits that flow from it help to mitigate these dangers and, thus, improve the quality of all students' college experiences.

ARGUMENT

I. Meaningful representation of African-American students is necessary to achieve the full educational benefits of diversity.

As petitioner acknowledges, "critical mass is defined by reference to the educational benefits that diversity is designed to produce." Pet. Br. 26 (quoting *Grutter*, 539 U.S. at 330). For UT, as for the University of Michigan Law School in *Grutter*, those benefits include enhanced "cross-racial understanding, . . . break[ing] down racial stereotypes," enabling students "to better understand persons of different races," and creating "a path to leadership" that is "visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 330, 332 (internal quotation marks and citations omitted); SJA 1a-3a, 16a-17a.

There is no quota, target, or predetermined percentage of undergraduate enrollment that automatically produces these benefits; nor could there be, as this Court has directed repeatedly. *See Grutter*, 539 U.S. at 329-30, 334. For this reason, critical mass cannot be defined by simple numerical calculations alone. Rather, critical mass depends on the quality, as much as the quantity, of individual students' cross-racial interactions, as well as the context and community in which the particular university is situated.

A. A critical mass of underrepresented minority students helps break down stereotypes and allows all students to explore, develop, and express their individuality.

Obtaining a critical mass of underrepresented minority students is in no way inconsistent with promoting the individual dignity of all students. An important function of higher education is to provide students with an environment that helps them develop their full potential through wide exposure to diverse individuals, ideas, and viewpoints. Indeed, this is one of the key educational benefits of diversity endorsed in *Grutter*, 539 U.S. at 324.

For many students, college is the first time they have meaningful opportunities to interact and problem-solve with people from vastly different backgrounds. "Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole." *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment). The lack of diversity at the neighborhood level contributes to the persistent "problem of *de facto* resegregation in schooling" at the K-12 level in Texas and throughout the nation. *Id.* at 788; *see* Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality:*

College Admissions and the Texas Top 10% Law, 8 Am. L. & Econ. Rev. 312, 318-19 (2006); Resp. Br. 8. When students who have been "'surrounded only by the likes of themselves'" reach college, they often hold perspectives shaped by the limits of their formative experiences. *Bakke*, 438 U.S. at 312 n.48 (opinion of Powell, J.) (quoting William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). Too often, they are not even aware of the full extent of their lack of knowledge about others. These gaps in awareness and understanding permit racial stereotypes to flourish in ways that have far-reaching social consequences, from the classroom to the broader campus and beyond.

Racial stereotypes stifle the educational environment. They inhibit students of all races from engaging in the atmosphere of "speculation, experiment and creation—so essential to the quality of higher education." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (internal quotation marks and citation omitted). Not only can racial stereotypes irreparably harm students who are targeted by such false assumptions, but they also diminish individual growth and self-realization for students who live their lives based on narrow and incomplete views about other people. *See Grutter*, 539 U.S. at 333.

Absent a critical mass, racial stereotypes are likely to remain entrenched for at least two reasons. First, having insufficient numbers of underrepresented minority students reduces the likelihood of meaningful cross-racial interaction. Colleges and universities provide important opportunities to transcend the restricted social patterns that many students have previously experienced—with long-term positive consequences. *See, e.g.*, Nicholas A. Bowman et al., *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J.C. Student Dev. 729 (2011) (finding that cross-racial interactions in college are positively related to personal growth, purpose in life, recognition of racism, and volunteering behavior among college graduates in their mid-30s); Amicus Br. of Am. Educ. Res. Ass'n et al. at 14-16. In the absence of such intervention, racially segregated social patterns are likely to persist. The lack of cross-racial interactions also diminishes educational opportunity. Conversely, "encountering unfamiliar and novel situations, people, and experiences" fosters personal growth because it requires us to grapple with "uncertainty, instability, and possibly anxiety" that stimulate individual learning and development. Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 Rev. Higher Educ. 185, 189-90 (2007). Hence, critical mass both reduces racial stereotypes and enriches the educational environment as a whole—in classrooms, extracurricular activities, dining halls, and more informal settings. *Cf. Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2999 (2010) (Kennedy, J., concurring) ("Extracurricular activities . . . facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self.").

Second, underrepresented minority students may not feel comfortable expressing their individuality when they are relegated to token status. Rather, they may be pressured, even by well-meaning teachers and fellow students, to serve as "spokespersons for their race." *Grutter*, 539 U.S. at 319. When this happens, minority students may suppress their own distinctive and, perhaps unexpected, idiosyncratic, or contradictory views. *Id.* at 319-20, 330. In this way, stereotyping inhibits individuals and affects their ability to discover and develop their distinctive character. *Cf. Lawrence v. Texas*, 539 U.S. 558, 574 (2003) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.") (internal quotation marks and citation omitted).

By contrast, having a meaningful representation of underrepresented minority students reduces the likelihood that that they will feel isolated or compelled to conform to a forced social script. In such circumstances, "nonminority students learn there is no minority viewpoint but rather a variety of viewpoints among minority students." *Grutter*, 539 U.S. at 320 (internal quotation marks and citation omitted).[3]

Thus, enrolling a critical mass of underrepresented minority students offers them more freedom to define their own individual identities, rather than being defined by others or defining themselves through the lens of racial stereotypes. Moreover, having a critical mass of under-represented minorities encourages *all* students to grow and flourish as individuals by "diminishing the force of [racial] stereotypes" on campus and in the classroom. *Grutter*, 539 U.S. at 333.[4]

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[3] Exposure to diverse individuals also helps foster improved cognitive skills, civic engagement, and other benefits. *See generally* Amicus Br. of Am. Educ. Res. Ass'n et al. As numerous researchers have shown, when individuals learn to work together in diverse teams, they produce better, more creative results. *See, e.g.*, Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Society* 131-238 (2007) (discussing how diversity produces collective benefits).

The point here is not that critical mass, by itself, solves all of the lingering effects of racial isolation in schools, neighborhoods, and the daily lives of many Americans. Rather, critical mass creates the conditions for substantial educational benefits in the distinctive contexts of our nation's colleges and universities, which can result in individual growth, greater cross-racial understanding, and, ultimately, social progress.

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[4] In assessing whether it was helping students break down stereotypes, it was particularly appropriate for UT to take account of classroom diversity as a "benchmark for critical mass." Pet. Br. 30. As this Court recognized in *Grutter*, the educational benefits that diversity is designed to produce are particularly salient at the classroom level. *See* 539 U.S. at 330; Resp. Br. 39. Indeed, the record developed by the University of Michigan Law School in *Grutter* included a similar assessment of diversity at the classroom level. *See* Resp. Br., *Grutter v. Bollinger*, 539 U.S. 306 (No. 02-241), 2003 WL 402236, at *6 n.7. Petitioner's critique of UT's focus on small classes, Pet. Br. 43-44, overlooks the pervasive racial isolation of African-American students across the curriculum, regardless of class size. *See* SJA 66a-150a; Resp. Br. 10, 39, 43-44. Overall, "79 percent of [all] UT [undergraduate] classes had zero or one African-American students." Pet. App. 156a; *cf. Int'l Bhd of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) (recognizing that an "inexorable zero" can be probative evidence of racial inequity) (internal quotation marks and citation omitted).

B. Critical mass cannot be assessed by lumping together underrepresented minorities.

In assessing whether it was providing the wide exposure to different viewpoints necessary to break down stereotypes and promote individual autonomy, UT appropriately considered the very low level of African-American students who matriculated during its 1997-2004 experiment with exclusively race-neutral admissions. During this period, UT enrolled an average of approximately 7,000 students in each freshman class. Yet, at most, there were only 309 African Americans in any freshman class. JA 127a. And at no point between 1997 and 2004 did African Americans constitute more than 4.5% of any first-year class. *Id.*[5]

That low level of African-American enrollment is insufficient to obtain the educational benefits of diversity described in Section I.A *supra*, especially at a university, such as UT, with a very large student body and a sprawling campus. *See* Resp. Br. 4. *Grutter* permits a university to take such enrollment levels into consideration in its critical mass inquiry: "'[S]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323 (appendix to opinion of Powell, J.)) (alteration in original). Petitioner does not contest the importance of devoting some attention to numbers in the critical mass inquiry, but she ignores these low levels of African-American enrollment and instead lumps all underrepresented minority students together and treats them as fungible. *Cf.* Pet. Br. 3, 4, 5, 26, 35. In petitioner's view, a university would be precluded from taking any additional race-conscious measures if the aggregate enrollment of all underrepresented minority student groups reached a particular level—even if 99% of such students were African Americans and only 1% were Latinos, or vice versa. No precedent supports this position.

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[5] Such persistent and comparatively low levels of African-American enrollment had a domino effect. Low levels of admissions meant lower levels of enrollment; these patterns, in turn, discouraged others from applying and matriculating. *See* Angel Harris & Marta Tienda, *Minority Higher Education Pipeline: Consequences of Changes in College Admissions Policy in Texas*, 627 Annals Am. Acad. Pol. & Soc. Sci. 60, 66-67, 77-78 (2010).

To the contrary, in *Parents Involved*, the Court sharply criticized the Seattle School District for lumping together students of different racial backgrounds. 551 U.S. at 723-24. Under Seattle's plan, "a school with 50 percent Asian-American students and 50 percent white students but *no* African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not." *Id.* at 724 (emphasis added). The Court found it "hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly diverse.'" *Id.* (quoting *Grutter*, 539 U.S. at 329).

Petitioner's exclusive focus on aggregate minority enrollment is equally flawed. *See* Resp. Br. 41-42. As the court of appeals recognized, "African-American and Hispanic students, for example, are not properly interchangeable for purposes of determining critical mass." Pet. App. 67a. Paraphrasing this Court's insight in another context, "[s]ometimes the grossest discrimination can lie in treating [individuals who] are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

Petitioner's unwillingness to disaggregate Latino and African-American enrollment is reason enough for this Court to reject her challenge to UT's determination that it did not achieve a critical mass of underrepresented minorities through race-neutral admissions alone. Equally important, however, petitioner fails to acknowledge that the critical mass inquiry "must be sensitive to important distinctions *within* these broad groups" of Latino and African-American students. Pet. App. 67a (emphasis added).

For instance, this Court has criticized Texas for ignoring the fact that Latino populations in different parts of the state have "divergent needs and interests." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006). Similarly, Justice Powell recognized in *Bakke* that university admissions policies could consider "the variety of points of view, backgrounds and experiences of blacks in the United States." *Bakke*, 438 U.S. at 323 (appendix to opinion of Powell, J.).

Thus, in its assessment of whether it has achieved a critical mass of underrepresented minority students, UT should be permitted—and, indeed, encouraged—to take into account whether its campus and classrooms are meaningfully representative of the rich diversity *within* and *among* underrepresented minority groups. *See* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 360 (2002) ("Diversity enables students to perceive differences both within groups and between groups. . . ."). For the alumni and students who participate in amici BEST and BSA, the benefits of exposure to such "diversity within diversity," Resp. Br. 34, is particularly important to their learning process.

C. Because the benefits of diversity extend well beyond campus borders, the critical mass inquiry must ensure open paths to leadership and opportunity.

As part of the justification for its proposal to include race as one factor among many in its holistic review process, UT expressed concern that "the *significant differences* between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." SJA 24a (emphasis added). During UT's multi-year experiment with race-neutral admissions, as explained in Section I.B *supra*, African-American enrollment in incoming freshman classes never exceeded 4.5%, whereas African-American Texans then constituted over 10% of the state's workforce and approximately 12-13% of its high school graduates. Pet. App. 127a; JA 127a; SJA 3a. This significant discrepancy, in UT's view, resulted in a "less-than-realistic environment" on campus and in the classroom that was "not conducive to training the leaders of tomorrow." SJA 24a-25a.[6]

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[6] It bears emphasis that UT's consideration of such demographics "took place only when the University first studied whether a race-conscious admissions program was needed to attain critical mass." Pet. App. 47a. As the court of appeals

This legitimate concern about significant racial disparities does not in any way suggest—as petitioner claims—that UT's pursuit of critical mass was designed to achieve "demographic proportionality." Pet. Br. 27. At UT, as the court of appeals recognized, "[t]he need for a state's leading educational institution to foster civic engagement and maintain visibly open paths to leadership . . . requires a degree of attention to the surrounding community." Pet. App. 50a. Indeed, "[a] university presenting itself as open to all may be challenged when the state's minority population grows steadily but minority enrollment does not," as has been the case in Texas over the past decade. *Id.*

Opening pathways to leadership and opportunity is particularly critical for African-American students because they were excluded from the University for much of its history—first by law and then in effect. *See Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994) ("Discrimination against blacks in the state system of higher education is well documented in history books, case law, and the State's legislative history."), *rev'd on other grounds*, 78 F.3d 932; *Sweatt*, 339 U.S. at 634; Resp. Br. 3-4; *see generally* Dwonna Goldstone, *Integrating the 40 Acres: The Fifty—Year Struggle for Racial Equality at the University of Texas* (2006) (charting halting progress towards integration from *Sweatt* through *Hopwood*). As UT candidly concedes, it is "painfully aware" that "vestiges of *de jure* segregation" have persisted in

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recognized, "[t]he summary judgment record shows that demographics are not consulted as part of any individual admissions decision." *Id.*

the decades after this Court's decision in *Sweatt*. Resp. Br. 4 (citing SJA 14a and *Sweatt*, 339 U.S. 629).[7] This history has a continuing corrosive impact on the current makeup of Texas leadership, and the way in which African-American students and their families perceive the University today. Accordingly, UT has a strong imperative "to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain" in order to ensure "that opportunity is not denied on account of race." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). For these reasons, it was permissible for UT to stress the importance of "sending a message that people of all stripes can succeed at UT." Pet. App. 50a; Resp. Br. 4; *cf.* Pet. Br. 28.

UT's interest in visibly open paths to leadership is fundamentally pedagogical—"focused on enhancing the university experience" for its students. Pet. Br. 26. Yet this interest is not exclusively "inward-facing," as petitioner alleges. *Id.* To the contrary, UT acknowledges that its relationship with—and reliance upon the support of—the community it serves is critical to its ultimate success in fulfilling its educational mission of training tomorrow's leaders. As the Court explained in *Grutter*, "[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." 539 U.S. at 332. Indeed, UT's leaders have long recognized that "[p]ublic confidence is the only real endowment of a state university." University of Texas System Administration, *Standards of Conduct Guide* 3 (2012) (quoting H.Y. Benedict, UT President (1927-37)), *available at* http://www.utsystem.edu/systemcompliance/SOCcombined.pdf.

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[7] After the Court forced UT Austin to open its law school to African Americans, change occurred slowly. Beginning in the 1970s, the federal government undertook a court-ordered investigation of Texas's higher education system and found that the state had failed to eliminate vestiges of its formerly segregated system. *See Hopwood*, 861 F. Supp. at 555-57 (chronicling this investigation and Texas's subsequent efforts to come into compliance). To date, the federal government has yet to announce that Texas has satisfied its obligations under federal civil rights law.

For many decades, this Court has understood the dynamic relationship between higher educational institutions and the communities that they serve, especially in the context of UT. When the Court struck down UT Law School's policy of racial segregation in *Sweatt*, it did so in part based on its recognition that a law school "cannot be effective in isolation from the individuals and institutions with which the law interacts." 339 U.S. at 634. The Court strongly endorsed this premise by citing it in *Grutter*. *See* 539 U.S. at 332 (quoting *Sweatt*, 339 U.S. at 634). Thus, petitioner's purported dichotomy between "inward-facing" and "outward-facing" concepts of diversity, Pet. Br. 26, is not only a demonstrably inaccurate assessment of the University's interests in diversity, but it also is premised on a fundamental misreading of settled law.[8]

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[8] In any event, regardless of whether *Grutter*'s conception of diversity is inward-facing, outward-facing, or both, UT had not attained a critical mass of African Americans when it decided to reinstitute race-conscious admissions in 2004. *See* Section I.B, *supra*, and Section II, *infra*.

II. The University's Task Force on Racial Respect and Fairness provided additional evidence that UT's race-neutral efforts did not yield meaningful African-American representation when race-conscious admissions were banned in 1997-2004.

In the eight years between *Hopwood* and *Grutter*, UT engaged in "serious, good faith consideration" and robust implementation of race-neutral alternatives, *Grutter*, 539 U.S. at 339, and found them insufficient to provide a "critical mass" of underrepresented minority students, *id.* at 329-30. The University's experiences with race-neutral alternatives, as well as the data produced in its subsequent review of admissions in 2003-04, provide ample evidence to support UT's educational judgment that consideration of race as one factor in its individualized review is necessary to fully obtain the educational benefits of diversity. *See* Resp. Br. 41.[9]

As discussed above, "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330. Those benefits are qualitative as well as quantitative. *See* Section I *supra*. Thus, it was entirely proper for UT to rely on student surveys in which

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[9] Petitioner contends that UT should be compelled to satisfy a "strong basis in evidence" standard to demonstrate the need for promoting diversity. *See* Pet. Br. 31-33. For the reasons articulated by UT and the court of appeals, *see* Resp. Br. 49-50; Pet. App. 37a-42a, that standard, derived from the context of reviewing laws to remedy past or present discrimination, is inapplicable to the diversity interest asserted here. At any rate, the evidence relied upon by UT fully satisfies that "strong basis" standard.

"[m]inority students reported feeling isolated, and a majority of all students felt there was 'insufficient minority representation' in classrooms for 'the full benefits of diversity to occur.'" Pet. App. 22a (citation omitted). As many participants in amicus BEST and former members of amicus BSA can attest, substantial racial isolation was an unavoidable aspect of campus life for those who attended UT during the post-*Hopwood*, pre-*Grutter* period (1997-2004).

In addition, there is other contemporaneous evidence that provides relevant "[c]ontext" that "matters," *Grutter*, 539 U.S. at 327, for the University's decision to reintroduce race as a factor in its holistic admissions program. *Cf. Tennessee v. Lane*, 541 U.S. 509, 524-25 (2004) (cataloguing pre-enactment evidence that was part of the historical "backdrop" for government action). During the same period that UT was undergoing a thorough review of its admissions policies, a number of racially charged incidents occurred on campus. For instance, a complaint was lodged alleging racial profiling by the campus police, including an incident where an officer demanded that an African-American member of student government show his identification in the student union; one majority-white fraternity was suspended and another was sanctioned for sponsoring parties where attendees dressed in "blackface" and derided African Americans; and vandals egged the campus's statue of Martin Luther King, Jr. on the national holiday celebrating the civil rights leader's birth. *See* Todd Ackerman, *UT Task Force Calls for Greater*

Racial Sensitivity, Houston Chron., Jan. 21, 2004, at A17.[10]

These incidents were not the first, nor were they the last, episodes of racial hostility on campus; but in combination, they sparked student protests and prompted the University to convene a Task Force on Racial Respect and Fairness in March 2003, consisting of students, faculty, and staff. *Id.* UT charged the Task Force with making recommendations for improvements to the campus climate. *See* University of Texas at Austin, *Report of the Task Force on Racial Respect and Fairness*, at 3 (2004), *available at* http://www.utexas.edu/news/attach/2004/2262_report_respect.pdf [hereinafter the Task Force Report].

After ten months of study and meetings, the Task Force issued a report in January 2004, while the University's review of its admissions policies was still pending. The Task Force proposed a variety of interventions. For instance, supporting the necessity of visibly open pathways to leadership described in Section I.C *supra*, the Task Force Report recommended that UT "emphasize often and unequivocally the University's commitment to serve all Texas residents, particularly those who have been historically excluded from higher education in the state of Texas." Task Force Report at 6.

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[10] At the time, the Martin Luther King Jr. statue was the only monument commemorating a person of color on a campus that had a number of statues of Confederate generals, and even a building named after a Ku Klux Klan leader. That building was subsequently renamed after significant advocacy. *See* Thomas D. Russell, *"Keep Negroes Out of Most Classes Where There Are a Large Number of Girls": The Unseen Power of the Ku Klux Klan and Standardized Testing at the University of Texas, 1899-1999*, 52 S. Tex. L. Rev. 1, 35 (2010); Destinee Hodge, *Simkins Hall Renamed in Unanimous Decision*, Daily Texan, July 15, 2010.

The Task Force also recommended that UT "[i]nstitute a photo roster privacy policy that would protect students of color who are the only members of their racial/ethnic group in classes" and permit them to "request that their photo not be included." *Id.* at 12. "The concern [was] that these students [were] repeatedly called on by well-intentioned instructors hoping to be inclusive, but the result [was] often discomfort for the students" who felt as if they were under a microscope as spokespersons for their race. *Id.* Just a few months before the Task Force issued its report, this Court underscored the same concern—that racially isolated students may feel compelled to be "spokespersons for their race" in the classroom. *See Grutter*, 539 U.S. at 319. And that concern also was one of the grounds for the University's conclusion that it had not achieved a critical mass of underrepresented minority students. As UT's review of its admissions policies revealed, the vast majority of undergraduate classes had zero or only one African-American or Latino students. *See* SJA 66a-150a; *see also supra* at n.4.

Equally relevant for purposes of this case, the Task Force concluded that the need to increase the recruitment, retention, and advancement of underrepresented minority students was a necessary component of any plan to create a more inclusive campus environment. *See* Task Force Report at 5, 15-17. In his response to the Task Force Report, Larry Faulkner, then President of UT, made explicit the connection between improving campus climate and achieving a critical mass of underrepresented minority students: As a "major innovation for the near term," he referenced the pending proposals for "the reinstallation of race-sensitive admissions at the undergraduate, graduate, and professional levels." University of Texas at Austin, Office of the President, ***Comments on the Report of the Task Force on Racial Respect and Fairness*** ¶ 41, May 10, 2004, *available at* http://www.utexas.edu/president/speeches/rrf_051004.pdf.[11] Affirming the pressing need to implement these proposals, there were additional incidents of racial hostility in the months after the Task Force issued its report, including another act of vandalism targeting UT's Martin Luther King, Jr. statue. *See* David Kassabian, *Officials Talk Camera Upgrades: New Technology Would Detect Suspicious Acts Around MLK Statue*, Daily Texan, Aug. 27, 2004.

The Task Force Report and President Faulkner's response belie petitioner's claim that President Faulkner rushed to judgment when he issued a statement, on the day *Grutter* was decided, expressing his view that race-conscious admissions were a necessary supplement to the Top Ten Percent Plan and other race-neutral alternatives. *Cf.* Pet. Br. 5. His suggestion was grounded in the context of the Task Force's proceedings, as well as UT's prior, eight-year experience with race-neutral admissions post *Hopwood*.

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[11] This connection also is supported by research findings that more diverse colleges typically have more racially inclusive campus climates. *See, e.g.*, Rebecca L. Stotzer & Emily Hossellman, *Hate Crimes on Campus: Racial/Ethnic Diversity and Campus Safety*, 27 J. of Interpersonal Violence 644, 654-55 (2012) (finding that reported hate crimes are lower on campuses with higher percentages of African-American and Latino students); Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1199 (2010) ("Underrepresented minority students in states that *permit* affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states.").

III. Consideration of race in UT's holistic admissions process is vital to create a broadly diverse student body.

UT's race-conscious holistic admissions program is an essential supplement to the Top Ten Percent Plan and other race-neutral efforts. While this component of the admission program is "modest" in its approach, *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting), its impact is meaningful. Pursuant to Texas law, the vast majority of available slots in each entering class at UT are filled automatically through the Top Ten Percent Plan. Tex. Educ. Code § 51.803 (1997) (amended 1999, 2007 & 2009). Yet, in the years between 2004 (when the University decided to use race as one factor among many in the holistic component of its admissions policy) and 2008 (when petitioner applied for admission), a sizable percentage of UT's African-American student population has enrolled through the holistic process. *See* SJA 156a-157a. Moreover, UT's race-conscious holistic admissions process affords the University enhanced flexibility to admit students of all races who will contribute to broad diversity on campus and in the classroom, even if they were not ranked at the very top of their high school class. In particular, the race-conscious, individualized review process provides the opportunity to obtain the educational benefits of diversity both *within* and *among* underrepresented minority student communities.

A. Race-conscious holistic review is an important supplement to the Top Ten Percent Plan.

Although petitioner contends that UT's race-conscious holistic admissions program has only "an infinitesimal impact on critical mass in the student body as a whole," Pet. Br. 21 (quoting Pet. App. 107a (Garza, J., specially concurring)), "it is undisputed in the record before the Court that the consideration of race in admissions does increase the level of minority enrollment," Pet. App. 163a n.14. Comparing the incoming freshman class for the 2004-2005 school year (the last class admitted exclusively through race-neutral admissions) with the incoming freshman class for the 2008-2009 year (the class to which Fisher applied), total African-American enrollment increased by 21.4%. Moreover, in the first four entering classes after UT's 2004 decision to use race-conscious admissions, 435 out of the total of 1,544 African-American students—a full 28%—were admitted through the holistic admissions program. *See* SJA 156a-157a.

These raw numbers only begin to tell the story. Research confirms that increases in the enrollment of African-American students, even on a relatively small scale, have a multiplier effect. A recent study of selective universities found that even "a one percentage point increase in the share of [ ]students [of color] in the entering freshman cohort is associated with a 3 or 4 percent increase in the odds of interacting with students of different racial backgrounds."

Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 199 (2009) [hereinafter Espenshade & Radford, *No Longer Separate*];[12] *see also* Sylvia Hurtado, *Benefits and Barriers: Racial Dynamics of the Undergraduate Experience*, *in The Next Twenty-Five Years: Affirmative Action in Higher Education in the United States and South Africa* 196, 197 (David L. Featherman et al. eds., 2010) (finding that "white students from predominately white environments who attended universities with relatively higher percentages of students of color tended to report frequent positive cross-race interactions").[13]

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[12] While some of petitioner's amici rely on this study, *see, e.g.*, Amicus Br. of Cal. Ass'n. of Scholars, et al. at 26–27, they ignore important findings, like the one described in the text, and misconstrue others. Notably, this study also provides evidence demonstrating that, on a nationwide scale, percentage plans would be even less effective than UT's Top Ten Percent Plan in ensuring meaningful representation of African-American students. *See* Espenshade & Radford, *No Longer Separate* at 362-64; *cf.* Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. Labor Econ. 113, 116 (2010) (predicting that African-American and Latino enrollment at the most selective colleges and universities would decline 10.2% if race-neutral admissions were mandated nationwide).

[13] Even if petitioner were correct that UT's race-conscious program had only a small impact on enrollment, that would not doom the constitutionality of the policy. *Cf.* Pet. Br. 40-41. Although *Parents Involved* questioned the necessity of a K-12 student assignment plan that had minimal statistical impact, the Court noted that this plan involved rigid, binary racial classifications that could be "determinative standing alone." 551 U.S. at 723; Pet. App. 69a-70a. In *Parents Involved*, the Court distinguished the type of individualized review, at issue

Notwithstanding these meaningful increases in African-American enrollment, UT acknowledges that it has not yet achieved a critical mass of underrepresented minorities. While UT has taken strides to promote a more welcoming and inclusive campus climate, racial hostility directed towards African-American students has not entirely abated.[14] Moreover, African-American students are still represented at mere token levels in too many classrooms and other settings on campus. In the face of these challenges, members of amicus BSA and other current African-American students along with alumni participants in amicus BEST—like the prior generations that fought to integrate UT—are committed to improving the campus community. For instance, one current student recently founded an online newspaper aiming to feature the voices of African-American

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in *Grutter* and here, where race is considered "as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'" *Parents Involved*, 551 U.S. at 723 (quoting *Grutter*, 539 U.S. at 330); *see also id.* at 793 (Kennedy, J., concurring in part and concurring in the judgment) (distinguishing Seattle's "rigid criteria" from the University of Michigan Law School's holistic review).

[14] *See, e.g.*, Ahsika Sanders, *Racial Conflicts Tarnish History of Roundup*, Daily Texan, Apr. 13, 2012 (connecting a recent incident of hostility to the history of racial tensions between fraternity members and African-American students at annual spring fraternity parties); Ralph K.M. Haurwitz, *UT Student Paper Issues Apology for Cartoon*, Austin American-Statesman, Mar. 28, 2012 (discussing apology issued by Daily Texan for racialized editorial cartoon about the fatal shooting of Trayvon Martin); Andrew Freidenthal, *Shameful Graffiti Paints Larger Picture*, Daily Texan, Sept. 22, 2008 (reporting on a drawing posted in a campus bathroom stall depicting President Obama lynched and hanging from a tree).

students so that they do not feel invisible on campus. As she explained, "I just think there are a lot of issues involving the black community at UT . . . that don't really get reported about." Bobby Blanchard, *New UT Publication Brings Different Perspectives to 40 Acres*, Daily Texan, May 2, 2012. Contrary to petitioner's claim that critical mass should be capped at the level obtained through race-neutral means, amici firmly believe that—consistent with *Grutter*—UT can and, indeed, should do *more*, not less, to ensure that all students fully attain the educational benefits of diversity.

B. Race-conscious holistic review admits students likely to promote the educational benefits of diversity.

Race-conscious holistic review helps the University achieve its goal of ensuring that its student body is "*both* exceptionally academically qualified *and* broadly diverse." *Grutter*, 539 U.S. at 329 (emphasis added) (internal quotations and citation omitted); *cf. Parents Involved*, 551 U.S. at 722. The University's holistic admissions process provides flexibility to identify and admit students who bring a set of other talents and leadership skills that are important to realizing the benefits of diversity, even if they are not in the top ten percent of their high school class.

Meaningful representation of African Americans among *both* Top Ten Percent and non-Top Ten Percent students is critical to achieving the educational benefits of diversity. In particular, race-conscious holistic review yields uniquely qualified students who otherwise may have been overlooked. Students admitted through the holistic review process contribute to the vibrancy and diversity of the overall UT student community and also enhance the degree of diversity *within* the African-American community at UT.

Petitioner's proposed race-neutral approach might preserve some racial diversity through Top Ten Percent Plan admissions, on the one hand, but it would likely prevent any improvement in the racial diversity in holistic review admissions, on the other—with significant adverse consequences for UT's educational mission. During UT's eight-year experiment with race-neutral admissions, the percentage of African-American students who were *not* admitted through the Top Ten Percent Plan stagnated at 3-4%. SJA 157a. Between 2005 and 2008, however, after UT reintroduced race as one factor in its individualized review, African-American enrollment as a percentage of non-Top Ten Percent enrollees increased. *Id.*

Of course, as UT emphasizes, it is not just underrepresented minorities who can benefit from consideration of race as one factor among many in UT's holistic review process. Pet. App. 46a-47a. Without the ability to consider race in its holistic admissions process, UT could not decide, for instance, that a non-Top Ten Percent "white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective." *Id.* at 46a. Yet, such individuals—along with African Americans and Latinos who are, for example, talented debaters or musicians—are precisely the type of students who can help the University promote its goals of increasing cross-racial understanding, breaking down racial stereotypes and, ultimately, creating an educational environment where students feel free to develop their individuality.

C. Excluding race from individualized review would demean many students' individual dignity.

Petitioner seeks an admissions policy in which virtually *any* aspect of students' experience, background, and identity can be considered, except for their race. Singling out this one factor, among so many others, contradicts *Grutter*'s requirement that a university's individualized review must be "'flexible enough to consider all pertinent elements of diversity[.]'" 539 U.S. at 337 (quoting *Bakke*, 438 U.S. at 318) (opinion of Powell, J.). Moreover, it sends a message to minority students that a critical element of their identity is irrelevant to, or even unwelcome at, UT.[15] That result is neither constitutionally compelled nor pedagogically advisable in a state and on a campus where race remains a salient factor in students' experiences. *See Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) ("Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions.").

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[15] Taken to an extreme, a purely race-neutral holistic review process could result in "a form of viewpoint discrimination" insofar as it would require admissions officials to scrub all references to race from students' essays and every other aspect of their application files before they are evaluated. *See* Gerald Torres, Fisher v. University of Texas*: Living in the Dwindling Shadow of LBJ's America*, 65 Vand. L. Rev. En Banc 97, 110 (2012). Moreover, a race-neutral process may encourage admissions officials to make stereotypical assumptions about applicants' race based on purportedly race-neutral aspects of application files—for example, surnames—that may or may not say anything about their experiences or identities in our increasingly multi-cultural society.

Negotiating life as an underrepresented minority can fundamentally affect the way an individual views the world: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333. Yet, the University does not premise its need for a broadly diverse student body on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. To the contrary, individualized race-conscious review helps to overcome stereotypes suggesting that all students of color (or any students for that matter) think alike. As explained in Section I.A *supra*, the presence of different types of students of various races, with unique perspectives and viewpoints, is the hallmark of UT's push for broader diversity.

For these reasons, requiring the University to exclude consideration of race from its holistic admissions program would force it "to become a much different institution and sacrifice a vital component of its educational mission," as this Court recognized in *Grutter*, 539 U.S. at 340. Percentage plans, by themselves, "may be a race-neutral means of increasing minority enrollment," but "they are not a workable alternative—at least in a constitutionally significant sense—because 'they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.'" Pet. App. 54a (quoting *Grutter*, 539 U.S. at 340); *see also* Resp. Br. 31-36. While the Top Ten Percent Plan did achieve some progress, it should not limit UT's ability to do more to expand opportunities for students of all races.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* BOSTON BAR ASSOCIATION ET AL. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus the Boston Bar Association ("BBA") was founded in 1761 by John Adams and other Boston lawyers and is the nation's oldest bar association. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. This case implicates two of the most significant aspects of the BBA's mission: promoting education and diversity.

The Education Clause of the Massachusetts Constitution, the oldest functioning state constitution, was drafted by Adams and reportedly was his favorite provision of the document. *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 533 & n.40 (Mass. 1993). Consistent with that history, the BBA strives to further educational interests in the legal profession and in society. At the same time, the BBA has developed and implemented a number of diversity initiatives, including formally partnering with various affinity bar associations,[2] establishing a "Diversity and

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[1] This brief is filed with the consent of the parties. The letters of consent have been filed with the Court. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

[2] Affinity bar associations (sometimes referred to as special purpose bar associations) are formed to promote the administration of justice, improve relations between communities within the legal profession and the public, and serve the interests of local legal communities.

Inclusion" section for its members, administering mentoring and judicial internship programs, and engaging in other pipeline and recruitment work with law schools and public schools. It respectfully submits this brief to advise the Court of the essential relationship between diversity in undergraduate educational institutions and the current and compelling needs of the legal profession.

Amicus the Asian American Lawyers Association of Massachusetts ("AALAM") is a professional bar association devoted to serving the Asian American legal community and improving and facilitating the administration of law and justice.

Amicus the Bar Association of San Francisco ("BASF") is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,500 individuals, law firms, corporate legal departments, and law schools. Through its board of directors, committees, volunteer legal services programs, and other community efforts, BASF has worked to promote and achieve equal justice for all and to oppose discrimination in all its forms, including, but not limited to, discrimination based on race, sex, disability, and sexual orientation. BASF also engages in many efforts to increase diversity in the legal profession, including a dedicated Diversity Department that manages several college and law school programs focusing on diversity in the legal profession.

Amicus the Beverly Hills Bar Association ("BHBA") was established in 1931 and has over 5,000 members, most of whom are California attorneys living or practicing in the Beverly Hills and Century City areas of Los Angeles County, California. Its mission is to serve its members, to lead the profession, and to advocate for justice in the community.

Amicus the Cincinnati Bar Association ("CBA") is a professional bar association founded in 1872 whose members include over 4,000 attorneys principally practicing in Hamilton County, Ohio. Its mission is to maintain the highest professional standards among attorneys, to improve the administration of justice, to serve the needs of its members, and to provide law-related service and education to the public. The CBA and its members promote diversity and inclusion across the legal profession in many ways including the Round Table, a joint venture with the Black Lawyers Association of Cincinnati, the Summer Work Experience in Law, an initiative that serves as a pipeline program supporting racially diverse students in high school, college undergraduate programs, and law schools. Because of the ongoing critical need to improve diversity, in particular racial and ethnic diversity, to promote public confidence in our legal system, the CBA joins the other *amici* and resolutely supports diversity-conscious admissions policies at institutions of higher learning such as the University of Texas.

Amicus the City of Boston is a municipal corporation. Its Chief Executive, Mayor Thomas M. Menino, is the appointing authority of the Corporation Counsel of the City of Boston, whose office represents the City of Boston in all legal matters. The Office of Corporation Counsel is a diverse and inclusive legal office which promotes diversity because it recognizes the great value of maintaining a legal workforce which embraces the broad range of ethnic, religious, and cultural backgrounds and perspectives in a diverse and dynamic city. Mayor Menino also serves as the appointing authority for the chief executives or boards of the Boston Public Health Commission, the Boston Housing Authority, and the Boston Redevelopment Authority. These agencies have diverse and inclusive legal departments which share the City's and Mayor Menino's prioritization of diversity and inclusion in the legal workforce. All of the above legal offices maintain that an undergraduate "pipeline" of diverse students is essential to a strong, effective, and representative legal profession.

Amicus the Massachusetts Association of Hispanic Attorneys ("MAHA") is a professional bar association that promotes service and excellence in the Hispanic legal community and seeks to provide opportunities for professional growth to its members in order to increase the participation of Hispanic leaders in the civic arena, and elevate the standard of integrity, honor, and courtesy in the legal profession.

Amicus the Massachusetts Black Lawyers Association ("MBLA"), a professional bar association since 1973, provides a valuable network and visible presence for attorneys of color within the Massachusetts legal community. The MBLA is responsible for providing its membership professional development and career advancement through trainings, continued education, and mentorship programs. The MBLA also sponsors forums on current topics of interest to persons in the legal community and seeks collaborations with other bar associations and professional organizations, particularly in the interest of providing services to the communities of color.

Amicus the Massachusetts Black Women Attorneys ("MBWA") is a professional bar association committed to the advancement of justice and equality for all people, with a particular emphasis on people of color. The MBWA seeks to eradicate sexism and racism in the legal profession, advance equal employment opportunities and actively support the career development of its membership.

Amicus the Massachusetts LGBTQ Bar Association is a professional bar association of lesbian, gay, bisexual, transgender and queer lawyers and allies that promotes the administration of justice throughout Massachusetts for all persons without regard to their sexual orientation or gender identity or expression.

Amicus the Women's Bar Association ("WBA") is a professional association of over 1,500 attorneys, judges, and policy makers committed to the full and equal participation of women in the legal profession and in a just society. The WBA has been active in advocating for diversity in the legal profession and other professions as well as in educational institutions and other institutions in our society because only when the basic foundations of our society reflect all its members can they be just, fair, and strong.

Amicus South Asian Bar Association Greater Boston ("SABA GB") is a professional bar association that serves as the regional voice for the concerns and opinions of South Asians in the community and in the legal profession. SABA GB's mission includes supporting attorneys and law students of South Asian heritage to advance their careers and promoting greater access to and involvement in the American legal system for all, including the South Asian community.

Amici EMC Corporation and National Grid USA are businesses and employers who share a desire to attract, retain, and secure a talented, diverse workforce and customer base. In order to succeed, their employees and the law firms who represent them must have a broad range of perspectives and the ability to comprehend and negotiate a range of cultural differences. These *amici* wish to advise the Court of their legitimate and compelling needs to promote diversity in today's modern, and increasingly global, economy.

Amici Anderson & Kreiger LLP; Brennan, Dain, Le Ray, Wiest, Torpy & Garner, P.C.; Brown Rudnick LLP; Burns & Levinson LLP; Collora LLP; Davis, Malm & D'Agostine, P.C.; Edwards Wildman Palmer LLP; Foley Hoag LLP; Goulston & Storrs – A Professional Corporation; Greater Boston Legal Services; Krokidas & Bluestein; Looney & Grossman LLP; Medical-Legal Partnership | Boston, a program of Third Sector New England, Inc.; Morgan, Brown & Joy, LLP; Nixon Peabody LLP; Office of the General Counsel, Partners HealthCare System, Inc.; Prince Lobel Tye LLP; Rackemann, Sawyer & Brewster; Rose, Chinitz & Rose; Sherin and Lodgen

LLP; Sugarman, Rogers, Barshak & Cohen, P.C.; Sunstein Kann Murphy & Timbers LLP; Verrill Dana LLP; Yurko, Salvesen & Remz, P.C.; and Zalkind, Rodriguez, Lunt & Duncan, LLP are law firms that promote diversity because of its importance to the civil and criminal justice system, the essential role that diversity and cultural competence plays in a law firm's ability to effectively represent its clients in the modern, increasingly global economy, and because it is consistent with their values. As lawyers, these *amici* recognize the important role undergraduate programs play in the ability of law schools to admit and train talented and diverse candidates needed for the legal profession to attain its goal of representing all parts of society.

SUMMARY OF ARGUMENT

Justice Frankfurter once stated that "[o]nly those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion." *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952). Similarly, when addressing the "persistent and difficult questions of educational policy," the Court's "lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973).

Because the science of government "is the science of experiment," it is "utopian" to think that "government can exist without leaving the exercise of discretion somewhere." *Anderson v. Dunn*, 19 U.S. 204, 226 (1821). The judiciary thus is "well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *Rodriguez*, 411 U.S. at 43.

The experimentation underway at the University of Texas is an attempt to promote an educational "atmosphere of 'speculation, experiment and creation'" by placing a limited, flexible value on diversity in the admissions process. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). It is based on the belief that the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples," or, one might add in today's global economy, as diverse as the nations of the world. *Id.* at 313.

Amici, like most lawyers, are not professional educators. They submit, however, that the benefits of diversity in the educational process proffered by respondents in this case mirror the ways in which the legal decision-making process—whether related to jury trials, business negotiations, legal analysis, or client relations—directly benefits from diversity in our ranks. It is why we seek out colleagues with experiences different from ours before we try cases before a jury, particularly in venues where we are not known. It is why we do moot courts before appellate arguments, and carefully pick our panels of moot "judges" in the hopes that they will see things about the case, our argument, or us, that we do not see. It is why we consult with others about how to approach sensitive negotiations, or how to repair or build a client relationship. These are the oldest forms of continuing legal education, and they are practiced and valued throughout our profession by prosecutors, criminal defense lawyers, legal services providers, public servants, private practitioners, and law firms.

Judges may have similar experiences when zealous advocates comprehend the complexities of an adversary's position, or when the life story of a colleague brings an invaluable perspective to a legal issue, or when exchanges with judicial colleagues from foreign countries highlight the differences between the political and cultural challenges they face and those of our own. The professional satisfaction, engagement, and sometimes even joy, that comes from these experiences mirrors what diversity in the educational setting is designed to achieve.

Amici have no doubt that respondents and other professional educators will explain from their own experiences the ways in which a diverse student body improves academic analyses, solutions, and processes.[3] *Amici* seek to be heard in this case because the effect of the Court's decision likely will extend to law school and other graduate admissions programs. The legal profession's efforts to diversify its ranks cannot succeed without a pipeline of diverse law school candidates rising from undergraduate student bodies. As shown below, efforts to diversify the undergraduate student population thus serve a compelling state interest that is essential to the effective delivery of legal services by our profession.

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[3] Educators also are far more qualified than lawyers to assess the value of diversity to the educational and creative processes of various disciplines, including, for example, mathematics and science. As the great mathematician David Hilbert once said of a former student, "He is all right. You know, for a mathematician he did not have enough imagination. But he has become a poet and now he is doing fine." Paul Arthur Schilpp, THE PHILOSOPHY OF ERNST CASSIRER 35 (1949). *Compare Fisher v. Univ. of Texas at Austin*, 644 F.3d 301, 307 (5th Cir. 2011) (Jones, C.J., dissenting from denial of en banc rehearing) (questioning the

ARGUMENT

I. STATE EFFORTS TO PROMOTE DIVERSITY IN EDUCATION SERVE COMPELLING GOVERNMENTAL INTERESTS DIRECTLY RELEVANT TO THE GOALS OF THE LEGAL PROFESSION.

All parties to this case (and likely all *amici*) agree that education is both the lifeblood of our democracy and an area of traditional state and local expertise. These propositions are underscored by the fact that the state constitutions adopted by all thirteen former colonies contain provisions making specific reference to the education of the citizenry. *See* Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Ga. Const. art. VIII, § I, para. I; Md. Const. art. VIII, § 1; Mass. Const. pt. II, ch. V, § II; N.H. Const. pt. II, art. 83; N.J. Const. art. VIII, § IV, para. 1; N.Y. Const. art. XI, § 1; N.C. Const. art. I, § 15; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; Va. Const. art. I, § 15.

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value of diversity when teaching subjects such as mathematics).

The oldest functioning state constitution containing an education clause was drafted in principal part by John Adams. *See* Samuel Eliot Morison, A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS 18-20 (1917); 8 John Adams, PAPERS OF JOHN ADAMS editors' note at 235 (Gregg L. Lint et al. eds., 1989). The clause reflected his beliefs that "education here intended is not merely that of the children of the rich and noble, but of every rank and class of people, down to the lowest and the poorest," and that the "revenues of the state would be applied infinitely better, more charitably, wisely, usefully, and therefore politically, in this way, than even in maintaining the poor." 6 John Adams, THE WORKS OF JOHN ADAMS 168 (C.F. Adams ed., 1851).

In keeping with those principles, the education clause Adams drafted provides:

> Wisdom, and knowledge, as well as virtue, *diffused generally among the body of the people*, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, *and among the different orders of the people*, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns ....

Mass. Const. pt. II, ch. V, § II (emphases added). *See generally McDuffy*, 615 N.E.2d at 525-28 & 533-37.

Adams was by no means the only leader of his generation to emphasize the unique role and duty of the states in educating their populations. *See, e.g.*, N.H. Const. pt. II, art. 83 ("Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools"); Va. Const. art. I, § 15 ("That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth."); R.I. Const. art. XII, § 1 ("The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.").[4]

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[4] Just as the Equal Protection Clause initially was intended to protect the "newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him" and only later was "gradually extended to all ethnic groups," so too do education clauses of state constitutions now extend beyond their original intended beneficiaries to all racial

Neglect of public education was one of the chief grievances charged against the Mexican Government in the Texas Declaration of Independence. Vernon's Ann. Tex. Const. art. VII, § 1, Interpretive Commentary (2007). The state constitution of Texas reflects the Founders' tradition of emphasizing the central role of education in state government:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.[5]

No party to this case (and presumably none of the *amici*) disputes that, as the Framers recognized, the "foundation of every state is the education of its youth."[6] Instead, their differences center on the belief of the state of Texas that the very process of education—so critical to a functioning democracy—directly benefits from a diversity of thought, culture, and experience that exists "among the different

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and ethnic groups. *Bakke*, 438 U.S. at 291-92 (quoting *Slaughter-House Cases*, 83 U.S. 36, 71 (1873) (internal quotations omitted)). The history of the clauses, however, confirms the unique state interest involved.

[5] Tex. Const. art. VII, § 1. Over time since the desegregation of Texas state universities in 1969, Respondent has sought to discharge this duty such that the liberties and rights of *all* its people are preserved.

[6] Library of Congress, Inscription on the North tablet of The West Corridor of The Great Hall of The Thomas Jefferson Building.

orders of the people," including those of different race and ethnicity.

Thus, in addition to presenting important issues about racial equality, this case presents an important question about the scope of the "four essential freedoms" that constitute academic freedom: the right to determine on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (quoted in *Bakke*, 438 U.S. at 312 (internal quotations omitted)). Among other benefits, these freedoms ensure that educators have sufficient discretion to account for the limits of their ability to "objectively" assess the depth and breadth of the talents and potential of applicants.

The constitutional principles of racial equality and academic freedom at issue in this case apply in full force to the legal profession. Like academic institutions, the legal profession embraces diversity of views amongst its ranks. Yet persons of color remain significantly underrepresented in undergraduate student bodies, law schools and, consequently, the legal profession. *See* § II (A), *infra*.

"[A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). Law firms, legal services organizations, and public sector lawyers "cannot be effective in isolation from the individuals and institutions with which the law interacts." *Id.* Continued underrepresentation erodes public confidence in the legal system, hinders the profession from fulfilling its responsibilities to society, and harms its ability to attract, represent, and retain an increasingly diverse client base in the United States and abroad. *See* § II (B)-(C), *infra*.

II. UNDER-REPRESENTATION OF LAWYERS OF COLOR HARMS THE LEGAL PROFESSION AND SOCIETY AS A WHOLE.

A. The Legal Profession Does Not Reflect The Society It Serves.

In 2004, not long after this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the chief legal officer of one of the country's largest corporations wrote "A Call to Action"—a pledge ultimately signed by numerous general counsel vowing to make diversity a major consideration in their selection of outside counsel. The pledge stated, "[o]ur action is based on the need to enhance opportunity in the legal profession and our recognition that the legal and business interests of our clients require legal representation that reflects the diversity of our employees, customers and the communities where we do business."[7] From private law firms to government legal offices to legal aid organizations, the legal profession as a whole has made this commitment to enhance opportunity within the profession in order to effectively represent the legal and business interests of its clients.

Efforts to attract and include attorneys of diverse backgrounds, however, have been constrained by the disproportionately low number of persons of color within the profession and graduating from law school. According to the 2010 U.S. Census, 36.3% of the population is Hispanic, Black, Asian, American Indian or Native Alaskan, Native Hawaiian or other Pacific Islander, some other race, or two or more races.[8] In contrast, persons of color accounted for only 11.1% of the legal profession as of 2011.[9]

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[7] Roderick Palmore, Sara Lee, A Call to Action: Diversity in the Legal Profession (2004), http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074.

The under-representation of lawyers of color is particularly severe in private law practice at the partnership level. Only 6% of equity partners in America's law firms are persons of color.[10] As many as 29% of law firms nationwide have no attorneys of color in their partnership ranks.[11]

Moreover, while the racial and ethnic diversity of the United States population as a whole is increasing exponentially, the diversity of the legal profession is not. It is forecast that by the year 2050, nearly 50% of all Americans will be African

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[8] U.S. Census Bureau, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 4 tbl. 1 (Mar. 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf. Persons identifying themselves as part of these racial and ethnic groups are referred to herein as "persons of color."

[9] Kathleen Nalty & Arin Reeves, Ctr. for Legal Inclusiveness, BEYOND DIVERSITY: INCLUSIVENESS IN THE LEGAL WORKPLACE 40 (2012), http://www.legalinclusiveness.org/clientuploads/pdf/CLI%20Inclusiveness%20Manual_2012%20Beyond%20Diversity%20-%20Introduction.pdf.

[10] NALP, Women and Minorities in Law Firms - By Race and Ethnicity (Jan. 2011), http://www.nalp.org/women_minorities_jan2012.

[11] *Id.*

American, Hispanic, Asian, or Native American.[12] Representation of persons of color in the legal profession increased by only 1.4% from 9.7% in 2000 to 11.1% in 2011, after experiencing a period of decline in 2010.[13]

This slow growth in the proportion of attorneys of color correlates with the figures for law school enrollment. Between 2000 and 2009, the enrollment of law students of color increased by only 1.3%.[14]

Over the last forty years, the average rates of enrollment in higher education institutions, expressed as a percent of all 18- to 24-year-old high school graduates of the same race or ethnicity, were 48.5% for Whites, 46.3% for Blacks, and 43.7% for Hispanics.[15] The differences between the actual numbers of enrollees is even greater than the percentages reflect because the percentages apply to populations that are far from equal; White 18- to 24-year olds, regardless of high school completion, outnumber their Hispanic counterparts by a factor of roughly four; they outnumber their Black counterparts by a factor of almost five.[16] These factors are almost certainly larger when only high school graduates are considered.[17]

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[12] U.S. Census Bureau, U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin, Table 1a (Mar. 2004), http://www.census.gov/population/www/projections/usinterimproj/natprojtab01a.pdf.

[13] Nalty & Reeves, *supra* note 9, at 40; *see also* Inst. for Inclusion in the Legal Profession (IILP), IILP REVIEW 2011: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION, at 10, 13 (2011), http://www.theiilp.com/resources/Documents/IILP2011_Review_final.pdf. Because these are national averages, the statistics differ in different parts of the country. Some regions are significantly more or less diverse, particularly with respect to certain racial or ethnic populations.

[14] IILP, *supra* note 13, at 17.

[15] *See* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics: 2011 (NCES 2012-001), Table 213, http://nces.ed.gov/programs/digest/d11/tables/dt11_213.asp.

Confronted with this disturbing reality, the American Bar Association concluded in 2005 that "the pipeline for minority students–from pre-kindergarten into the legal profession–is leaking."[18] Five years later, a nationwide assessment conducted by the ABA concluded that "the lack of genuine diversity remains a disappointment."

> As America races toward a future where minorities will be the majority and more marginalized groups make their voices heard, the legal profession's next steps towards advancing diversity must produce more viable, sustained outcomes. Despite our

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[16] *See* U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 10, http://www.census.gov/compendia/statab/2012/tables/12s0010.pdf.

[17] For the decade covering 2000 to 2010, the average high school dropout rates of 16- to 24-year-olds were 6% for Whites, 10.4% for Blacks, and 22.2% for Hispanics. *See* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, The Condition of Education 2012 (NCES 2012-045), Indicator 33, http://nces.ed.gov/fastfacts/display.asp?id=16.

[18] ABA Presidential Advisory Council on Diversity in the Profession, THE CRITICAL NEED TO FURTHER DIVERSITY THE LEGAL ACADEMY & THE LEGAL PROFESSION 2 (2005), http://apps.americanbar.org/op/pipelineconf/acdreport.pdf.

> efforts thus far, racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession.[19]

Diversity within the legal profession cannot be achieved without a pipeline of diverse law school graduates. That pipeline, in turn, cannot be maintained without diverse representation in undergraduate institutions. In addition, although this case arises in the context of an undergraduate admissions policy, the Court's decision almost surely will affect the admissions policies of all public university higher education programs and institutions, including medical schools, masters and doctorate programs and, of particular importance to *amici*, law schools. Accordingly, and as further shown below, wholly apart from the resulting significant educational benefits, the limited, flexible consideration of race as one factor in the admissions process serves the compelling governmental interest of helping to ensure the ongoing legitimacy and effectiveness of the legal system.

B. The Lack Of Diversity In The Legal Profession Erodes Public Confidence In The Judicial System.

As advocates and administrators of justice, attorneys and judges must inspire public confidence in and promote public access to the judicial system. In order to perform these tasks, it is necessary to confront the fact that perceptions of the fairness of the judicial system differ sharply based on race and ethnicity.

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[19] ABA Presidential Initiative Comm'n on Diversity, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 5 (2010), http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf.

Blacks and Latinos perceive the probability of fair outcomes in court to be lower than do majority respondents.[20] Responses to a California survey showed that African Americans, Latinos, and Asian Americans all "perceive 'worse results' in [court] outcomes for African Americans, low-income people, and non-English speakers."[21]

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[20] David B. Rottman & Randall M. Hansen, How Recent Court Users View the State Courts: Perceptions of Whites, African-Americans, and Latinos 5 (2001), http://www.flcourts.org/gen_public/family/diversity/bin/perceptions2.pdf (among survey participants that had no court experience, 57% of Whites, 21% of African Americans, and 35% of Latinos believed that court outcomes are always or usually fair; among recent court users, 49% of Whites, 15% of African Americans, and 40% of Latinos believed that court outcomes are always or usually fair); Hon. John R. Dunne, Comm. for Modern Courts, Testimony at N.Y. State Senate Public Forum: A Lasting Blueprint for Judicial Diversity (Dec. 4, 2006), http://www.moderncourts.org/advocacy/diversity/index.html (describing a "significant racial divide" in a survey of registered voters in New York that asked how fair and impartial New York State judges were, where 71% of registered voters agreed that judges as a whole are fair and impartial, but only 51% of African-American voters agreed judges are fair and impartial).

[21] Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 17 (2007-2008), *available at* http://www.proceduralfairness.org/~/media/Microsites/Files/procedural-fairness/CR44-1-2.ashx; David B. Rottman, Nat'l Ctr. for State Courts, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS 30 (2005), http://www.courts.ca.gov/documents/4_37pubtrust1.pdf.

Enhancing racial and ethnic diversity within the bar and on the bench is a significant means of countering both the perception and the underlying reality of unfairness in the judicial system. A diverse legal profession demonstrates that those who wield and uphold the law hale from different racial and ethnic backgrounds, much like those whose interests are at stake, and that the judicial system is open to all people.[22]

Until the composition of the legal profession more closely resembles that of the public whose interests are at stake, the perception will remain that the legal system is entrusted to and accessible to the white majority above all others. Not only does that perception undermine the legitimacy of the judicial system,[23] it further discourages participation by people of color, creating a self-perpetuating cycle of exclusion.

Reduced to essentials, robust participation of persons of color within the legal profession is important because the judicial system is a key component of our democracy. In the words of one advocate before this Court:

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[22] Malia Reddick et al., *Racial and Gender Diversity on State Courts*, JUDGES' JOURNAL, Summer 2009, at 1, *available at* http://www.judicialselection.us/uploads/documents/Racial_and_Gender_Diversity_on_Stat_8F60B84D96CC2.pdf.

[23] *See* Dunne, *supra* note 20. Indeed, for much the same reason, this Court long ago struck down jury selection procedures that purposefully exclude persons of color not just because of the harm suffered by the juror and defendant, but because the overall effect is to "undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

> Democracies depend on people seeing each other as peers [in a shared enterprise], that is, people who know and respect each other. Diverse democracies depend on diverse people who know and respect each other.
>
> This is why racial diversity in the legal profession matters. It matters to the legitimacy and health of our democracy.[24]

Stated otherwise, our democracy depends on different perspectives being shared, respected, and valued, which cannot occur absent the inclusion of those different perspectives.

The academic objectives at issue here, moreover, are not limited to providing educational benefits to persons of color. All students need, and benefit from gaining, the cultural competence required to succeed in the modern marketplace. And given the significant underrepresentation of lawyers of color in the legal profession, it is essential for all lawyers to learn cultural competence while in school if they are to effectively serve their clients.

Amici can attest to the benefits to the process of legal decision-making generated by diversity of thought and culture. Lawyers and judges, much like jurors, come to reasoned decisions after exchanging views and testing conclusions based on a range of life experiences. For example, lawyers rehearse opening statements, air strategies, and test arguments with their peers to gather thoughts, reactions, and insights from different perspectives. Judges engage in rigorous discourse with one another as well as their law clerks, whom they often select for the value of viewpoints different from their own. Members of this Court have themselves attested to the value of this exchange. Justice Byron White, for instance, said that Justice Thurgood Marshall shared "things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience."[25]

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[24] John Payton, *Democracy and Diversity*, 35 PEPPERDINE L. REV. 569, 582 (2008), http://digitalcommons.pepperdine.edu/plr/vol35/iss3/1.

Exclusion, or failed inclusion, of people from different backgrounds has the same effect on the legal profession as Justice Marshall once observed in the jury room: it removes from the law office or judges' chambers, as it removes "from the jury room[,] qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable" and deprives lawyers and judges, as it "deprives the jury[,] of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

In sum, diversity in the bar increases our capacity to provide culturally competent legal services to all clients, including some of the most disenfranchised populations seeking access to justice. The legal profession, those it serves, and public confidence in the judicial system, all suffer when the perspectives of persons of color are as obscured as they are today. In that sense, all stand to gain from admissions policies like those at the University of Texas that foster a pipeline of diverse students, some of whom may one day find their way to the legal profession.

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[25] Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992); *see also* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992); William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23 (1991).

C. The Legal Profession Needs Diversity In Its Ranks, And The Additional Skills And Perspectives Diverse Attorneys Possess, To Effectively Attract, Represent, And Retain An Increasingly Diverse Client Base Here And Abroad.

The legal profession is better able to serve diverse populations if: (1) lawyers have been exposed to various forms of diversity through their educational experience; and (2) the profession is sufficiently diverse to ensure that it has the cultural competency to comprehend the differences its clients present.

For example, the nation's top law firms provide representation to a wide range of businesses whose global footprints are expanding and whose competition for attracting both customers and talent is intensifying. More than ever, these clients specifically recognize racial and ethnic diversity as an important component of the overall diversity that is key to their success.[26]

Companies, particularly those in the service industry, are keenly aware of the rapidly changing

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[26] *See generally* Melanie Lasoff Levs, *Call to Action - Sara Lee's General Counsel: Making Diversity A Priority*, DIVERSITY & THE BAR, Feb. 2005, *available at* http://0350474.netsolhost.com/FileLib/9/cr_handouts.pdf.

demographics in the United States and understand that people of color represent a significant and growing share of the consumer market; service firms accordingly are striving to identify the needs of the expanding market segments to maximize profits.

The nation's leading corporations, moreover, are operating and competing in a global economy and understand that "[e]ffective and successful interactions with suppliers and customers require[] a team of individuals who not only reflect these [international] constituents, but also understand their needs and how they can best be met."[27]

Private and public sector legal services organizations face the same challenges. In today's world, a successful lawyer is one who has been exposed—at college and in law school—to the broadest range of perspectives, backgrounds, and personalities. They will be representing the rich and the poor; Black, White, Hispanic, Asian, Native American, and increasingly people of mixed races; gay and straight; domestic and international. They need to graduate with the ability to comprehend and negotiate a range of differences if they, and ultimately the legal system, are to be effective. In a fundamental way, student body diversity—

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[27] Mark Roellig, Mass. Mut. Life Ins. Co., "WHY" Diversity is Critical to the Success of Your Law Department 2 (2012), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_cccle_materials/6_value.authcheckdam.pdf; Levs, *supra* note 26, at 23 (quoting Eli Lilly & Co.'s general counsel as stating, "As a global corporation, we benefit tremendously from a broad spectrum of perspectives that can be achieved by having people from as widely diverse backgrounds as possible working with us.").

particularly diversity of both colleges and law schools—equips lawyers of all races and backgrounds with necessary skills in today's world.

"The overarching message is that a diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes."[28] For many businesses, diversity is not only a matter of what may be socially desirable or just, it is a matter of sound business practices and economic survival.

III. THE LIMITED USE OF RACE IN EDUCATIONAL ADMISSIONS PROCESSES REMAINS VITAL TO THE LEGAL PROFESSION'S EFFORTS TO ACHIEVE RACIAL AND ETHNIC DIVERSITY.

Nine years ago, this Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions," *Grutter*, 539 U.S. at 325, and that the "goal of attaining a critical mass of under-represented minority students" is entirely constitutional. *Id.* at 335.

No intervening event has challenged the wisdom or rationale of this holding. The "logical end point" of diversity as a compelling academic objective, or as an imperative for the legal profession, simply has not been reached. *Id.* at 342. Unconscious bias (a phenomenon which compounds structural racism) continues to perpetuate damaging homogeneity, particularly among lawyers and judges. Flexible and limited consideration of race in admissions decisions is one narrowly tailored way to overcome unconscious bias by intentionally putting the issue on the table, and to create structural anti-racism, which is an essential tool in the effort to dismantle the structures that continue to perpetuate racial inequity in this country.

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[28] ABA Presidential Initiative Comm'n on Diversity, *supra* note 19, at 5.

Two studies released by the Harvard Civil Rights Project have demonstrated that programs admitting students at the top of their high school classes—like the "Top Ten Percent Law" utilized by the University of Texas—are not sufficient to achieve the goals of diversity.[29] *See generally Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 240 (5th Cir. 2011) ("The reality is that the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it. While the Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity.").

Nor are ongoing private efforts by themselves sufficient. Nearly one hundred of the country's largest corporations joined the 2004 "Call to Action," challenging corporate legal departments and law firms to improve their efforts in hiring and retaining women and persons of color. The signatory corporations agreed to "end or limit [their] relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse."[30] Since 2004, some companies have taken further measures, requiring outside counsel to demonstrate diversity within the ranks of relationship partners and upper levels of the firm.[31]

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[29] *See* Patricia Marin & Edgar K. Lee, Harvard Univ., APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA (2003); Catherine Horn & Stella M. Flores, Harvard Univ., PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES (2003).

The legal profession has taken measures of its own, such as establishing organizations like the Leadership Council on Legal Diversity. Law firms and other legal services employers throughout the country have undertaken targeted recruitment efforts, often conducted in tandem with law schools, including diversity job fairs and on-campus interviews; firm-sponsored conferences, workshops, and panel discussions at schools with diverse student populations; specialized mentoring and training programs for summer clerks; and scholarship programs.

Many of the bar association *amici* also have undertaken numerous initiatives to cultivate diversity within the bars of their home states. Examples include, but are not limited to, the BBA's Summer Job Program, pipeline and diversity initiatives, judicial internship program, and its partnerships with affinity bar associations.

The fact remains, however, that not only have these efforts fallen short of achieving diversity in the legal profession, all of them are highly dependent upon the continuing flow of diverse students through the pipeline that leads from high schools to colleges and universities to law schools to the legal profession.

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[30] *See supra* text accompanying note 7.

[31] Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES, June 21, 2006, http://www.nytimes.com/2006/07/21/business/21legal.html.

For all of these reasons, *amici* respectfully submit that the limited and flexible consideration of race as one of several factors in an admissions policy remains vital to integrating our nation's colleges and universities and, by extension, the legal profession. It also is essential to the uniquely compelling state interest, expressed in the constitution of Texas and other states, of promoting the "general diffusion of knowledge" that is so "essential to the preservation of the liberties and rights of the people." Tex. Const. art. VII, § 1.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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August 13, 2012

APPENDIX

APPENDIX

LIST OF AMICI

Anderson & Kreiger LLP
The Asian American Lawyers Association of Massachusetts
Bar Association of San Francisco
Beverly Hills Bar Association
Boston Bar Association
Brennan, Dain, Le Ray, Wiest, Torpy & Garner, P.C.
Brown Rudnick LLP
Burns & Levinson LLP
The Cincinnati Bar Association
City of Boston
Collora LLP
Davis, Malm & D'Agostine, P.C.
Edwards Wildman Palmer LLP
EMC Corporation
Foley Hoag LLP
Goulston & Storrs – A Professional Corporation
Greater Boston Legal Services
Krokidas & Bluestein
Looney & Grossman LLP
Massachusetts Association of Hispanic Attorneys
Massachusetts Black Lawyers Association
The Massachusetts Black Women Attorneys
Massachusetts LGBTQ Bar Association
Medical-Legal Partnership | Boston, a program of Third Sector New England, Inc.
Morgan, Brown & Joy, LLP
National Grid USA
Nixon Peabody LLP
Office of the General Counsel, Partners HealthCare System, Inc.
Prince Lobel Tye LLP

Rackemann, Sawyer & Brewster
Rose, Chinitz & Rose
Sherin and Lodgen LLP
South Asian Bar Association Greater Boston
Sugarman, Rogers, Barshak & Cohen, P.C.
Sunstein Kann Murphy & Timbers LLP
Verrill Dana LLP
Women's Bar Association
Yurko, Salvesen & Remz, P.C.
Zalkind, Rodriguez, Lunt & Duncan, LLP

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 13 2012
OFFICE OF THE CLERK

No. 11-345

In the Supreme Court of the United States

ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE DAVID BOYLE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

1. Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions. (Respondents' version)

Whether the University of Texas at Austin's use of race in undergraduate admissions decisions is lawful under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003). (Petitioner's version)

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STATEMENT OF INTEREST OF AMICUS CURIAE

The present amicus curiae, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondents in Case 11-345 ("*Fisher v. University of Texas at Austin*"). Amicus has a special vantage point, having been a student at the University of Michigan Law School in a time (1999-2002) leading up to the *Grutter v. Bollinger* (539 U.S. 306 (2003)) decision that vindicated the school's affirmative action program. Amicus has also made frequent efforts to follow affirmative-action issues in the years after *Grutter*.

Amicus (who, incidentally, was not an affirmative-action beneficiary) was a member of a "students for affirmative action" group at the school; but even among the student population in general, there was very strong support for affirmative action, as far as Amicus could tell. In fact, there was an amazing solidarity of many students, from multifarious backgrounds, in supporting the embattled program; a solidarity which would have been absent if the various horror stories of the Petitioner and her supporters about the "divisive effects" of affirmative action were true. A few people questioned affirmative action, but they were very much in the minority (so to speak).

---

[1] As per Supreme Court Rule 37, no party or counsel for a party, nor anyone else besides Amicus himself, wrote or helped write this brief, or contributed money to fund the writing or submission of it. Blanket permission is on record with the Court for amicae/i to write briefs.

If not quite "paradise", the school of that period was a showcase of friendly and productive relations and interchange among all sorts of people and ethnic groups. There were not any underrepresented-minority student groups trying to segregate themselves from all contact with whites, or carrying around "Kill Whitey" signs, or such. In fact, Amicus remembers with pleasure the "Butch Carpenter" annual dinner given by BLSA ("Black Law Students Alliance"), and the "Juan Tienda" annual dinner given by LLSA ("Latino Law Students Association"), both of which were widely attended by students and faculty of many ethnicities. The school's APALSA ("Asian Pacific American Law Students Association") did not parade around complaining that Asians were being victimized by the school's affirmative-action policies; rather, they were strong supporters of those policies. So, Amicus' experience at Michigan Law School, the school dealt with in *Grutter*, belies many myths used against affirmative action.

However, Amicus is not completely uncritical of affirmative action, or of the way that schools administer it. So, as a long-time follower of that controversial matter, he felt duty-bound to write this brief in defense of *Grutter* and the University of Texas ("UT") admissions program, but doing so in a measured way that deals with the various strengths or weaknesses of affirmative-action programs, and makes some observations or suggestions for the future of American affirmative action.

To that end, Amicus will try not to repeat too many arguments made by other supporters of Respondent, but instead will largely focus on various contextual or equitable issues regarding affirmative action, and also focus on rebutting various amicus briefs for Petitioner.

SUMMARY OF ARGUMENT

Especially since racism still persists, affirmative action should continue, at least until 2028. The unfair privileges given to alumni children and others are a larger problem than affirmative action. Affirmative action does not really hurt Jews or Asians, and holistic review is better than review based only on grades and test scores. Each state and its schools can decide for themselves about affirmative action. Various arguments against affirmative action fail, especially since they suggest, at most, reforms of transparency and accountability to affirmative action, instead of the immediate end of affirmative action. The Court can help America thoughtfully ready for a time without either affirmative action, or preferences for the already-privileged such as alumni children.

ARGUMENT

I. SADLY, RACISM STILL LIVES IN AMERICA

While racism may never be fully eliminated in America, great strides have been made in the last six decades since *Brown v. Board of Education* (347 U.S. 483 (1954)). America now even has a black President, Barack Obama, which might have been unthinkable some while back. However, racism still persists, which gives more reason to preserve the UT program and uphold *Grutter*, in the name of valuing diversity and reducing barriers between Americans of different backgrounds. (Several amici have called for the overturning of *Grutter*, not just of the UT program.)

Some recent, and frightening, examples of current racism: *see, e.g.*, Alex Seitz-Wald, *Fla. Republican: We wanted to suppress black votes*, Salon.com, July 27, 2012, 7:34 a.m., http://www.salon.com/2012/07/27/fla_republican_we_suppressed_black_votes/ (prominent Florida Republican discusses party effort to suppress Afro-American vote); *Walton Henry Butler Says He 'Only Shot a N*gger'*, YouTube, uploaded by SanVicenteMedia on Jul. 31, 2012, http://www.youtube.com/watch?v=RLA5ebQwetQ (apparently-white man alleged to have shot black man in the head uses racial slur); Ruth Manuel-Logan, *Motel 6 Customer Greeted With 'Hello, N*gger' On TV Screen*, NewsOne.com, Aug. 2, 2012, http://newsone.com/2028387/joseph-ross-motel-6-ohio/ (self-explanatory); Asha Anchan, *Families sue St. Paul School District, alleging racial discrimination*, Star Tribune, Aug. 5, 2012, 10:04 p.m., http://www.startribune.com/local/stpaul/165086846.html?refer=y (black students sue school district because now-resigned teacher Timothy Olmsted allegedly made blacks sit at the back of the class and called them "fat, black, and stupid"). While those unpleasant anecdotes regard African Americans, other minorities may have suffered similar experiences.

Also, the well-known shooting death of Trayvon Martin earlier this year may have been due to unnecessary, unreasoning fear of a black "hoodie"-wearing teenager. Indeed, motorist Rodney King's call for harmony, "Can we all get along?" during the 1992 riots following the acquittal of police officers videotaped beating him, seems not to be fulfilled in this country yet. King died earlier this year, *see, e.g.*, CNN Wire Staff, *Rodney King dead at 47*, CNN, June 17, 2012, http://articles.cnn.com/2012-06-17/us/us_obit-rodney-king_1_los-angeles-police-rodney-king-randy-de-anda?_s=PM:US, and was found at the bottom of a swimming pool: an eerie echo of another black victim, the murdered youth Emmett Till, being found dead in a Mississippi river in 1955. In any case, the vision of another King, the Rev. Dr. Martin Luther King, Jr., a vision of the "beloved community", needs a lot more work, including promotion of diversity and integration.

Some may argue that affirmative action stokes racial tensions and prevents a color-blind society. However, one doubts that affirmative action caused any of the nasty incidents listed above. Maybe some Americans hate black people or Latinos ("Hispanics") or Native Americans, *just because they want to hate them*, not because of affirmative action. Race hatred is far older in this country than affirmative action is. So, while affirmative action should end at some point, being an imperfect instrument for social improvement, an instrument using the controversial metric of race: affirmative action is a tool to promote diversity and integration, and should last at least the sixteen more years that Justice Sandra Day O'Connor recommended in her *Grutter* opinion. ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." (O'Connor, J.) 539 U.S. at 343.)

Also, self-segregation by minorities may have zero connection to affirmative action. For example, the Nation of Islam group has preached that blacks should self-segregate, e.g., avoid interracial marriage and possibly form a separate nation within America, *see, e.g.*, Wikipedia, *Nation of Islam*, http://en.wikipedia.org/wiki/Nation_of_Islam (as of Aug. 11, 2012, at 13:29 GMT). But group leader Minister Louis Farrakhan has *opposed* affirmative action, *see, e.g.*, Larry Elder, *Think Black*, FrontPage Magazine.com, June 12, 1998, http://archive.frontpagemag.com/readArticle.aspx?ARTID=22753 (mentioning Farrakhan's opposition to affirmative action); *cf.* Hist. Res. Dep't of the Nation of Islam, *Hard Work or Hardly Working? How White People Got So Rich Part 4*, The Final Call, June 28, 2011, 5:04:25 p.m., http://www.finalcall.com/artman/publish/Perspectives_1/article_7944.shtml (decrying affirmative action as really benefiting women, gays, and others, not blacks). So any connection between affirmative action and self-segregation is quite tenuous. (And recall what Amicus mentioned, *supra* at 1-2, about the harmonious interracial atmosphere at Michigan Law School under affirmative action.)

It is true that by creating a "critical mass" of minorities, affirmative action may allow minorities to congregate as a group, whereas if only a tiny number of minorities were at a school, they would have to interact more with white people, or have virtually no social interactions at all. However, this idea of "minority group congregation" could even be used as a reason against allowing a large group of minorities in under *any* circumstances (e.g., minorities with the same grades and test scores as whites), since that group, being large, might stick together instead of interacting with whites. But that refusal to admit minorities would be absurd. And racist as well.

Rather, colleges should strongly encourage and abet diverse interactions among students, including interracial study groups, so that less-prepared (e.g., admitted with lower test scores) students, from any group, can learn from others who may have stronger prior preparation or qualifications. Integration may take some effort, but it is worth the effort. After all, America put in a huge amount of effort at segregation over the last several hundred years, including slavery, Jim Crow laws, abuse of Latinos and Native Americans, etc. If it now has to put in considerable effort to integrate instead of segregate, this seems only fair.

And true desegregation may also involve ending the practice of turning a blind eye to admission practices which are common but have segregative tendencies, such as giving advantages in college or university admissions to the children of alumni, or of large donors, or of politicians or other powerful people. To these repulsive, and possibly illegal, practices we now turn.

II. THE EVIL OF ALUMNI, DONOR, OR POLITICAL-FAMILY ADMISSIONS PREFERENCES

"[A]ll men are created equal." Decl. of Independence pmbl. (U.S. 1776) Thus, while preferential admission for members of *underrepresented* groups, and traditionally powerless groups at that, may be justified (and has been justified by this Court, *see, e.g.*, *Grutter*), how can one justify giving advantages to those who are already advantaged or overrepresented, such as those who are "born with a silver spoon" of being an alumna/alumnus offspring, or offspring of a wealthy donor or prominent government officer? *Cf.* the noted 1960's song by Creedence Clearwater Revival, *Fortunate Son*,[2] "It ain't me, it ain't me, I ain't no Senator's son . . . . I ain't no fortunate one [etc.]" *Id.*

Alumni privileges may not be directly at issue in the instant case, since UT may not grant them. (Amicus does not know whether donors' or politicians' children receive any admission bonus at UT.) But since not only the UT program but *Grutter* itself is under threat, Amicus mentions the "legacy admissions" issue, since it would be inequitable, and vile, to end affirmative action in this country before alumni (or donor, or powerful-family) admissions are themselves ended, everywhere and fully.

Alumni preferences are ridiculously ubiquitous. It seems that former President George W. Bush, a notoriously mediocre student, may not have gotten admission to Yale College or Harvard Business School if he were not a Yale alumni child and the son of a Congressman (later President), George H.W. Bush. One wonders if presidential candidate Willard "Mitt" Romney would have gotten into the schools he did, were his father not a governor. And Barack Obama, who maybe should be more properly called

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[2] *On* the album *Willy and the Poor Boys* (Fantasy Records 1969).

Barack Obama Jr. or Barack Obama II (just as George W. Bush could be called "George Bush Jr." or "George Bush II"), may have benefited from being the child of a Harvard alumnus when he applied to Harvard Law School. (Amicus has never heard anyone else mention the Harvard alumni child factor re Barack Obama's career, so he is mentioning it now.)

Amicus does not want to live in the sort of America where most of our leaders not only come from privileged backgrounds, but also get extra rewards just for being privileged. Americans deserve better.

A gold mine of information about this issue is the book *Affirmative Action for the Rich: Legacy Preferences in College Admissions* (The Century Found., Inc. (Richard D. Kahlenberg, ed., 2010)). Chapter 9, "Privilege Paving the Way for Privilege: How Judges Will Confront the Legal Ramifications of Legacy Admissions to Public and Private Universities", is by Judge Boyce F. Martin, Jr. (with Donya Khalili). Martin's words are well worth quoting:

> In 2002, I authored the majority opinion in the Sixth Circuit in the landmark affirmative action case, *Grutter* v. *Bollinger* . . . .
>
> Thus, I enter the debate on college admissions policies firmly on the side of even more diversity. . . . Unfortunately, the ideal standard of focusing on academic skills, benefit to the

community, and a commitment to diversity is undermined by the substantial weight that legacy status carries in the admissions process of many elite public and private universities and graduate schools. . . . At the University of Virginia, half of the 1,400 legacy applicants each year are accepted, a substantially higher admittance rate than for non-legacy applicants . . . .

This is all in spite of studies—such as one done at Duke University . . . . —revealing that legacy students typically underperform compared to their peers . . . .

. . . Because many, if not most, institutes of higher education have long discriminated on the basis of race, religion, and/or gender, admission preference given to the children of those who used to be the only people who could be admitted perpetuates the effect of class and race discrimination from generations ago. Most of the beneficiaries of legacy admissions are white Protestant students. These preferences operate like "educational grandfather clauses" . . . . If our universities have a commitment and, indeed, a compelling interest in fostering a diverse campus community, legacy preferences fight their attempts

> to achieve a "critical mass" of diverse students. . . .
>
> . . . .
>
> I do not know what test will be applied to determine whether legacy preferences in admission policies violate the Equal Protection Clause nor whether preference will survive the tests applied. But it is clear to me that legacy preferences are destructive to the diversity of our campuses and the perception of merit in admissions and that they perpetuate the class and race discrimination that the rest of our laws are fighting to stop. I look forward to reading the first cases to examine this issue in light of the Supreme Court's decision in *Grutter*[.]

Id. at 199-201, 209 (footnote omitted).

Amicus is grateful that Judge Martin took the time to discuss, *see id.*, the fact that alumni preferences are a sort of *anti*-"compelling state interest" (being almost the polar opposite of diversity), which should be assiduously avoided. (Diversity is, of course, a compelling state interest; *see Grutter*, *supra*, at, e.g., 325.)

A last comment for now on legacy and other "privilege preferences" comes from across the Atlantic, *see* Gary Younge, *Affirmative action and the real enemy of education equality: Affirmative action faces renewed challenge in the supreme court, but in truth, it's class, not race, that fixes college* *admissions*, The Guardian (London), Mar. 2, 2012, 10:14 a.m., http://www.guardian.co.uk/commentisfree/cifamerica/2012/mar/02/affirmative-action-enemy-education-equality,

> This fall, opponents of affirmative action will have another shot with a far more conservative court. Few expect the practice to survive this time [??]. . . .
>
> . . . .
>
> . . . When [Patrick] Hamacher [who sued the University of Michigan over affirmative action] applied, the university of Michigan also awarded extra points if you were the child of alumni: an advantage he enjoyed but did not see fit to relinquish. [Jennifer] Gratz[, who also sued Michigan,] was also turned down by Notre Dame, which gives huge preferences to children of alumni and, as a result, has a greater proportion of them than any other major university. Legacies amount to more than 20% of the freshmen class – or around twice the number of African Americans and Hispanics combined. Gratz did not file suit against legacies. . . .
>
> "The preferences of privilege are nonpartisan," writes Daniel Golden, author of *The Price of Admission: How America's Ruling Class Buys Its Way into Elite Colleges – and Who Gets Left Outside the Gates*:

> > "They benefit the wealthy and powerful across the political and cultural spectrum, Democrats and Republicans, supporters and opponents of affirmative action, leftwing Hollywood movie stars and rightwing tycoons, old-money dynasties and nouveau riche. They ensure each fresh generation of upper-class families – regardless of intelligence or academic qualifications – access to the premier college[s] whose alumni hold disproportionate sway on Wall Street and in Fortune 500 companies, the media, Congress, and the judiciary."
>
> If you were serious about looking for a single means of injecting fairness into American universities, you would target the privileged who game the system, not the under-represented and historically excluded who are trying to get a foot in the door.

Id.

On that note: Amicus has wondered whether criticizing affirmative-action beneficiaries rather than "privilege preference" beneficiaries is sometimes a form of negative "racial profiling". Even those affirmative-action enemies who claim to decry racial profiling may sometimes stereotype or otherwise insult minorities; *see, e.g.*, Cynthia Gordy, *Racial-Profiling Hearing Gets Heated*, The Root, Apr. 17, 2012, 5:58 p.m., http://www.theroot.com/blogs/end-racial-profiling-act/racial-profiling-hearing-gets-heated,

> Roger Clegg, president and general counsel for the Center for Equal Opportunity . . . . opposed the End Racial Profiling Act . . . .
>
> . . . .
>
> Where African Americans are concerned, Clegg first acknowledged that they are often stopped on the basis of race alone, which he opposes. "Nonetheless, I think we have to recognize that it's going to be tempting for the police and individuals to profile so long as a disproportionate amount of street crime is committed by African Americans," he continued. "And there will be a disproportionate amount of street crime committed by African Americans so long as more than seven out of 10 African Americans are being born out of wedlock ... So ultimately, people in society who don't like racial profiling are going to have to face up to this problem."
>
> (After some groaning from the audience, Sen. Dick Durbin called the room to order.)

Id. Clegg may claim to oppose racially profiling blacks, but his insensitive remarks—which even caused "groaning", *id.*—border on racial profiling themselves, or at least simplistic stereotyping. (Amicus is not disputing, e.g., Clegg's statistics about non-marital births among African Americans; but Clegg is a little conclusory about how that might produce crime, and a little apologetic for officials performing racial profiling, *see id.*)

See also, e.g., U.S. Cath. Bishops, *Brothers and Sisters to Us—Pastoral Letter on Racism* (1979), *available at* http://usccb.org/issues-and-action/cultural-diversity/african-american/brothers-and-sisters-to-us.cfm,

> [R]acism is sometimes apparent in the growing sentiment that too much is being given to racial minorities by way of affirmative action programs . . . . At times, protestations claiming that all persons should be treated equally reflect the desire to maintain a *status quo* that favors one race and social group at the expense of the poor and the nonwhite.

Id.

Even unconscious insensitivity, e.g., someone using the term "illegal amigos" without malice to talk about Latinos, can still be hurtful. The thoughtlessness that would be shown by overturning affirmative action while "privilege preferences" survive, would not make any court look fair or thoughtful.

We now turn to mention of some groups who have been excluded from the best of American life in the past, but who are not truly hurt by affirmative action, everything considered, despite dangerous myths to the contrary.

III. JEWS AND ASIANS ARE NOT "VICTIMS" OF AFFIRMATIVE ACTION

The Brief *Amicus Curiae* of the Louis D. Brandeis Center for Human Rights Under Law, et al., in Support of Petitioner (May 29, 2012), is one amicus brief in this case that refers to historical discrimination against Jews in college admissions, and compares the current situation of college-applicant Asians to that which Jews used to face, *see id. passim*. However, this is a facile analogy. Of course, overt discrimination against anyone, Jew, Gentile, Asian, non-Asian, etc., is horrible. However, geographical preferences for applicants in Nebraska or Wyoming may also not favor Jews and Asians. Does this mean that those "Midwest-Rockies" preferences are some plot against Asians and Jews? Maybe not.

We are not in the old days any more, among other things. The brief, *see id.* at 24-25, refers to the unpleasant quotas wielded against Jews around the 1920's at places like Harvard. The sorry picture of a bunch of crusty, bigoted old Jazz Age "WASPs" in Cambridge, Massachusetts maybe worrying that the school song would have to be changed to "Harvard Nagilah" because of a supposed "Hebrew horde", is very discouraging and is even reminiscent of Nazism. (If school administrators felt Jews were not socially integrated, measures such as social mixers or even "deportment classes" could have been helpful, instead of extreme measures like ghettoizing many Jews out of the university through a vicious quota.)

However, these days Jews are hardly in the same position as in the 1920's. *See, e.g.*, Daniel Brook, *A Tough Decision for Yale's Jewish Students*, Diverse: Issues In Higher Education, Feb. 3, 2000 (originally *in* Jewish Currents, Jan. 2000 ed.), *available at* http://diverseeducation.com/article/451c1/a-tough-decision-for-yale-s-jewish-students.html,

> When the shock waves of the 1960s finally shook Yale's gothic ivory towers, anti-Jewish hiring discrimination was a thing of the past. . . .
>
> . . . .
>
> . . . In the past, Jews could look out for their own interests and at the same time feel justifiably self-righteous in fighting for the underdog. Today, in America, Jews have attained such a high position that these two things do not always coincide. Today's generation of young Jews has to make the tough choice of deciding between them.

Id. Among other things, if, say, Jewish students in the Ivy League comprise about 25% of the total (a rough composite of figures Amicus has heard over the years), and have done so since about the 1960's when discrimination against Jews seemed to be on the retreat, then there have been, by simple math, several generations of numerous Jewish Ivy Leaguers, maybe a quarter of alumnae/i, who have passed on alumni privileges (and possibly other privileges, e.g., donor privileges) to their children or grandchildren. (*See* the Brook article *supra* about American Jews' attainment of "high position", *id.*)

So, one could argue that Jews, if counted as "whites" (rather than as "Mediterranean-Asians", say), have passed on traditional white racial privilege, legacy privilege, to their descendants applying to these schools, just as white Anglo-Saxon Protestants have for generations. Why do litigants not sue for the end of largely-white alumni preferences, then, instead of trying to end affirmative action for underrepresented minorities? The mind boggles.

There is also the issue of whether all racial preference is really corrosive, especially re American foreign aid. For example, it is widely known that the U.S. gives at least $3 billion of aid every year to the country of Israel, which is a self-declared Jewish state. However, Amicus has not noticed a huge rush of affirmative-action opponents begging the Government to stop all aid to Israel until Israel stops giving racial preferences to Jews, since such preferences would (ostensibly) stigmatize Jews and make them feel less worthy, at the same time as they give them advantages over others not receiving such preference. This lack of complaint is interesting, and evinces a possible double standard.

(Amicus himself does not mind that some of his taxpayer money has gone to a Jewish state such as

Israel. But not to recognize that it *is* a Jewish state, with that openly and highly racialized status, would be hypocritical and silly. *See, e.g.*, Rabbi Michael Lerner, *Recognize Palestine AND Re-Affirm Israel as a Jewish State*, Tikkun, Sept. 14, 2011, http://www.tikkun.org/nextgen/recognize-palestine-and-re-affirm-israel-as-a-jewish-state: "Israel was the first affirmative action state[.]" *Id.*)

An additional point of interest is affirmative action *in America* for Jews. *See, e.g.*, Minority Bus. Dev. Agency (U.S. Dep't of Com.), *Director Hinson Remarks at the 2009 Minority Enterprise Development (MED) Week Conference, Washington, DC*, Aug. 28, 2009, *available at* http://www.mbda.gov/node/420, "MBDA supports businesses . . . owned and operated by members of the Native American, Hasidic Jewish, . . . Asian, Alaska Native, Pacific Islander [and other minority] communities." *Id.* Amicus wonders why "Hasidic", a religious label (and why not non-Hasidic Jews also?), is being lumped in with racial labels, *see id.*; but that issue aside, the presence of Jews (and Asians) as American affirmative-action beneficiaries, *see id.*, demolishes the idea of affirmative action as some horrible plot against Jews (or Asians).

(Additionally, President Ronald Reagan—a relatively conservative man—established this preference for Jews, *see, e.g.*, Richard Severo, *Reagan Grants Hasidim 'Disadvantaged' Status*, N.Y. Times, June 29, 1984, *available at* http://www.nytimes.com/1984/06/29/nyregion/reagan-grants-hasidim-disadvantaged-status.html. Do most people consider Reagan a flaming bigot who promoted corrosive race preferences? Amicus doubts it.)

As for Asians: once again, at Amicus' school, the Asian/Pacific student organization avidly supported affirmative action, *see supra* at 2. So were they supposedly too inept (!) to defend their own interests? or, were they simply recognizing that diversity benefits our Nation? Probably the latter. *See also* the Br. of Amici Curiae Asian Pac. Am. Legal Ctr., et al. in Supp. of Appellees and in Affirmance of the Dist. Ct. J. (Mar. 11, 2010), submitted in the Fifth Circuit version of this case:

> A Hmong applicant whose family fled to the United States as refugees . . . could benefit from the consideration of race in UT's admissions policy. . . .
>
> . . . .
>
> The suggestion that Asian American students do not share in the well recognized benefits of a diverse educational environment is both inaccurate and illogical. . . .
>
> . . . .
>
> UT's effort to admit a critical mass of African American and Latino students through its holistic admissions policy is good for Asian American students.

Id. at 4, 7, 18. Unless one thinks that all the Asian groups listed on the brief are a "bunch of dupes", it seems that affirmative action is good for Asians—and everyone else.

The Brief of the Asian American Legal Foundation and the Judicial Education Project as *Amici Curiae* in Support of Petitioner (May 29, 2012) claims that Asian Americans "constitute a minority without significant political influence", *id.* at 22. Perhaps this "lack of Asian political power" would be news to Governors Nikki Haley of South Carolina and Bobby Jindal of Louisiana, U.S. Secretary of Energy Steven Chu, and other prominent Asian-American political figures.

That brief also claims, *see id.* at 26, that UT is really aiming at "racial balance" instead of diversity. However, the brief itself recites statistics saying that Asians are roughly 4% of Texans, but roughly 16% of the UT student body, as of 2010, *see id.* at 7-8. If so, UT has done a *very* poor job of racial balancing, since they let in four times as many Asians as would create "racial balance", *see id.* Rather than accuse UT of having math skills that bad, perhaps it is more logical to conclude that UT is not aiming for "racial balance" at all. (One also notes that many Asians entering colleges now will pass on alumni preferences to their children, who will receive that racialized privilege.)

A more fertile place to look at exclusion of Asians might be the armed forces, *see, e.g.*, Heritage Found., *Racial Composition of New Enlisted Recruits in 2006 and 2007*, http://www.heritage.org/static/reportimages/3E59D41279449CAB99F8C7CF54E02351.gif, showing that Asian males in recent years have been underrepresented in the U.S. military compared to their percentage of the population, *see id.* If there is some quota keeping Asians out of the military, it should cease immediately, perhaps with the help of some of the groups complaining that Asians are underrepresented in colleges.

Finally, speaking of the military, a group which often requires high physical fitness: the Brandeis brief, *supra* at 14, may not come up to the high standard of an archetypal "Brandeis brief" when it unnecessarily and excessively questions the very idea of holistic review, and of qualifications like good physical shape, *see id.* at, e.g., 30. We explore these issues below.

IV. AMICUS' PERSONAL EXPERIENCES IN INTERVIEWING COLLEGE APPLICANTS, RE THE LIMITED UTILITY OF GRADE AND TEST SCORES

"'It is our ambition for Princeton that it should develop, not mere scholars, but leaders – men of sound body, mind and spirit.' . . . 'Harvard should seek out young men of "the healthy extrovert kind . . . so much admired by the American public."'" *Id.* at 30-31 (citations omitted). The Brandeis brief cites these early-20th-Century pronouncements as being exclusive of Jewry, *see id.* Amicus is tempted to quip, God forbid that leadership, body, health, extroversion, or spirit ever be counted in a person's favor. (Recall the old formula, *Mens sana in corpore sano*—"A sound mind in a sound body", from the Latin.) Of course, the schools listed may have *misused* the listed criteria in order to exclude Jewish applicants. That does not mean the criteria themselves are wrong.

And such criteria may have been used for far longer than that brief might claim. *See, e.g.*, Harv. Univ. Libr., *Harvard University. Faculty of Arts and Sciences. Admission lists, 1743-1764: an inventory*, http://oasis.lib.harvard.edu/oasis/deliver/~hua47011, "Historical note[:] In the 18th century, [a]s specified in the College Laws, if the student successfully displayed sufficient knowledge of both Latin and Greek and *indicated a good moral character*, he was granted admission to Harvard." *Id.* (emphasis added) So it seems that "character" has been used for centuries in American college admissions—as it should have been—, and is not just some nefarious 20th-Century (or 21st-Century) trick to make life miserable for Jews and Asians.

And Amicus knows something about holistic review. He has for several decades interviewed applicants to the college (name withheld here) whence he was graduated. (Amicus was even, for several years, the head of a regional committee of college alumni who interview applicants.) He interviewed on multiple occasions high school seniors who had perfect "4.0" (all A's) grade-point averages, and who often even had paperwork attesting to that status.

On many of those occasions, though, Amicus was flabbergasted at the poor interview performance of the "perfect students" in question. Whether poor command of spoken English, or lack of articulateness, or lack of ability to think on one's feet, or just plain stupidity: various deficits plagued many of these "4.0 paragons" whom he interviewed. Amicus has wondered how much the college, and the

Nation, would suffer if these unfortunate applicants were admitted.

This is proof that the utility of grade numbers, and maybe test score numbers, is highly limited. *Ceteris paribus*, it's better to have all A's than all F's, of course. But there is so much more to a college application than numbers, that it would be highly mistaken to make "academic merit" (at least as measured by sheer numbers) the be-all and end-all of college admissions.

In fact, the pity is not that there *is* holistic review, as some fanatical devotees of grades and test scores would claim; rather, the pity is that colleges do not offer holistic review to *everybody*. Mere numbers only convey so much, so that only an inferior assessment of a candidate can result without holistic review; and holistic review would ideally include an interview for each and every applicant.

On a broader level: college is not just a "consumer experience" where an applicant comes and says, "I have all A's, so I command you to let me in so I can buy a college degree from you and be a happy consumer." Rather, college is...collegiate, as the word "college" would suggest, meaning that the school's own society and human relations are important, not to mention the society and interpersonal relations of the whole American nation. Superior academic performance should be sought largely out of the sheer love of learning, not just as a "golden ticket" which applicants can use to force their way into a school, when those applicants may be lacking in other respects, or the school and society could profit hugely from having a more diverse student body.

Another aspect of diversity is allowing each diverse State to experiment on its own with affirmative action or other admissions programs, instead of ending affirmative action permanently through some premature federal *diktat*. The next section addresses this issue.

V. FEDERALISM AND AFFIRMATIVE ACTION

Some racial measures, may, naturally, be too dangerous or odious for the Court to permit, even if a State or subdivision of a State cries "state sovereignty" or "states' rights" in an attempt to get away with hateful practices. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (using Equal Protection Clause, Fourteenth Amendment, to desegregate Topeka schools). However, this does not mean that States' traditional authority over education, whether under the "police power", or the Tenth Amendment, or otherwise, is a nullity. Federalism does not mean respecting only the federal government, after all.

In *Grutter*, this Court supported the idea of letting States and universities experiment with different types of college admissions practices, *see* 539 U.S. at 342. *See also New St. Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932): "Denial of the right to experiment may be fraught with serious consequences to the nation. . . . [A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." (Brandeis, J., dissenting)

There have been well-meaning but perhaps misguided attempts to say that States *must* offer affirmative action. *See, e.g.*, NBC 7 San Diego, *Court Upholds Affirmative Action Ban*, Associated Press, Apr. 3, 2012, 8:12 a.m., http://www.nbcsandiego.com/news/local/Court-Upholds-Affirmative-Action-Ban-145933275.html, "[A] federal appeals court panel upheld California's ban on using race, ethnicity and gender in admitting students to public colleges and universities. The ruling marked the second time the 9th U.S. Circuit Court of Appeals turned back a challenge to the state's landmark voter initiative, Proposition 209[.]" *Id.* Just because affirmative action is *allowed*, that does not mean it is *mandatory*, and that the will of the State's people, if the people oppose affirmative action, supposedly means nothing, *see id.*

Conversely, if the people of a State want affirmative action, it should be allowed. The Brief Amicus Curiae of Pacific Legal Foundation, et al. in Support of Petitioner (dated May, 2012) claims, *see id.* at 13-14, that race-neutral solutions work well in some states, such as California, so that race-based affirmative action is no longer needed. However, just because the absence of affirmative action may have worked well for one State, that does not mean it will work well in every State. States are different, and the conditions in them, and the desires of the people, are different.

A State may have the power to offer affirmative action, or same-sex marriage, or any number of things, without undue federal interference. In large part, the choices of a State should be respected. *See,* *e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ____, 132 S. Ct. 2566 (2012) (upholding states' rights to make substantial choices, e.g., to refuse an expansion of Medicaid). And in affirmative-action cases, there may also be more-than-usual deference due, *see, e.g.*, *Grutter*, "Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions", *id.* at 328 (O'Connor, J.). Texas and its University in Austin chose affirmative action, and the Court should affirm that choice.

Speaking of deference, Amicus shall now "defer" to some other amici's arguments against UT, though not always agreeing with them.

VI. SOME REBUTTALS TO MISCELLANEOUS AMICUS BRIEFS

The Brief of Abigail Thernstrom, et al. as *Amici Curiae* in Support of Petitioners (undated) claims, *see id.* at 6, that admissions are "zero-sum" in that schools purportedly "rob Peter to pay Paul", since minority students attending one institution will not be attending another, so that the latter institution will be less diverse than before. However, the pool of acceptable minority students may be flexible in size; e.g., if preferences are available at even "lower-tier" schools, so that those schools are willing to take students they would not have otherwise, then the pool may be larger than it would have been without preferences. The numerical qualifications of students may be lower the larger the pool is, but, among other things, tutoring or remedial work can help students with potential. Athletes, too, may need some assistance in competing academically; but would Thernstrom ban the admission of athletes because of this? Finally, not all qualified minorities may apply; so colleges can step up recruitment of minorities as to widen the pool.

The brief also presents what Amicus shall call the "racist moron" scenario, *see id.* at 8 n.7: i.e., the claim that students at elite institutions are less likely to be bigots, so that less-elite institutions need minority students more badly, to provide diversity. This imaginative claim may be hard to justify, though. After all, less-elite institutions may be down the socioeconomic ladder anyway, and thus have a larger number of underrepresented minorities anyway, before affirmative action.

Also, Thernstrom's claim that "top-drawer" people are less bigoted may be questionable. —The recently-deceased intellectual and writer Gore Vidal came from an elevated social background, and, while he did not attend college, attended Phillips Exeter Academy (which may offer a better education than some colleges do). However, Vidal—an acerbic type who once called Truman Capote's death "a good career move"—suggested in his later years that "white nations like America and Russia needed to unite against the supposed threat of Asia", Michael Lind, *Gore Vidal: The Virgil of American populism*, Salon.com, Aug. 2, 2012, 9:30 a.m., http://www.salon.com/2012/08/02/gore_vidal_the_virgil_of_american_populism/. This ridiculous "Whites Unite vs. the 'Yellow Peril'" scenario, *see id.*, shows that "elite" people can be as bigoted as anyone else.

In addition, Thernstrom claims that the research of public-policy professor Robert Putnam shows that diversity often creates conflict, misery, and distrust, especially in the short term, *see* Thernstrom Br. at 10-13. However, Putnam supports affirmative action, *see, e.g.*, Applied Res. Ctr., ***Robert Putnam's E Pluribus Unum: No Trust Before Justice***, ARC.org, undated but website copyrighted 2012, https://www.arc.org/content/view/531/178/. *See also* Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*[,] *The 2006 Johan Skytte Prize Lecture*, Wiley Online Libr., June 15, 2007, originally *in* 30 Scandinavian Pol. Stud. 2, pp. 137–174, June 2007, *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9477.2007.00176.x/full,

> It would be unfortunate if a politically correct progressivism were to deny the reality of the challenge to social solidarity posed by diversity. It would be equally unfortunate if an ahistorical and ethnocentric conservatism were to deny that addressing that challenge is both feasible and desirable. . . . The task of becoming comfortable with diversity will not be easy or quick, but it will be speeded by our collective efforts and in the end well worth the effort.

Id. This hopeful yet realistic spirit, *see id.*, seems to comport with our national ethos better than does Thernstrom's pessimism.

The Brief of the Honorable Allen B. West as *Amicus Curiae* in Support of Petitioner (May 25, 2012) lambasts race-conscious policies as an enemy of military readiness, *see id. passim*. West also portrays former Joint Chiefs of Staff Chairman, Colin Powell, as an enemy of race preferences, *see id.* at 11-13, 25. This is intriguing in light of Powell's high-profile support of affirmative action at the University of Michigan, *see, e.g.*, CNN, *Powell defends affirmative action in college admissions*, Jan. 20, 2003, 4:25 p.m., http://edition.cnn.com/2003/ALLPOLITICS/01/19/powell.race/.

> Calling himself a "strong proponent" of affirmative action . . . . Colin Powell said Sunday[,] "I believe race should be a factor among many other factors in determining the makeup of a student body of a university."
>
> . . . .
>
> Powell's statement goes further than friend-of-the-court briefs the Bush administration filed . . . last week opposing the University of Michigan's affirmative action admissions policy.

Id. So, West's brief may not only be off-point (i.e., regarding the military, not college admissions), but it may misstate Colin Powell's position on affirmative action.

The Brief of the Texas Association of Scholars As Amicus Curiae In Support of the Petitioner (undated) features the delightful declaration, *see id.* at 31, that "Diversity Has No Societal Value and

May Cause Significant Societal Harm to All Americans" (!!). Amicus had no idea. The brief's sentiment sounds quite clannish.

Moreover: in a novel that Amicus has been thinking for a number of years about writing, a main character is an evil U.S. President given to statements like "Diversity is a weakness." It is amusing to see that the "truth", *see* Br. of Tex. Ass'n of Scholars, *supra*, at 31, is at least as strange as that part of Amicus' fiction.

The Brief of *Amici Curiae* California Association of Scholars, et al. in Support of Petitioner (May 29, 2012) opines, *id.* at 7 n.2, that the Court, as "[a]n alternative to overruling *Grutter*[,] overrule [*Regents of the Univ. of Cal. v.*] *Bakke*[, 438 U.S. 265 (1978)] on Title VI [of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d)]. Such an approach would have the virtue of avoiding the constitutional issue." However, such an approach would also have the vice of possibly seeming sly and circuitous, which may not help the image of the Court in the present high-profile case.

The Brief of the Southeastern Legal Foundation, Inc., as *Amicus Curiae* Supporting Petitioner (May 29, 2012) raises the question, *see id.* at 17, of whether minorities (or any race) have something racially distinct to offer in math or science classes. However, while "2 + 2 = 4" is probably not going to change according to the race of a student, dialogue about the *uses and ethics* of science (say, regarding genetic alteration, or climate change and its remedies, e.g., whether Third World countries could be affected disproportionately by global warming) could easily benefit from racial, gender, and other forms of diversity in the classroom.

The Brief for *Amici Curiae* Current and Former Federal Civil Rights Officials in Support of Petitioner (May 29, 2012) states, *id.* at 18, that "through the Internet, professors and students can instantly access any diverse viewpoint . . . . regardless of the racial or ethnic identifications of course classmates." While the Internet has its uses: if one goes too far with this, then why not just abandon the physical campus altogether and have all college students live in a virtual bubble?

The previous brief's point of view reminds Amicus of the old *Doonesbury* comic strip where Reverend Scot Sloan, at a Christmas pageant, says that "The part of Baby Jesus is played by a hidden 40 watt light bulb." *Id.* (*Available at*, e.g., G.B. Trudeau, *40: A Doonesbury Retrospective* (2010), p. 68, Google Books, http://books.google.com/books?id=duzoPmkCy1QC&printsec=frontcover&dq=40:+A+Doonesbury+Retrospective&source=bl&ots=7ZTeM6pXEG&sig=J-pY4qhczz2vgujIYT9OE8yYqs0&hl=en&sa=X&ei=05YlUOWRIqbtiwLK6YG4DQ&ved=0CDYQ6AEwAA#v=onepage&q=40%3A%20A%20Doonesbury%20Retrospective&f=false; strip is dated Dec. 21, 1973) Sometimes the glow of a screen is not quite a substitute for reality.

So, the civil rights officials' "Video Game Theory" of campus diversity may not work too well. If one followed their theory, one may as well permanently excuse Justices Clarence Thomas and Sonia Sotomayor (who were both helped by affirmative action to launch their spectacular legal careers) from appearing in person at the Court, since they could appear by "Twitter" or some other electronic medium instead. Amicus will keep a weather eye to see whether that happens.

Finally: the Amicus Brief of the American Center for Law and Justice in Support of Petitioner (May 29, 2012) mentions, *see id.* at, e.g., 8-9, the difficulty of the issue of just how to define what someone's race is, whether by percentage of "blood" (particular racial background), or otherwise. However, while there is no perfect solution to that question: if Americans can abide a Black History Month without giving a precise blood-quantum definition of "Black", then perhaps the country can abide affirmative action that does not have an exact definition of "Black" or any other group.

Of late, there has been controversy about the supposed Cherokee heritage of Harvard law professor Elizabeth Warren. While many do wonder about just how she considers herself Cherokee, her unusual case does not give reason to penalize others, including "full-blooded" blacks, Latinos, or Native Americans, by taking away their affirmative action. Warren can be punished (if need be), by public ridicule or otherwise, without less-privileged persons having to suffer needlessly.

VII. KEEPING AFFIRMATIVE ACTION ACCOUNTABLE

Similarly, affirmative action itself can be mended, if need be, instead of prematurely ended.

The merits brief for Respondents (August, 2012) does a fine job of defending the UT program as a narrowly-tailored, seriously needed program which is an actual improvement on the Michigan program allowed in *Grutter*, e.g., not requiring daily reports about race as Michigan Law School did, *see* Resp'ts' Br., *supra*, at 2. One particularly worthy observation is that "It would be an abrupt—and destabilizing—step for the Court to overrule *Grutter* just nine years after this Court reconsidered and reaffirmed Justice Powell's opinion in *Bakke*." *Id.* at 53.

Indeed, there is a reliance interest in keeping affirmative action alive until at least 2028, 25 years after *Grutter*. However, that reliance interest may cut both ways: i.e., the public may be relying on the cessation of affirmative action by 2028.

Amicus has not seen any great rush of affirmative-action supporters clamoring for, or planning for, that 2028 transition. So, in promoting accountability for affirmative action, the Court may want to focus on making that date a reality, not just a nullity. *See, e.g.*, *Grutter*, 539 U.S. at 346: "[O]ne may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." (Ginsburg, J., concurring in the judgment)

Educational institutions, after all, are not always prone to candor or other optimal behavior. For example, Amicus himself, when he heard around 2008 about the controversial "Wolverine Scholars Program" which let applicants with high grades apply to Michigan Law School, but only if they had not taken the LSAT (!!!) before an admissions decision, he was curious what was going on; was it, say, an attempt to game the U.S. News and World Report rankings? Eventually, he had to request information about the Program under the Freedom of Information Act and pay c. $1560.00 to get it. (By the way, the Program failed and was canceled; *see* Elie Mystal, *The Life and Death of the Michigan 'Wolverine Scholars' Program*, Above the Law, Nov. 17, 2011 at 12:55 p.m., http://abovethelaw.com/2011/11/the-life-and-death-of-the-michigan-wolverine-scholars-program/, for some fascinating details.)

The requested information, *available at* http://tinyurl.com/WoScFOIA, has notable and surprising features. E.g., on page 4 of an April, 2009 Decision and Recommendation of the ABA Accreditation Committee (p. 33 of the PDF), we see, "A third goal of the program is to increase student diversity. Under Michigan law, race may not be taken into account . . . [E]liminating the LSAT as a factor in admissions decisions removes a potential impediment to minority admissions[.]"

So, while the Program did not violate the law, *see id.*, there are questions of candor to the public in a controversial issue such as racial diversity. Amicus does not remember *any* public mention of racial diversity as being a purpose of the Program. Amicus, by contrast, would have been proud of that purpose and trumpeted it to the public, rather than "burying" it (even unintentionally...) in documents to an elite committee so that it had to be found out by expending over $1500 and many hours of work.

(Incidentally, one wonders how thoughtful the "increase diversity" effort really was, since the Program essentially excluded the University of Michigan-Dearborn and -Flint campuses, which have relatively less-affluent and more-minority student bodies than the Ann Arbor campus. Still, the Program was *declared* to be about racial diversity, and should have been *publicly* declared as such.)

Mentioning this issue here shows that Amicus is not an uncritical observer of diversity issues, nor a mindless follower of his own law school. A prime lesson here is that institutions showing a lack of transparency should be criticized, and urged towards more transparency.

One way to do this is by following some of the advice in the Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party (May, 2012). The brief is very pessimistic about affirmative action, *see id. passim*. However, there are constructive ideas in the brief, such as in Section V, "The Court Should Require Each State School That Seeks To Use Racial Preferences To Make Them No Larger Than Its Socioeconomic Preferences And To Disclose Their Size, Operation, And Effects And A Timetable For Phasing Them Out By 2028", *id.* at 32. Amicus disagrees with the first idea mentioned there: if a school were forced to keep racial preferences no larger than socioeconomic ones, that could cause problems. For example, a school not offering socioeconomic preferences would not be able to offer racial ones. Also, in a holistic program, one might not be able to quantify one preference as being larger than another, so that it might be impossible to make a racial preference "smaller" than a socioeconomic.

But the second idea, about disclosure of race preferences' mechanics and consequences, and about keeping faithful to *Grutter* by having schools make a good-faith, thorough plan for phasing out affirmative action by a quarter-century after *Grutter*, is an excellent idea. Amicus is for affirmative action, unlike Sander and Taylor, but he sees no downside to their suggestion.

The Brief for the National Black Law Students Association as *Amicus Curiae* in Support of Respondents (Aug. 8, 2012) nicely rebuts some of Sander and Taylor's other ideas. For example, the Sander/Taylor brief claims that there is an "academic mismatch" problem, whereby minorities do badly when affirmative action admits them to schools where they are not up to academic par, *see id. passim*. The "NBLSA" brief, *supra*, admits that there may be some "mismatch" or other academic problems, but shows they may result from factors besides affirmative action, and notes that it may be patronizing to minority students, and deprive them of agency and free choice, to take away affirmative action entirely, rather than let them take the risk of going to a school where they may not be at the top of the academic heap, *see id.* at 4, 8.

While the two briefs just mentioned may seem antagonistic, they can be reconciled, as Amicus has just shown. Affirmative action can endure, at least until 2028, but it should proceed with more candor, and information for the public and applicants, than before. If informed choice is one core component of "ordered liberty", then the Court can help keep affirmative action accountable, to the benefit of all.

VIII. THE GENERATIONS AFTER *GRUTTER*

Amicus has a dream: that people will one day not be judged by the color of their skin, or by their parents' alumni, donor, politician, or celebrity status. The Court can help America achieve a fair and bright future by promoting this dream.

While it might be too much to ask the Court to consider and outlaw the sordid business of "privilege preferences", like legacy preferences, right now, the Court can at least make some thoughtful commentary upon the issue. Once again, Amicus would find it obscene if the Court were to outlaw affirmative action while any "privilege preferences" still stand. If this means keeping affirmative action beyond 2028, so be it.

And affirmative action need not end exactly in 2028, although it would be ideally best if it did. For example, the economic crisis of 2008, which may have hit minorities harder than others, is one real-life factor which could advise pushing back affirmative action's end date several years beyond 2028. (As brilliant as the Court is, it could not foresee in 2003 the economic crash 5 years later.)

But preparation for a 2028 transition is prudent in any case, and could include, say, a gradual tightening of academic standards for affirmative-action recipients over the next 16 years, so as to prepare people for the leap to a world without race preferences.

President Obama himself has said that his daughters, seeing their father's status, should not receive affirmative action preferences, *see, e.g.*, David Paul Kuhn, *Obama shifts affirmative action rhetoric*, Politico, Aug. 10, 2008, 8:24 a.m., http://www.politico.com/news/stories/0808/12421.html. Amicus is comfortable with that, and also thinks that, say, a "check-off", whereby an under-represented-minority applicant may tick a box on the application form and ask *not* to have his or her ethnicity considered, may be a good idea.

Even minor improvements by the Court will be welcome. E.g., perhaps it is time to retire the term "critical mass" from the lexicon. Comparing minorities to a fissionable lump of uranium is probably not the most fortunate nomenclature, especially if one wants to reduce racial tensions. "Significant number" or "substantial group" may be less explosive terms than "critical mass".

Minor improvements, after all, may forestall the need for major destruction. For example, if the Court is not fully happy with the UT plan, e.g., if it found the consideration of integration down to the classroom level to be excessive, it could still leave the rest of the plan intact. (Amicus does not object to any aspect of the UT plan, but is realistic enough to guess that not all on the Court may share his views.)

And the Court's improved national rubric for affirmative action, including the transparency and timing-out aspects this brief has mentioned, will help affirm affirmative action, but with added accountability. This balanced decision will, God willing, hasten the time when, as Martin Luther King said, "in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their scintillating beauty." (Letter from Birmingham Jail, Apr. 15, 1963)

CONCLUSION

Amicus respectfully asks the Court to uphold the judgment of the court of appeals, *Grutter*, and *Bakke*, with any needed modifications; and humbly thanks the Court for its time and consideration.

August 13, 2012 Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

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In The
Supreme Court of the United States

◆

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

BRIEF *AMICI CURIAE* OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES IN SUPPORT OF RESPONDENTS

◆

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QUESTION PRESENTED

Petitioner asked the Court to decide the following question:

> "Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions."

Pet. Br. i.

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INTEREST OF THE *AMICI CURIAE*[1]

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that seeks to improve the fundamental systems of democracy and justice, including by eradicating racial disparities in political participation and access to justice.[2] The Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector. It seeks to bring the ideal of representative self-government closer to reality and strives to ensure that our Nation's institutions reflect the diverse voices and interests that make for a rich and energetic democracy. It also seeks to secure the Nation's promise of equal justice for all by reducing the gap between that promise and the day-to-day reality.[3]

The League of Women Voters of the United States is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in 800 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, and that assures opportunities for citizen participation in government decision-making. To further this goal, the League has fought since its inception to ensure that every citizen can fully and productively participate in American society, from the school room to the ballot box.

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[1] The parties have filed letters with the Court consenting to all *amicus* briefs. No counsel for a party has authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] This brief does not purport to represent the opinions of N.Y.U. School of Law.

[3]

Amici support the appropriate consideration of race, ethnicity, and other factors as necessary means to realizing our Nation's "compelling interest" in "obtaining the educational benefits that flow from a diverse student body" at the Nation's colleges and universities. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *accord*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 722 (2007). They do so in recognition that "[t]he enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). *Amici* agree that state educational institutions have "[a] compelling interest . . . in avoiding racial isolation," and "achiev[ing] a diverse student population." *Id.* at 797-98.

Amici have an interest in this Court's approval of the use of *Grutter*-style programs. Laws like the Top

Ten Percent Law serve valid purposes, such as ameliorating school financing disparities, and may have a beneficial impact on increasing minority enrollment. But these tools lack the precision of a holistic review of applicant files that includes race as but one factor, like that at issue, which accommodates a desire for excellence, including excellence achieved through diversity, by enabling admissions officers to evaluate the content of an applicant's *character* in part by what the applicant *may have experienced* by reason of the color of their skin.[4]

◆

SUMMARY OF ARGUMENT

Nearly sixty years after *Brown v. Board of Education*, 347 U.S. 483 (1954), racial segregation and inequality are still with us. As a result, "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all[.]" *Parents Involved*, 551 U.S. at 797 (Kennedy, J.). In the field of education and school admissions, the Court has endorsed both race-conscious policies that are race-neutral on their face and "if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component," *id.* at 790, to the end of ensuring classroom diversity that effectively "prepar[es] students for work and citizenship" and provides an open and diverse "training ground for . . . our Nation's leaders." *Grutter*, 539 U.S. at 331-32. These goals, the Court has held, properly serve the "compelling state interests" required by the Equal Protection Clause of the Fourteenth Amendment. *Id.*

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[4] *Cf.* The Rev. Martin Luther King, Jr., "I Have a Dream," *available at* http://www.americanrhetoric.com/speeches/mlkihaveadream.htm (last visited Aug. 7, 2012). *See also* William G. Bowen & Derek Bok, *The Shape of the River* (1998) (explaining the distinct benefits of holistic race-conscious admissions policies).

Petitioner nevertheless challenges the central precept of what constitutes a "compelling state interest," both with respect to diversity in the general student population and at the classroom level. *See* Pet. Br. at 26-30. Because this challenge ultimately rests on overruling *Grutter* or substantially reformulating it, it is appropriate to revisit the data that demonstrate the benefits to all races of a holistic review of university admissions files that enables admissions officers to take an applicant's race into account as one factor among many when shaping a multifaceted and diverse group of admittees.

A long history of social science research rebuts the efforts by Petitioner and her *amici* to downgrade Texas's goal of achieving meaningful classroom-level diversity. *Infra* pp. 11-29. Findings from numerous rigorous studies make clear that affirmative action as practiced by the University of Texas ("UT") and other selective universities (a) benefits all races and (b) does so with respect to skills central to our democracy by (i) enhancing leadership skills and increasing social and political engagement and (ii) promoting tolerance and collaboration. *Id.*

Petitioner's argument, that by reason of the impact of Texas's Top Ten Percent Law, use of a *Grutter*-style review for the 15 percent of remaining entering class slots is not "narrowly tailored," must also be rejected because it runs afoul of *Grutter*'s core reasoning, and is based itself on the very error it accuses UT of making – reducing individuals to racial and ethnic labels. It fails to appreciate the obvious purpose of UT's use of a *Grutter*-compliant program for the 15 percent of the slots available after the Top Ten Percent Law does its work, namely, to identify those individuals whose character, shaped by personal life experience – including their race, among other factors – makes them the best-suited to fill out the class.

To accept Petitioner's and her *amici*'s arguments that this is not "narrow tailoring" would not only undermine *Grutter*'s central holding and the reasoning of Justice Kennedy's opinion concurring in the judgment in *Parents Involved*, but defy the logic underpinning this Court's analysis elsewhere. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1991) (on "narrow tailoring"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511 (1996) ("greater powers include lesser ones"). Neither UT's tracking of the racial makeup of its applicant pool and entering classes nor the lack of a "hard stop" to its program are grounds for reversal. *See Grutter*, 539 U.S. at 336, 343; *Parents Involved*, 551 U.S. at 790 (Kennedy, J.).

◆

ARGUMENT

I. THE COURT HAS LONG HELD THAT INCREASING RACIAL AND ETHNIC DIVERSITY IN EDUCATIONAL SETTINGS IS CRITICAL TO OUR NATION'S DEMOCRATIC INSTITUTIONS AND IS THEREFORE A COMPELLING STATE INTEREST

A. Racial and Ethnic Diversity in Education, Particularly at Institutions of Higher Learning, is Necessary to Promote Democratic Values in a Society in Which Racial Disparities and Segregation Still Exist

Brown v. Board of Education, 347 U.S. 483 (1954), and the cases that followed it, held the promise of a democracy in which all have an equal voice and an equal chance regardless of race, in line with the post-Civil War Amendments' guarantee of full citizenship for all. U.S. Const. amends. XIII, XIV and XV. To realize racial equality and foster a democracy in which race does not inhibit opportunity, it is not enough to legislate equality and invoke ideals of racial harmony. Such things do not occur by fiat; they require learned behaviors and practice.

"This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all[.]" *Parents Involved*, 551 U.S. at 797 (Kennedy, J.). Yet racial segregation and inequality are unfortunately still with us and race remains a critical variable in the opportunities afforded to our citizens. *See Grutter*, 539 U.S. at 333 ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.").[5]

A variety of data show that African Americans and Hispanics are less likely than white Americans to have graduated from institutions of higher education,[6] are disproportionately imprisoned,[7] hold a

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[5] *See also* William H. Frey, *Census Data: Blacks and Hispanics Take Different Segregation Paths*, THE BROOKINGS INSTITUTION (Dec. 16, 2010), *available at* www.brookings.edu/research/opinions/2010/12/16-census-frey (last visited Aug. 7, 2012) (noting that urban segregation is still largely prevalent today).

[6] *See* Labor Force Characteristics by Race and Ethnicity, 2010, U.S. Department of Labor, U.S. Bureau of Labor Statistics, at 1 (2011), *available at* http://www.bls.gov/cps/cpsrace2010.pdf (last visited Aug. 7, 2012) ("57 percent of Asians in the labor force ha[ve] a bachelor's degree or higher, compared with 35 percent of Whites, 24 percent of Blacks, and 16 percent of Hispanics.").

[7] *See* Quick Facts About the Bureau of Prisons (June 2012), *available at* http://www.bop.gov/news/quick.jsp#1 (last visited Aug. 7, 2012) (finding that African Americans make up 37.4% of the federal prison population and Hispanics make up 34.7%); United States Demographics Profile, Index Mundi (2012), *available at* http://www.indexmundi.com/united_states/demographics_

(Continued on following page)

disproportionately small percentage of political leadership positions,[8] have poorer health outcomes,[9] and have lower incomes.[10] Further, race remains a central feature of our democracy, as reflected in the continuing role it plays in elections. *See, e.g.*, *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *see*

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profile.html (last visited Aug. 7, 2012) (showing that whites make up 79.96% of the U.S. population).

[8] *See, e.g.*, African, Hispanic (Latino), and Asian American members of Congress, *available at* http://www.ethnicmajority.com/congress.htm (last visited Aug. 7, 2012) (showing only two Hispanic Senators and no African American Senators).

[9] *See CDC Health Disparities and Inequalities Report – United States, 2011*, Morbidity and Mortality Weekly Report, at 47-109 (Jan. 14, 2011), *available at* http://www.cdc.gov/mmwr/pdf/other/su6001.pdf (last visited Aug. 7, 2012) (stating that various racial minorities had higher rates than whites, often substantially, of strokes, preterm infant births, obesity, asthma, and hypertension-related complications such as diabetes and kidney disease).

[10] *See* Money Income of Households – Percent Distribution by Income, Level, Race, and Hispanic Origin, in Constant (2009) Dollars, Table 690, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0691.pdf (last visited Aug. 7, 2012) (showing that in 2009, the median income was $51,861 for white households, $32,584 for black households and $38,039 for Hispanic households, and black and Hispanic households were far more likely to live with an annual income of $15,000 or less); Labor Force Characteristics by Race and Ethnicity, *supra* note 6, at 3 ("Hispanics and Blacks have considerably lower earnings than Asians and Whites. In 2010, the median usual weekly earnings of full-time wage and salary workers were $535 for Hispanics and $611 for Blacks, compared with $765 for Whites and $855 for Asians.").

also Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1400 (2001) (voting patterns and race-based preferences in candidate selection). Notwithstanding the election of an African American to the highest office in the land, race remains a significant issue in electoral politics.[11]

Our educational institutions play a crucial role in helping to narrow these racial disparities and in providing a model for the diverse society our democracy aspires to be. Thus, nine years ago, this Court upheld the use of appropriate race-conscious tools at the level of higher education, in part to ensure "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332; *see Parents Involved*, 551 U.S. at 787 (Kennedy, J.); *accord*, 551 U.S. at 722-23. It acknowledged that these mechanisms of social change, including use of "race as a component," may be essential to assure the kind of diversity that "promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Grutter*, 539 U.S. at 330 (citing William G. Bowen and Derek Bok, *The Shape of the River* (1998)).

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[11] *See, e.g.*, Seth Stephens-Davidowitz, *How Racist Are We? Ask Google*, N.Y. Times (June 9, 2012), *available at* http://campaignstops.blogs.nytimes.com/2012/06/09/how-racist-are-we-ask-google/ (last visited Aug. 7, 2012) (analyzing Google search terms to find that President Obama's race played a role in the 2008 election and predicting that it will play an even more significant role in the 2012 election); Spencer Piston, *How Explicit Racial Prejudice Hurt Obama in the 2008 Election*, 32 Pol. Behavior 431 (2010) (finding that negative stereotypes about African Americans significantly eroded white support for President Obama).

These holdings accord with notions expressed by our leaders in every era. As Thomas Jefferson wrote more than two centuries ago, educating "the whole mass of the people" is the "only sure reliance for the preservation of our liberty."[12] It is against the background of this centuries-long recognition of the importance of education to the functioning of our democratic institutions that this Court has held that "achiev[ing] a diverse student body population" is a "compelling interest" and "[r]ace may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered." *Parents Involved*, 551 U.S. at 798 (Kennedy, J.). Thus, when applicants to colleges and universities are "considered for a whole range of their talents and school needs with race as just one consideration," the state's compelling interests are validly achieved. *Id.* at 793.

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[12] 6 The Writings of Thomas Jefferson 391-92 (Memorial ed. 1903); *see also* Abraham Lincoln, First Political Announcement (1832) ("Upon the subject of education . . . I view it as the most important subject which we as a people may be engaged in."); Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910) ("Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.").

B. Social Science Research Demonstrates that Increased Racial and Ethnic Diversity in Higher Education Improves Our System of Democracy

A substantial record of social science research demonstrates that diversity in higher education benefits students of all races and promotes values essential to a strong and vibrant democracy. Diversity encourages the cross-racial interaction that is necessary to enhance students' ability and willingness to engage more collaboratively in civic activities. Diversity also promotes leadership skills and encourages civic engagement among students of all races and ethnicities, encouraging tolerance. It opens students to different perspectives that affect their view of the world and decisions they make as citizens in this Nation.

A key aspect of Petitioner's case rests on the notion that, contrary to *Grutter*, having a "critical mass" of minority students in the student body (and, relatedly, in the classroom) is not a compelling government interest. Implicit in the arguments of Petitioner and her *amici* is a focus on the "costs" of any efforts to achieve such goals through race-conscious means, including the stigma allegedly associated with race-conscious admissions programs and the discord these programs can at times generate.[13] But this Court, in endorsing Justice Powell's guiding opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), has thoughtfully taken account of these points in its *Grutter* decision and *stare decisis* forecloses Petitioner's claim. Further, the overwhelming record of social science research documenting the great benefits of diversity in higher education, for all races and for our democratic institutions, counsels strongly against undoing the settled law on this topic.

Social science research has shown, at the time when *Grutter* was decided and today, the positive effects racially and ethnically diverse student populations have on students of all races, including enhanced cognitive abilities, self-confidence, leadership skills, social activism and engagement, tolerance, and the ability to work collaboratively in a diverse environment.

The seminal work identifying the effects of holistic admissions programs in which race may be considered as one factor is former Princeton and Harvard University Presidents William G. Bowen's and Derek Bok's book *The Shape of the River* (1998).[14] Bowen and Bok analyzed the effects of racial diversity in higher education, primarily as it applies to white and black students. It analyzed data from an immense "College and Beyond" (hereinafter "C&B") database. The C&B database at the time contained records from more than 80,000 undergraduates at 28 "selective colleges and universities" collected in the fall of 1951, 1976 and 1989. *Id.* at lv-lvi.[15]

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[13] *See, e.g.*, Pet. Br. at 25, 30, 33, 36, 43-44; *see also infra notes* 17-24 (discussing the particularized positions of *amici* briefs supporting Petitioner).

[14] For the most recent edition, *see* William G. Bowen & Derek Bok, *The Shape of the River*, lv (2d prtg. 2000).

Bowen and Bok found that race-conscious admissions policies were essential to creating and maintaining racially diverse student bodies at selective universities. *Id.* at 50-51, 234-36. They explained that "race-neutral" methods, such as Texas's Top Ten Percent Law, would not lead to as genuinely diverse and high quality a student population as a race-conscious policy because, among other reasons, black students are only half as likely as white students to end up in the top ten percent of their high school class. As a result, beyond possibly decreasing the pool of eligible black applicants, this type of policy "could well have the effect of lowering minority graduation rates from college and diminishing the pool of students who can compete effectively for positions of leadership in business, government, and the professions." *Id.* at 273-74.

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[15] The C&B database included a variety of information about students, such as their race, gender, test scores, high school academic performance, and family background. *Id.* at lvi. It included post-graduation survey data, including information about students' occupations, professional school enrollments, income, involvement in civic activities and familial status. *Id.*

Bowen and Bok found numerous benefits that accrued to both black and white students at racially and ethnically diverse universities. For example, students who attended schools with racially diverse student populations showed enhanced tolerance and ability to work with members of other races, skills essential for success in an increasingly diverse world. *Id.* at 225-28. Bowen and Bok found students of all races at selective schools, and particularly black students, were more engaged in civic activities, took on more leadership roles, and were more politically active than those at less selective schools. *Id.* at 158-73. All of these benefits from diversity in higher education are critical to the success of our Nation's democratic institutions.[16]

As discussed *infra* pp. 17-29, an unbroken line of research over the past 15 years has built on and bolstered these findings. Collectively, this evidence shows racial and ethnic diversity in student bodies at institutions of higher learning benefit students of all races and promote values critical to the functioning of our government and, generally, a collaborative and law-abiding civil society.

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[16] The authors also identified clear evidence that black students fared better at selective colleges than at other schools in terms of graduation rates, professional school enrollment and post-graduation earnings, even if their grades in college were lower than their high school grades and test scores would have otherwise predicted, and that these students experienced no signs of self-perceived inferiority or demoralization from competition. *Id.* at 88-92, 256-68. Retrospectively, black students at selective colleges reported greater satisfaction with their undergraduate experience than black students at less-selective colleges and white students at more diverse schools reported greater satisfaction with their undergraduate experience than white students at less-diverse schools. *Id.* at 194, 240.

Petitioner's *amici* nevertheless argue that race-conscious admissions policies that result in racially and ethnically diverse student bodies in higher education harm minority and non-minority students and negatively affect campus race relations.[17] They allege that these policies dis-incentivize minority students by leading them to expect future preferences, result in academic underperformance by minorities which causes "disidentification with academic excellence,"[18] and discourage minority students from pursuing prestigious and rewarding careers.[19] They claim policies that consider race as one factor in assembling a diverse class harm other minority groups such as Asian Americans.[20]

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[17] *See, e.g.*, Brief of Abigail Thernstrom et al. as Amici Curiae in Support of Petitioners [hereinafter "Am. Brief of Thernstrom et al."], at 10 ("Whether in the former Yugoslavia . . . or the Far East, contact between people of different racial and ethnic groups is more likely than not to lead to tension, ethnic conflict, and a tendency to self-segregate").

[18] *See id.* at 24-32.

[19] *See* Amicus Brief of Gail Heriot et al. in Support of the Petitioner [hereinafter "Am. Brief of Heriot et al."], at 4-25 (contending that "African-American students attending law schools failed or dropped out at much higher rates than white students" and stating that "[s]ince many of these students who left law school would likely have performed better at a less competitive law school, they appear to have been, in a very real sense, victims of affirmative action").

Ultimately, the arguments set forth by Petitioner's *amici* hinge on the contention that the substantial body of social science data identifying the positive benefits of racial and ethnic diversity in higher education for students of all races and ethnicities is fundamentally flawed or misinterpreted.[21] Petitioner's *amici* seek to discredit the conclusions of Bowen and Bok and an array of other social scientists by misconstruing the data,[22] by focusing on the data's less telling trends,[23] and by overlooking their obvious and powerful conclusions.[24] Petitioner's *amici* essentially seek to undermine *Grutter*'s "compelling interest" holding, without genuine support, and it is imperative that this Court appreciate the significant and positive impact that racial and ethnic diversity in higher education have on the effective functioning of society and our Nation's democratic institutions.

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[20] *See, e.g.*, Brief for the Asian American Legal Foundation and The Judicial Education Project as Amici Curiae in Support of Petitioner, at 6-13; Brief Amicus Curiae of The Louis D. Brandeis Center for Human Rights Under Law et al. in Support of Petitioner, at 5-20.

[21] *See* Am. Brief of Heriot et al., *supra* note 19, at 25-34; Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner, at 10-13; Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party [hereinafter "Am. Brief of Sander and Taylor"], at 2-11.

[22] *See, e.g.*, Am. Brief of Heriot et al., *supra* note 19, at 25-29.

[23] *See, e.g.*, Am. Brief of Thernstrom et al., *supra* note 17, at 25; Am. Brief of Heriot et al., *supra* note 19, at 8.

[24] *See, e.g.*, Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner, at 22; Am. Brief of Sander and Taylor, *supra* note 21, at 19 n.53.

1. Racial and Ethnic Diversity Provides Significant Educational Benefits to All

A broad range of research continues to demonstrate that, by exposing students to divergent perspectives and experiences in the classroom, institutions of higher education enable students of all backgrounds to interact, perhaps for the first time, with racial and ethnic groups different from their own. These experiences enhance their academic success and critical thinking skills, general knowledge, intellectual motivation and self-confidence. The data directly show a convincing link between diversity in higher education and a more educated and informed citizenry, the foundation for an effective and functioning democracy.

For example, social scientists at the University of Michigan found a statistically significant and positive relationship, among students of all races, between cross-racial experiences in the classroom and certain critical learning outcomes, such as active thinking, academic skills, and intellectual engagement and motivation. Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. R. 330 (2002). The researchers examined two extensive data sets, one local and one national, that included surveys from nearly 13,000 undergraduate students as freshmen and again four years later. They identified widespread patterns of educational benefits at both a single university and across varying institutional contexts, concluding that "the actual experiences students have with [racial and ethnic] diversity *consistently and meaningfully* affect important learning and democracy outcomes of a college education."[25] *Id.* at 358 (emphasis added).

More recently, social scientists at the University of California, Los Angeles, found that students who engaged in high levels of cross-racial interaction in college reported "significantly larger gains" than their counter-parts in their critical-thinking skills, problem solving skills, general knowledge, and intellectual and social self-confidence. Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Educ. 430 (2006). This study analyzed data recorded over a four year period from nearly 20,000 students of varying racial and ethnic backgrounds at 227 institutions.

There are a variety of explanations for the correlation between racial and ethnic diversity in higher education and enhanced cognitive and academic abilities. Gurin et al. posit that personal and social identity is formed during late adolescence and early adulthood, and "[h]igher education is especially influential when its social milieu is different from students' home and community background and when it is diverse and complex enough to encourage intellectual experimentation and recognition of varied future possibilities." 72 Harv. Educ. R. at 335. Cross-racial interactions in institutions of higher education are particularly significant because many students enter college having come from a segregated educational background. As Sylvia Hurtado has explained:

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[25] These benefits include an increase in students' drive to achieve, intellectual self-confidence, general knowledge, ability to think critically and to employ problem-solving skills, self-ratings of academic ability and listening ability, and beliefs in influencing the political structure and helping others in the community. *Id.* at 347.

> The theory of how diversity works in education . . . suggests that most of us are cognitively inclined to rely on familiar ways of thinking that include habits, routine, and even stereotypes that dominate our world view. . . . However, when encountering unfamiliar and novel situations, people, and experiences, it becomes difficult to rely on these familiar ways of thinking and acting. . . . To learn or grow cognitively, individuals need to recognize cognitive conflicts or contradictions, situations that . . . lead to a state of uncertainty, instability, and possibly anxiety. Thus, with the right amount of support and challenge, these moments of instability can lead to many dimensions of growth.

Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 R.

Higher Educ. 185, 189-90 (2007).[26] These studies, as well as many others,[27] underscore the continued importance of racially and ethnically diverse student bodies at institutions of higher learning.

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[26] *See also* Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (2007), discussed *infra* at pp. 28-29 (applying mathematical modeling to suggest that exposure to diverse perspectives enhances cognitive thinking and problem-solving skills).

[27] *See, e.g.*, Chad Loes, Ernest Pascarella & Paul Umbach, *Effects of Diversity Experiences on Critical Thinking Skills: Who Benefits*, 83 J. Higher Educ. 1 (2012) (finding that students with low levels of academic preparation prior to college benefitted from interacting with students of another race in college); Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 R. Higher Educ. 185 (2007) [hereinafter Hurtado, *Educational and Civic Missions*] (discussing the extensive social science research that has found educational benefits associated with racial and ethnic diversity in higher education); Shouping Hu & George D. Kuh, *Diversity Experiences and College Student Learning and Personal Development*, 44 J. Coll. Student Dev. 320, 327 (2003) (finding, based on a study of over 50,000 students, that interactional diversity on campus provided "substantial, uniformly positive effects" on general education, personal development, vocational preparation, science and technology, and intellectual development); Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Gary Orfield ed., 2001) [hereinafter Hurtado, *Educational Purpose*] (finding a "substantial positive" correlation between diversity in higher education and academic abilities including critical thinking and problem solving skills).

2. Racial and Ethnic Diversity Promotes Leadership Skills and Increases Civic and Political Engagement

This Court has consistently recognized that diversity in an academic setting instills civic values in students and is necessary for us to advance as a vibrant democratic society.[28] Social science research has found a significant correlation between a student's exposure to diversity in higher education and the student's interest and effectiveness in taking on leadership roles in society and becoming more socially and politically active.

Bowen and Bok found students of all races in a diverse university environment will be more likely to participate in civic contributions and volunteer activities, and perform as leaders in those areas. *See The Shape of the River* at 156-62.[29] Hurtado's 2001

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[28] *See Grutter*, 539 U.S. at 331 ("education . . . is the very foundation of good citizenship" and "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity") (citation omitted)); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) ("The atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body.").

[29] They found that African American students at predominantly white universities were particularly likely to give back to their communities after graduation and engage in leadership roles: "[M]inority graduates with advanced degrees are the backbone of the emergent black and Hispanic middle class. Their presence has brought greater diversity to the emergency clinics

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analysis reaffirmed their findings and showed that racially and ethnically diverse student and faculty populations in a college setting strongly influence the development of civic leadership skills in students of all races and ethnicities. Hurtado, *Educational Purpose* at 196-98 (analyzing data from 4,253 students and 16,000 faculty members at 309 universities over a four year period).

Many researchers have also found a positive correlation between diverse student populations in institutions of higher learning and greater student interest, by students of all races and ethnicities, in giving back to their communities and in becoming socially and politically active.[30] In fact, researchers

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and surgery rooms of leading hospitals, to government offices and law firms, to corporate hierarchies, and to the practice of entrepreneurship. They have also gained the training that will allow them to offer medical services to traditionally underserved communities and give political leadership to struggling urban constituencies." *Id.* at 116. *Amici* for Petitioner argue that minorities who attend schools with race-conscious admissions policies tend to "abandon" their initial aspirations for certain science-related careers as a result of these policies. *See* Am. Brief of Sander and Taylor, *supra* note 21, at 5. They fail to appreciate that many of these students may simply change their aspirations, without lowering them, to pursue different and more leadership-oriented roles in society.

[30] *See* Ernest T. Pascarella et al., *Some Complexities in the Effects of Diversity Experiences on Orientation Toward Social/Political Activism and Political Views in the First Year of College*, 83 J. Higher Educ. 467 (2012); Hurtado, *Educational and Civic Missions*, *supra* note 27, at 191-92; Hurtado, *Educational Purpose*, *supra* note 27, at 197. These studies powerfully rebut Petitioner's *amici*'s assertions regarding the so-called "low effort

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recently found that this increase in sense of civic duty and eagerness to improve society began as early as the first year in college and remained well after graduation. *See* Ernest T. Pascarella et al., *Some Complexities in the Effects of Diversity Experiences on Orientation Toward Social/Political Activism and Political Views in the First Year of College*, 83 J. Higher Educ. 467, 488 (2012) (analyzing data from 19 institutions and nearly 3,000 students over four years).

It is thus no surprise that, when researchers set out to determine the long-term effects of diversity experiences on a college student, they found a positive correlation between racial and cultural diversity in college and volunteer work thirteen years after graduation. Nicholas A. Bowman et al., *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J. Coll. Student Dev. 729, 735 (2011) (analyzing data from 416 respondents who completed three waves of surveys over a 13 year period).[31]

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syndrome" and the prediction that minority students who benefit from race-conscious admissions policies will be less likely to "work hard" in the future. Am. Brief of Thernstrom et al., *supra* note 17, at 26-32.

[31] *See also* Alexander W. Astin, *Diversity and Multiculturalism on the Campus*, 25 Change 44 (1993) (finding that diversity in higher education promotes specific values such as dedication to improving the environment). It is also important to note the effect of higher education on increased voting participation. *See, e.g.*, Barry C. Burden, *The Dynamic Effects of Education on Voter*

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Scholars have identified a variety of reasons why interacting with people of different races during college or graduate school may spur a student to become more involved in the social and political dimensions of a democratic society. One is that experiences with racially and ethnically diverse groups give rise to the "orientations that students will need to be citizens and leaders in the postcollege world: perspective-taking, mutuality and reciprocity, acceptance of conflict as a normal part of life, capacity to perceive differences and commonalities both within and between social groups, interest in the wider social world, and citizen participation."[32] Others suggest that racial, ethnic, and other forms of diversity in a college setting expand a person's awareness of different perspectives and knowledge of people in marginalized groups, and this personal orientation may increase

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Turnout, 28 Electoral Stud. 540 (2009); D. Sunshine Hillygus, *The Missing Link: Exploring the Relationship Between Higher Education and Political Engagement*, 27 Pol. Behav. 25 (2005). Greater access to higher education for minorities should therefore lead to increased voting participation by these groups.

[32] Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes,* 72 Harv. Educ. R. 330, 341 (2002). *See also* Nicholas A. Bowman et al., *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J. Coll. Student Dev. 729, 736 (2011) ("[These] behavioral and attitudinal outcomes are quite consistent with some of the primary intended impacts of college diversity: to increase students' recognition of societal inequities and their demonstrated commitment to improving society.").

the student's motivation to engage in social and political activism.[33]

Regardless of the reason – or, more likely, reasons – behind the outcomes, the evidence establishes that racial and ethnic diversity in higher education promotes the skills and motivation necessary for students to become active, productive, and engaged members of and leaders in our democratic society.

3. Racial and Ethnic Diversity in Higher Education Increases Tolerance and Leads to a More Collaborative Civil Society

"Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. Lessons of tolerance and collaboration learned in diverse academic settings underscore our shared concerns and interests that keep our democracy healthy and ameliorate the divisions that hinder realization of the goal of "E Pluribus Unum."

Nearly a decade ago, this Court acknowledged that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[34] Since then, the Nation's cultural and racial composition has grown even more diverse.[35] A growing body of research confirms that student body diversity along a variety of variables, including race and ethnicity, in higher education promotes values – such as cross-racial tolerance, awareness and understanding – necessary for achieving a collaborative civil society composed of many racial and ethnic groups.[36]

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[33] *See* Loes, Pascarella & Umbach, *supra* note 27; Linda J. Sax, *Gender matters: The variable effects of gender on the student experience,* 14 About Campus 2, 8 (2009).

It is now well-established that exposing undergraduate and graduate students to others in the student body from diverse racial and ethnic backgrounds increases students' knowledge of and ability to accept peers who are of different races and cultures.[37] Although merely placing students in an

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[34] *Grutter*, 539 U.S. at 330.

[35] *See* Laura B. Shrestha & Elayne J. Heisler, Cong. Research Serv., *The Changing Demographic Profile of the United States*, RL32701, 21 (2011), *available at* www.fas.org/sgp/crs/misc/RL32701.pdf (last visited Aug. 7, 2012).

[36] *See* Hurtado, *Educational and Civic Missions*, *supra* note 27, at 190-91; Mitchell J. Chang, *Is It More Than About Getting Along? Broader Educational Relevance of Reducing Students' Racial Biases*, 42 J. Coll. Student Dev. 93 (2001).

[37] *See* Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Educ. 430 (2006); Hurtado, *Educational Purpose*, *supra* note 27; Astin, *supra* note 31; *see also* Jim Antony, *Can We All Get Along? How College Impacts Students' Sense of the Importance of Promoting Racial Understanding* (Nov. 7, 1993) (paper presented at the Annual Meeting of the Association for the Study of Higher Education) (finding that cross-racial awareness

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environment in which other students are interacting across racial lines contributes to a student's development, a student's own interaction (in and outside the classroom) with a person of another racial or ethnic group is a more powerful way to inculcate democratic values and foster the kind of collaboration needed in civil society in a democratic republic such as the United States.[38]

Tolerance and awareness resulting from cross-racial experiences prepare college level students for the diverse workplace they will encounter after graduation and better enables them to work collaboratively with people of other races.

> To improve students' racial judgments so that they are more favorable and less stereotypic, students must be provided with the opportunity to thoroughly inspect biased and erroneous information and to more effectively process new information. . . . Institutions of higher education do not only provide extraordinary possibilities for sustained meaningful interaction and dialogue between

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is particularly enhanced if students discuss diversity-related issues in class).

[38] *See* Chang et al., *supra* note 37. This evidence refutes *amici*'s argument that increasing cross-racial interaction between students actually *damages* relations among the races. Am. Brief of Thernstrom et al., *supra* note 17, at 9-10 (comparing interaction among students of different races at U.S. schools to strife among ethnic groups in Central Africa as well as in the former Yugoslavia).

> individuals of different racial groups, but can also deepen students' understanding of different points of view about how race affects individual and institutional biases.[39]

In *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (2007), University of Michigan Professor Scott Page uses mathematical models and case studies to illustrate the positive impact that diversity in institutions of higher learning can have on our democratic society. Page shows that organizations composed of different types of individuals are more productive than homogenous organizations because diverse groups of people provide more and different ways of viewing a problem, thereby providing more and different – and quicker – ways of solving the problem.

Page found that diverse groups of problem solvers outperformed the groups of the smartest individuals at solving problems measured traditionally, the reason being the diverse group became stuck less often than the smart individuals who tended to apply similar cognitive "tools" to a given situation – *i.e.*, similar people think similarly.[40] Applying this analysis to a democracy, Page concluded that a more diverse group of voters will make better decisions than a group that is homogenous and that nations with diverse market economies and cultures may be at an advantage.[41] *Id.* at 347. As Page concisely notes: "Our hope for democracy cannot rest on informed, engaged citizens. It must include diversity as well." *Id.*

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[39] Chang, *supra* note 36, at 103; *see also* Patricia Gurin, Biren A. Nagda & Gretchen E. Lopez, *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. Issues 17, 19 (2004) (students "who interact with diverse students in classrooms and in the broad campus environment will be more motivated and better able to participate in a heterogeneous and complex society").

II. THE UNIVERSITY OF TEXAS'S ADMISSIONS PROGRAM IS "NARROWLY TAILORED" AND SUMMARY JUDGMENT WAS APPROPRIATE

In addition to wrongly seeking the overruling or undermining of *Grutter*'s "compelling state interest" analysis, Petitioner and her *amici* ask the Court to depart from the straightforward principles that its "narrow tailoring" analysis dictates, not just in the arena of race-conscious admissions programs but across a broad swath of constitutional law. In describing "the hallmarks of a narrowly tailored [race-conscious] admission plan," this Court in *Grutter* observed that such plans require that "race be used in a flexible, nonmechanical way" and "that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks" or "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." 539 U.S. at 334. Insofar as it operates as a race-conscious plan at all, UT's admissions program adheres to all of these mandates.

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[40] *See also supra* at pp. 17-20 (discussing research finding that exposing students to racially diverse perspectives positively affects their cognitive abilities).

[41] *Amici* for Petitioner allege that affirmative action policies cause students to receive lower grades and therefore have a "Costly Side-Effect." Am. Brief of Sander and Taylor, *supra* note 21, at 5. Aside from ignoring premiums applied to grades from elite institutions, *amici*'s cost-benefit analysis fails to take into account the advantages that diverse perspectives provide to students of all racial and ethnic groups.

Petitioner and her *amici* point to several features of the UT affirmative action program that purportedly distinguish this case from *Grutter*, most pointedly the fact that the Top Ten Percent Law has proved somewhat helpful in increasing the numbers and percentages of African Americans and Hispanics in the entering classes. *See* Pet. Br. at 37-42. Petitioner contends that the race-conscious "holistic" review of the remaining applicants as "a factor of a factor of a factor of a factor"[42] is insufficiently necessary given the success of the Top Ten Percent Law and other means UT could use to boost minority enrollment. Petitioner's arguments, in this context, rest on the truism that no prior decision of this Court can ever be "strictly controlling, in the sense that no holding can be broader than the facts before the court." *United States v. Stanley*, 483 U.S. 669, 680 (1987). But in applying its precedents this Court looks to the "reasoning" of prior cases. *Id. Grutter*'s reasoning, fairly stated, and that of other lines of "narrow tailoring" cases provide no support to Petitioner.

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[42] *Fisher v. Univ. of Texas*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009).

Petitioner's central point is that the use of a holistic review, including race as just one factor, generates "'gratuitous racial preferences.'" Pet. Br. at 35 (quoting Pet. App. 182a (Jones, C.J., dissenting from the denial of en banc review)). But nothing could be more wrong, as Respondent amply demonstrates in its brief. UT considers race, but gives it no more weight than socioeconomic background, work experience, community service or a number of other factors. *See* Resp. Br. at 13-14. Race is not considered in isolation, but is simply part of UT's examination of each applicant as a "whole person." *Id.* There is no evidence for Petitioner's claim that UT measures "success" solely along the criteria of "racial balancing," *i.e.*, by the percentage of minorities admitted irrespective of the *other* qualities minorities chosen through a non-blind review will bring to the class. Instead it is Petitioner, not UT, who is guilty of focusing solely on applicants' race and nothing more. "[S]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike," *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), and it is this error that underpins the whole of Petitioner's case.

Race conscious measures to achieve this type of diversity and integration are entirely appropriate in a democracy in which segregation and racial inequalities continue to exist. The Texas Legislature recognized this essential truth in its recent legislation, finding that basing admissions decisions on any simple criterion, such as being in the top 10 percent of one's high school class, is unlikely to be a complete substitute for policies that permit assessment of an applicant's race as one component out of many.[43] The Texas Legislature thus has made clear that the Top Ten Percent Law does not pre-empt use of race as a factor in a holistic review of an applicant's file. Section 7 of Acts 2009, 81st Leg., ch. 1342, addressing Texas's "Closing the Gaps" initiative, states: "Nothing in this Act prevents a general academic teaching institution in this state from engaging in appropriate individualized holistic review, consistent with that purpose [of fostering diversity including racial diversity], for the admission of students who are not entitled to automatic admission under [the Ten Percent Law]." Thus, Texas recognizes that applicants admitted outside of the "grades-only" track dictated by the Top Ten Percent Law may be different in ways critical to democratic values underlying publicly supported higher education.

It is not unconstitutional in this context that UT's system admits relatively few minority students,

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[43] *See also* Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. Labor Econ. 113, 116 (2010) (finding that race-neutral admissions policies would cause black and Hispanic representation at four-year colleges to decline, particularly at the most selective institutions).

511 (1996) ("we do not dispute the proposition that greater powers include lesser ones"). In this respect, the relevant "critical mass" Texas seeks is not one based on racial balancing, but rather the desire to admit candidates of all backgrounds for whom race and other factors, each weighed individually, illustrate potential for leadership or other skills.

Precisely because the Top Ten Percent Law poses the risk of downplaying the role of extracurricular activities in university admissions (as well as potentially adversely affecting equally academically qualified students from highly competitive high schools), UT's plan is the quintessential "narrowly tailored" program. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1991) (if the government's goal would be "achieved less effectively" without the challenged feature, the feature is "narrowly tailored" to the end advanced).[44] Given that every applicant of every race can compete for these slots and is not subject to rejection *solely* based on their race, this is a properly tailored way of realizing UT's First Amendment interests in selecting who shall attend in order to achieve the benefits of a diverse student body. *Compare Grutter*, 539 U.S. at 334-35 *with* J.A. at 152a-314a (depositions of University officials). Here, race is "used in a flexible, nonmechanical way," *Grutter*, 539 U.S. at 334-35, such that a white student who has at the margin, via its race-conscious holistic admissions program. *Compare Parents Involved*, 551 U.S. at 790 (Kennedy, J.). As both the District Court and the Fifth Circuit recognized, this case is not about "[c]rude measures . . . that threaten to reduce children to racial chits," *id.* at 798, but rather a system that evaluates each applicant not admitted under the Top Ten Percent Law according to a broad spectrum of factors, of which race is only one that is looked at in the context of all the others. It is "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component." *Id.* at 790. Furthermore, unlike the Top Ten Percent Law, this holistic review process "permits the consideration of diversity within racial groups," in recognition of this Court's observation of the need to "account for the differences between people of the same race" in order to foster true diversity and break down racial barriers. Resp. Br. at 33-34 (*quoting League of United Latin American Citizens v. Perry*, 548 U.S. 399, 434 (2006)).

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[44] *See also, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 568-70 (2001); *United States v. Paradise*, 480 U.S. 149, 171-85 (1987).

By seeking to create a "critical mass" of students whose race, combined with other factors, such as *either* academic or extra-curricular achievement or both, puts them ahead of others, Texas has, doubtless to avoid upsetting expectations that grew up around the Top Ten Percent Law, sought to create, to the extent feasible, a class of students admitted based on the same criteria that this Court adopted in *Grutter*. Although it is not always the case, here less *is* less. *See 44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, overcome personal obstacles can be admitted on the same basis as others whose racial status and experience, and other factors, indicate academic strength, character or potential for leadership.

Beyond this, Petitioner and her *amici* focus on two other features of this case. First, they challenge UT's tracking of statistics showing the numbers and percentages of minorities who apply, are admitted, and enroll, *see* Pet. Br. at 26-30, conduct that this Court in *Grutter* and Justice Kennedy in his controlling opinion in *Parents Involved* held were insufficient to support a conclusion that the program was not "narrowly tailored" to support a compelling interest. *See Grutter*, 539 U.S. at 336 ("'[S]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota."); *Parents Involved*, 551 U.S. at 790 (Kennedy, J.) (noting the constitutional validity of "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component"). Second, they point to the lack of a "hard stop" to Texas's program, a factor that was also present in *Grutter*. *See* 539 U.S. at 343; Pet. Br. at 36. Here, it suffices that the University's admissions program is subject to periodic, close review. *See* J.A. at 124a, 398a.

◆

CONCLUSION

For these reasons, the judgment below should be affirmed.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

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IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF BROWN UNIVERSITY, UNIVERSITY OF CHICAGO, COLUMBIA UNIVERSITY, CORNELL UNIVERSITY, DARTMOUTH COLLEGE, DUKE UNIVERSITY, HARVARD UNIVERSITY, JOHNS HOPKINS UNIVERSITY, MASSACHUSETTS INSTITUTE OF TECHNOLOGY, UNIVERSITY OF PENNSYLVANIA, PRINCETON UNIVERSITY, STANFORD UNIVERSITY, VANDERBILT UNIVERSITY, AND YALE UNIVERSITY IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Brown University, University of Chicago, Columbia University, Cornell University, Dartmouth College, Duke University, Harvard University, Johns Hopkins University, Massachusetts Institute of Technology, University of Pennsylvania, Princeton University, Stanford University, Vanderbilt University, and Yale University submit this brief as amici curiae in support of respondents. Amici have long used admissions policies similar to the Harvard Plan that Justice Powell approved in *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), and the University of Michigan Law School plan this Court upheld in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). Amici accordingly have substantial experience with admissions policies that consider all aspects of an applicant's background and experience, including in some circumstances the applicant's racial or ethnic background.

Although Amici differ in many ways, they speak with one voice to the profound importance of a diverse student body—including racial diversity—for their educational missions. Amici seek to provide their students with the most rigorous, stimulating, and enriching educational environment, in which ideas are tested and debated from every perspective. They also seek to prepare active citizens and leaders in all fields of human endeavor. Although all Amici have highly selective admissions criteria designed to ensure that all of their students (including minority students) will be prepared for demanding coursework and will graduate successfully, they all recognized long ago that admissions by purely numerical factors such as grade-point averages and standardized test scores would not effectively accomplish their broader educational missions.

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[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

Amici therefore examine all aspects of individual applicants to assess potential for both extraordinary achievement and contribution to the university's learning environment. This holistic review is necessary in light of Amici's missions and roles. Each includes undergraduate, graduate, and professional schools. All draw applicants from around the nation and the world. All emphasize collaborative research, teaching, and learning. And all are residentially based communities where learning takes place not just from faculty but also in the broad range of students' interactions with their peers, in the classroom, and in many other settings.

In Amici's experience, a diverse student body adds significantly to the rigor and depth of students' educational experience. Diversity encourages students to question their own assumptions, to test received truths, and to appreciate the spectacular complexity of the modern world. This larger understanding prepares Amici's graduates to be active and engaged citizens wrestling with the pressing challenges of the day, to pursue innovation in every field of discovery, and to expand humanity's learning and accomplishment.

Amici have relied on *Bakke* and *Grutter* in shaping admissions policies designed to achieve these goals. A decision questioning or repudiating the principles in those cases could significantly impair Amici's ability to achieve their educational missions. Although Amici are private institutions, they are cognizant that Title VI of the Civil Rights Act of 1964 forbids institutions that receive federal funds from engaging in racial "discrimination," and so their ongoing efforts to attain diverse student bodies could be compromised by new limits this Court might place on state university admissions procedures. Amici accordingly urge the Court to interpret the Constitution, consistent with *Bakke* and *Grutter*, to continue to allow educational institutions to structure admissions programs that take account of race and ethnicity as single factors within a highly individualized, holistic review process.

SUMMARY OF ARGUMENT

This Court held in *Grutter* that diversity in higher education, of which race and ethnicity may be components, is a compelling government interest. This Court also held that the Constitution does not require a university to choose between academic selectivity and diversity, and thus does not require a university to use mechanistic, ostensibly race-neutral admissions plans as its means of obtaining a diverse student body. Petitioner here does not challenge either of those holdings, which remain of exceptional importance. Universities continue to have a compelling interest in ensuring that their student bodies reflect a robust diversity that enables them to offer a learning environment that enriches the educational experience for all students and also prepares them to be active, capable citizens and leaders in a complex and heterogeneous nation and world. A constitutional rule that universities may achieve such diversity only through the use of mechanistic policies would not only be unworkable for Amici institutions but would be fundamentally incompatible with Amici's educational missions. This Court accordingly should take pains not to disturb, indeed should emphatically reaffirm, those core holdings of *Grutter*.

The arguments petitioner does make in challenging the admissions policy of the University of Texas ("UT") would have this Court depart significantly from its settled equal protection jurisprudence. Amici write to emphasize three conspicuous errors in petitioner's understanding of strict scrutiny.

First, the decision in *Grutter*, not the various opinions in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), supplies the appropriate framework for reviewing race-conscious university admissions policies. *Parents Involved* addressed student assignment policies markedly different from holistic review. The Court emphasized in *Parents Involved* that the policies at issue were structured such that race was effectively the entire classification; the policies employed race in a mechanistic, binary fashion; and the policies called for no individualized consideration of any other aspects of a student. Both the majority opinion and the concurring opinion of Justice Kennedy therefore drew a sharp distinction between the policies at issue in *Parents Involved* and those approved in *Grutter*.

Second, petitioner's understanding of the scope and nature of the educational benefits of diversity is deeply flawed. This Court recognized in *Grutter* that one aspect of the mission of many universities is training future citizens and leaders for a heterogeneous society, and that diversity is vital to that objective. Petitioner's claim (at 26) that diversity is exclusively an "inward-facing" concept misunderstands both precedent and the educational mission of many universities, including Amici. Petitioner's related contention—that any consideration by a university of demographics in assessing diversity amounts to racial balancing—is equally misplaced. When a university considers which applicants will best contribute to a vibrant learning environment intended to prepare citizens and leaders for a heterogeneous society in which race remains a salient social factor, the university need not ignore the communities from which its students come and into which its students will graduate, whether it be a single state, the nation, or the world.

Third, contrary to petitioner's contention, this Court has never applied a strong-basis-in-evidence standard to race-conscious university admissions, and it should not do so now. This Court has applied that standard in the public contracting and employment contexts, where race was the predominant consideration in measures ostensibly taken to remedy historical discrimination or to avoid claims of discrimination. Those settings have nothing to do with the consideration of race and ethnicity as single aspects of individualized review in higher education. The application of such a standard to higher education would seriously impair a university's ability to use its educational judgment and experience, developed over decades, in deciding which students to admit. Educational judgment and experience are fundamental components of a university's academic freedom, protected by the First Amendment. Petitioner's proposed standard, moreover, could have a particularly significant impact on Amici: Given the large number of qualified applicants to whom each institution must deny admission every year and the nonquantifiable aspects of individualized, holistic review, it would invite significant litigation and judicial intrusion into university admissions processes and decisions.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM *GRUTTER*'S CORE HOLDINGS THAT DIVERSITY IS A COMPELLING INTEREST AND THAT UNIVERSITIES MAY PURSUE DIVERSITY WITHOUT RELYING UPON OSTENSIBLY RACE-NEUTRAL ALTERNATIVES THAT WOULD UNDERMINE OTHER IMPORTANT ASPECTS OF A UNIVERSITY'S MISSION

A. Diversity Remains A Compelling Educational Interest For Amici Institutions

Justice Powell recognized in *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), and this Court held unequivocally in *Grutter* v. *Bollinger*, 539 U.S. 306, 328 (2003), that universities "ha[ve] a compelling interest in attaining a diverse student body." The Court in *Grutter* further underscored that the educational benefits of diversity are "substantial" and "not theoretical but real." *Id.* at 330. These are points to which Amici can attest without qualification. Decades of experience with admissions policies based on the Harvard Plan, *Bakke*, and *Grutter* have convinced them that the quality of their students' education is greatly enriched if the student body is diverse in many ways—including racial and ethnic diversity. Diversity encourages students to question their assumptions, to understand that wisdom and contributions to society may be found where not expected, and to gain an appreciation of the complexity of the modern world. In these ways, diversity bolsters the unique role of higher education in "preparing students for work and citizenship" and training "our Nation's leaders" for success in a heterogeneous society. *Id.* at 331, 332; *see Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701, 783 (2007) ("Diversity ... is a compelling educational goal that a school district may pursue.")

(Kennedy, J., concurring in part and concurring in the judgment).

Petitioner does not ask this Court to abandon *Grutter's* holding on this score. *See, e.g.*, Pet. Br. 26 ("*Grutter* ... permits race to be used as a factor in admissions decisions to obtain a 'critical mass' of otherwise underrepresented minority students for educational reasons."); JA74a. That acknowledgment is exceptionally important to Amici. The admissions policies of Amici vary somewhat, but each is firmly committed to individualized, holistic review of the type long approved of by this Court.[2] In deciding which students to admit, Amici consider all aspects of their applicants both as individuals and also in relation to other potential members of the incoming class. That review is intended to produce a student body that is talented and diverse in many ways, including in intellectual interests, geography, socio-economic status, background and experience (including race and ethnicity), perspective, and areas of accomplishment.

1. In pursuing an academically excellent and broadly diverse student body, Amici do not place dispositive weight on objective numerical measures such as

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[2] *See Grutter*, 539 U.S. at 337 (upholding admissions policy because the Law School "engages in a highly individualized, holistic review of each applicant's file"); *Gratz* v. *Bollinger*, 539 U.S. 244, 271 (2003) (identifying constitutional vice in undergraduate admissions as the absence of "individualized consideration"); *id.* at 276 (O'Connor, J., concurring) (flaw in undergraduate admissions was a lack of "meaningful individualized review of applicants"); *Bakke*, 438 U.S. at 315 (Powell, J.) ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

GPA and SAT scores. Certainly, Amici seek students who have the potential to succeed at demanding coursework, but each institution's applicant pool includes many more academically strong candidates than the institution could hope to admit, and even the highest GPA or SAT scores by no means guarantee admission.[3] Thus, in addition to seeking students who are qualified, each institution also looks to compose a student body that is exceptional, complementary, and diverse in many ways. In service of this goal, each institution seeks, and invites applicants to submit, any relevant information about their experiences, accomplishments, and background to understand how the applicant might contribute to the vibrancy of the student body. The individualized, holistic review processes employed by Amici are not ways of ranking candidates from "strong" to "weak" but instead means to assemble an exceptional undergraduate community that exposes students to differences of many kinds: backgrounds, ideas, experiences, talents, and aspirations.

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[3] Amici's focus on factors beyond objective qualifications reflects both their educational philosophy and the strength of their applicant pools. For example, in the most recent admissions year, one Amicus could have filled more than two full matriculating classes from students ranked first in their high schools. In fact, however, only 12 percent of those applicants were admitted, comprising slightly more than 21 percent of the total number of admitted applicants. For that school, more than eight matriculating classes could have been filled by students in the top ten percent of their high schools. Another Amicus recently admitted only six percent of applicants in the top ten percent of their high school classes and declined to admit nearly two thirds of applicants with perfect SAT scores. And a third Amicus institution has admitted, over the last three admission cycles, fewer than half of applicants with perfect SAT scores. That same institution received applications from 2,272 valedictorians for the class of 2016, but admitted only 294 of those applicants.

Amici's admissions policies are based on the principle that, in a free society, inquiry proceeds best when views and goals must withstand examination from the widest possible range of perspectives. And Amici's experiences bear this out: A student body that is diverse in many dimensions, including racial and ethnic background, produces enormous educational benefits. Such diversity significantly improves the rigor and quality of students' educational experiences by leading them to examine and confront themselves and their tenets from many different points of view. It also prepares them for life, work, and leadership in a nation and world that are constantly becoming more complex.

This diversity benefits society as well, for it fosters the development of citizens and leaders who are creative, collaborative, and able to navigate deftly in dynamic, diverse environments. Indeed, the university plays a unique and critical role in this respect, for in our society a university educational experience may offer one of the few opportunities for individuals to live and interact on a daily basis with peers from markedly different backgrounds, experiences, and perspectives. As one university president has explained:

> Princeton also offers you a once-in-a-lifetime opportunity to connect with men and women whose lives have differed dramatically from your own; who view the world from a different vantage point. Never again will you live with a group of peers that was expressly assembled to expand your horizons and open your eyes to the fascinating richness of the human condition. ... The reason [the Admission Office] took such

> care in selecting all of you—weighing your many talents, your academic and extracurricular interests, your diverse histories—was to increase the likelihood that your entire educational experience, inside and outside the classroom, is as mind-expanding as possible. When you graduate you will enter a world that is now truly global in perspective, and in which success will require that you have a cosmopolitan attitude. You must be equipped to live and work in not one culture, but in many cultures.

Shirley M. Tilghman, *2005 Opening Exercises Greeting and Address* (Sept. 2005), *available at* http://www.princeton.edu/president/speeches/20050911.[4]

Like this Court, Amici look forward to the day when race does not matter. *See Grutter*, 439 U.S. at 343 (anticipating that "25 years from now, the use of racial preferences will no longer be necessary to further the interest" in diversity); *id.* at 346 (Ginsburg, J., concurring) ("one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action"). But for now, "the reality is that" "race [does] matter[]." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment); *accord Grutter*, 539 U.S. at 332-333. To say that race continues to matter is to acknowledge forthrightly that, for many reasons—including the frustrating persistence of segregated schools and communities—race continues to shape the backgrounds, perspectives, and experiences of many in our society, including Amici's students. *See, e.g., Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment) ("Due to a variety of factors ... neighborhoods in our communities do not reflect the diversity of our Nation as a whole.").

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[4] For Amici, diversity is meant to benefit the student body both inside and outside the classroom. Because Amici are all residential institutions, each strives to create a learning environment in which education occurs both within the classroom and through myriad other student interactions—in residences and dining halls, in performance, artistic, athletic, and recreational spaces, in student organizations and activities, and throughout the campus. Indeed, Amici aim to create an environment in which students learn as much from each other outside as within the classroom.

For many students, a university may be the first place in which they are exposed to others whose backgrounds are markedly different from their own. Through that exposure, students are encouraged to question their own assumptions and biases and to appreciate the complexity of our society and the world. In Amici's judgment, such exposure will hasten the arrival of the day when race no longer matters.

2. Abandoning *Grutter*'s compelling-interest holding would significantly impair the ability of Amici to fulfill their educational missions. It would also call into question Amici's ability to use individualized, holistic admissions at all. The structure of that review requires that Amici obtain and review copious information regarding the characteristics, life experiences, accomplishments, and talents of each applicant, to assess both the applicant's academic potential and the contribution that the applicant may make to the class as a whole. Such an application process should allow—indeed encourage—applicants to provide any information about themselves, including their background, that the appli-

cant thinks relevant.[5] If an applicant thinks his or her race or ethnicity is relevant to a holistic evaluation—which would hardly be surprising given that race remains a salient social factor—it is difficult to see how a university could blind itself to that factor while also gaining insight into each applicant and building a class that is more than the sum of its parts.

Nor is it at all apparent why universities should, at this point in our nation's evolving understanding of race, be forced to will ignorance with respect to race. As this Court has recognized, race continues to influence our experiences. *See Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment); *accord Grutter*, 539 U.S. at 332-333. In view of that reality, as well as the history and purposes of the Equal Protection Clause, it would be extraordinary to conclude at this time that race is the single characteristic that universities may not consider in composing a student body that is diverse and excellent in many dimensions, not just academically. *Cf. Shaw* v. *Reno*, 509 U.S. 630, 679 (1993) (Stevens, J., dissenting) ("If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do to the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause.").

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[5] *See, e.g.*, The Common Application, *2012-2013 First-Year Application* (calling for an essay on, among other things, an "experience that illustrates what you would bring to the diversity in a college community" and inviting applicants to "attach a separate sheet if [applicant] wish[es] to provide details of circumstances or qualifications not reflected in the application"), *available at* https://www.commonapp.org/commonapp/DownloadForms/2013/2013PacketFY_download.pdf (last visited Aug. 12, 2012).

Finally, the societal reliance interests on *Bakke* and *Grutter* counsel against any precipitous abandonment of diversity as a compelling interest. *Cf. Planned Parenthood of Se. Penn.* v. *Casey*, 505 U.S. 833, 861-869 (1992). In the 34 years since *Bakke* and the nine years since *Grutter*, Amici and other selective universities have undertaken a wide range of measures to encourage minority applications and to expand minority admissions. The principle that diversity is a compelling interest, announced in *Bakke*, widely followed in practice, and affirmed in *Grutter*, has provided the framework and foundation for these efforts. The reliance interests of universities, applicants, students, high schools, businesses, and other social actors and institutions on this Court's jurisprudence are substantial. Absent some "special justification"—which is not present here—principles of *stare decisis* require continued adherence to *Grutter*. *See Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) ("even in constitutional cases, [*stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification" (internal quotation marks omitted)).[6]

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[6] Forbidding race-consciousness in individualized, holistic admissions processes would have many wrenching effects on Amici, including a potential wave of litigation by disappointed applicants. Because admissions officials would doubtless be aware of the race of at least some successful applicants, some applicants not admitted might sue, claiming that race improperly influenced admissions decisions and was responsible for the fact that other students were admitted rather than them. Unlike in other contexts in which allegations of discrimination might be raised, universities

B. Mechanistic, Ostensibly Race-Neutral Policies Are Not Constitutionally Required Alternatives For Achieving Diversity

In addition to holding that diversity is a compelling interest, this Court in *Grutter* firmly rejected the view that universities must choose between maintaining "excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." 539 U.S. at 339. The Court declined to hold, as the Solicitor General pressed, that universities must first try mechanistic measures—such as the Texas 10% Plan, which itself depends upon the existence of segregated schools—before it may adopt race-conscious admissions policies. The Court was clear that strategies that "require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both" are not constitutionally required. *Id.* at 340.

Petitioner is not challenging that aspect of *Grutter*. *See* Pet. Br. 35 n.9 ("unlike in *Grutter*, Petitioners [sic] are not attempting to force a percentage plan upon Respondents"). She therefore is not advocating a rule

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would often not be able to point to specific, objective distinctions between one applicant and another because numerical scores are not determinative of Amici's admissions decisions: All such decisions are to some extent subjective and involve nuanced judgments about the applicant and composition of an entire class. Litigation over the merits of specific admissions decisions would inevitably draw courts into the second-guessing of core educational judgments. *See Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 (1985) (courts are not well-equipped "to evaluate ... academic decisions that are made daily by faculty members of public educational institutions—decisions that require an expert evaluation of cumulative information and are not readily adapted to the procedural tools of judicial ... decisionmaking" (internal quotation marks and brackets omitted)).

that universities must first attempt mechanistic, race-neutral alternatives in pursuing a diverse student body. This concession is crucial to Amici: Mechanistic admissions plans, whether based on guaranteed admissions or other "objective" numerical criteria, would be at war with the educational missions of Amici and unworkable.

As this Court explained in *Grutter*, guaranteed admissions plans are not desirable race-neutral alternatives for many universities because they "preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340. For Amici, the assumption embodied in mechanistic alternatives—*i.e.*, that objective numerical measures are the only or even the best measure of an applicant's potential—is profoundly misplaced. As we have explained, Amici rely on individualized, holistic review designed to assess the qualifications of the whole applicant, as well as how the applicant would contribute to fulfilling the educational missions of the institution.

Mechanistic proposals like the Texas 10% Plan are also completely impracticable. Amici receive applications from far more applicants qualified by objective measures than they could hope to admit. *See supra* n.3. Beyond that, Amici have nationally and internationally based student bodies at the undergraduate and graduate level. In the United States alone, there are more than 24,000 public secondary schools and more than 2,700 private secondary schools in addition to more than 14,000 combined elementary and secondary schools. *See* Snyder & Dillow, *Digest of Education Statistics 2011* tbl. 5 (June 2012), *available at* http://nces.ed.gov/pubs2012/2012001.pdf. Were each Amicus to guarantee admission to just the top student at each of the nation's secondary schools, that would require admitting many more than 20,000 students. Even if only 20 percent of those students matriculated, a class of 4,000-plus students would easily exceed any one of Amici institution's educational resources.[7] Apart from that basic math problem, guaranteed admissions policies would raise profound difficulties with respect to international students and at the graduate level. *See Grutter*, 539 U.S. at 340 (noting the United States did not "explain how [percentage] plans could work for graduate and professional schools"). Again, however, even if these plans were somehow workable for Amici (they are not), Amici would never voluntarily choose to structure their admissions policies in such a mechanistic fashion and with such a focus on a few quantitative measures.

Amici do extensively consider a wide range of race-neutral factors in seeking to compose broadly diverse and excellent student bodies. For example, Amici consider whether the applicant is the first in the family to attend college, whether he or she comes from a disadvantaged background, and whether languages other than English are spoken in the home. Amici also engage in substantial outreach and recruiting efforts aimed at increasing the size and diversity of the applicant pool. Furthermore, Amici have adopted financial aid policies designed to enable a wide variety of admitted students from all backgrounds to attend. These efforts have played an important role in contributing to the diversity, including racial and ethnic, of the student bodies of Amici institutions. But racial and ethnic diversity are a distinct kind of difference in background, and reliance on such race-neutral measures alone cannot substitute for individualized, holistic review that takes account of race and ethnicity of the type approved of by *Grutter*. *See, e.g.*, Minow, *After* Brown: *What Would Martin Luther King Say?*, 12 Lewis & Clark L. Rev. 599, 636 n.192 (2008) (collecting studies showing that reliance on socioeconomic status as an admissions factor alone cannot produce racial diversity).

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[7] For the class of 2016, for example, Harvard admitted 2,032 students. *See* Harvard College, Office of Admissions, *A Brief Profile of the Admitted Class of 2016*, *available at* http://www.admissions.college.harvard.edu/apply/statistics.html (last visited Aug. 12, 2012).

For these reasons, the Court should reaffirm, and in no way retreat from, the principle of *Grutter*, that the Constitution does not require the use of mechanistic, race-neutral policies before race-conscious admissions approaches may be used.

II. PETITIONER'S ARGUMENTS REGARDING THE APPLICATION OF STRICT SCRUTINY ARE DEEPLY FLAWED

Petitioner argues that UT's consideration of race in admissions does not satisfy strict scrutiny. UT ably defends the specifics of its admissions system in its brief. Amici write to emphasize that petitioner's arguments amount to a backdoor effort to drain *Grutter* of meaning and would significantly unsettle this Court's equal protection jurisprudence, on which Amici and many other universities have relied. Specifically, petitioner's apparent view that *Parents Involved*, rather than *Grutter*, governs this case is fundamentally misplaced; petitioner's understanding of the scope and nature of the educational benefits of diversity is unfounded; and petitioner's call for a strict-basis-in-evidence standard to review the use of holistic, individualized admissions processes in higher education finds no support in this Court's precedent and would have highly detrimental implications.

Before proceeding, Amici wish to underscore a crucial threshold point. No Amicus employs race or ethnicity as a *classification* in its admissions policies; no seats in the class are reserved to applicants of any race or ethnic background, nor are applicants of any race or background limited to a certain number of places. Rather, Amici's admissions policies, by considering myriad factors including race and ethnicity, are designed to foster excellence through the admission of a class diverse in multiple dimensions.

In this way, Amici's policies are influenced by the Harvard Plan approved by Justice Powell in *Bakke* and this Court in *Grutter*. Many universities have adopted or reaffirmed such policies in the wake of *Grutter*. In light of this commitment to individualized, holistic review, Amici consider race and ethnicity with extraordinary care and in the most limited fashion necessary to contribute meaningfully to the diversity of their student body. Imposing judicial constraints on such review beyond those set forth in *Grutter* therefore would risk depriving Amici of the ability to compose academically excellent and diverse student bodies that remain vital to achieving Amici's educational missions. *See Grutter*, 539 U.S. at 326-327 ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995) ("dispel[ling] the notion that strict scrutiny is strict in theory, but fatal in fact" (internal quotation marks omitted)).

A. Petitioner's Reliance On *Parents Involved* Is Unavailing

At nearly every step of petitioner's argument, she places heavy, if not exclusive, reliance on *Parents Involved*. That reliance is wholly misplaced. This Court has been clear that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause," *Grutter*, 539 U.S. 327, and the differences between *Parents Involved* and this case are stark. In view of the important guidance provided in *Grutter* with respect to structuring narrowly tailored admissions policies—guidance on which Amici and others have heavily relied—this Court should reject any suggestion that *Parents Involved*, rather than *Grutter*, governs review of individualized, holistic admissions processes in the context of higher education.

1. In applying narrow tailoring in *Grutter*, this Court identified the "hallmarks of a narrowly tailored [admissions] plan." 539 U.S. at 334. Those hallmarks are that an "admissions program cannot use a quota system"; an admissions program "may consider race or ethnicity only as a plus in a particular applicant's file, without insulating the individual from comparison with all other candidates for the available seats"; and an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.* (internal quotation marks and brackets omitted). The Court found that the program at issue in *Grutter* satisfied those requirements because, among other things, the law school "engage[d] in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337.

There is a wide gulf between that form of review and the assignment policies at issue in *Parents Involved.* Under the latter, race was a binary factor: One plan "classifie[d] children as white or nonwhite," while the other classified children "as black or 'other.'" 551 U.S. at 710; *see id.* at 723 ("Even when it comes to race, the plans here employ only a limited notion of diversity[.]"). For each plan, moreover, race was effectively the entire classification at issue, and it was applied in a "crude" fashion that failed to give consideration to any other characteristics of students. *See id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment). What is more, the assignment plans were challenged by parents of children "denied assignment to particular schools ... *solely* because of their race." *Id.* at 710-711 (emphasis added).

The plans at issue in *Parents Involved* bear no meaningful resemblance to the individualized, holistic review used by Amici and endorsed in *Grutter.* Justice Kennedy, for example, expressly distinguished *Gratz* and *Grutter* on the ground that, unlike the challenged policies before the Court in *Parents Involved,* those cases addressed a "system where race was not the entire classification." 551 U.S. at 792-793. Justice Kennedy further contrasted the assignment plans at issue with *Grutter*-like plans that would give "nuanced, individual evaluation of school needs and student characteristics that might include race as a component." *Id.* at 790. And the majority opinion drew precisely the same distinction in comparing *Grutter* with the policies at issue. *See id.* at 722 ("The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group."); *id.* at 723 ("under each plan[,] when race comes into play, it is decisive by itself" and "not simply one factor weighed with others in reaching a decision, as in *Grutter*").

In short, both the majority opinion and Justice Kennedy's concurring opinion in *Parents Involved* took pains to emphasize a distinction between policies in which race (applied as a black/white binary distinction) is effectively the entire classification and those in which race and ethnicity are but single factors as part of individualized, holistic review. The Court in *Parents Involved* was clear that the plans before it were "not governed by *Grutter*," 551 U.S. at 725, and the inverse is true here: *Grutter*, and not *Parents Involved*, continues to supply the appropriate benchmarks for assessing the constitutionality of admissions policies of universities, such as Amici, that are structured on *Grutter* and the Harvard Plan.

2. This basic distinction disposes of petitioner's argument (at 38-41) that the use of race is unconstitutional when it has an insubstantial effect on actual admissions decisions. To be sure, Justice Kennedy in *Parents Involved* observed that "it is noteworthy that the number of students whose assignment depends on express racial classifications is limited." 551 U.S. at 790. Those "small number of assignments affected," he reasoned, "suggest[ed] that the schools could have achieved their stated ends through different means," including "facially race-neutral means ... or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component." *Id.* The upshot of Justice Kennedy's analysis, as the Fifth Circuit noted below, was that a state actor, when faced with a racial classification that has little effect in practice, should instead use race-neutral measures or *Grutter*-like policies that evaluate,

in an individualized, holistic manner, a number of factors, including race and ethnicity. *See* Pet. App. 70a.

Contrary to petitioner's insistence, nothing in this Court's precedents suggests that where race and ethnicity play only a small role (or are single factors among many) in influencing decisions in a *Grutter*-like admissions system, the use of race and ethnicity becomes unconstitutional. Such a result would defy common sense: That race and ethnicity, when considered among a multitude of other factors, might have diminishing significance in effecting outcomes should be taken as welcome evidence that a program is carefully crafted to avoid overreliance on race and ethnicity while also achieving a diverse and academically excellent student body.

B. Petitioner Misapprehends The Educational Mission Of Universities And The Role And Benefits Of Diversity

In challenging UT's decision to reinstate a limited use of race in admissions after *Grutter*, petitioner argues (at 26) that "*Grutter* ... endorses an inward-facing concept of diversity focused on enhancing the university experience—not an outward-facing concept of diversity focused on achieving a level of minority enrollment that is in proportion to the general population." To be clear, Amici (apparently like UT[8]) do not seek to attain levels of enrollment that conform to state, national, or international demographics. But petitioner's proposed distinction between the "inward" and "outward" benefits of diversity is inconsistent with the educational missions of Amici and precedent.

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[8] *See* JA131a ("UT Austin has not established a goal, target, or other quantitative objective for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008."); Pet. App. 44a ("UT has never established a specific number, percentage, or range of minority enrollment that would constitute 'critical mass'" and "there is no indication that UT's *Grutter*-like plan is a quota by another name").

Amici's educational missions are broader than petitioner and her amici would acknowledge. Amici insist that students at their institutions will excel at demanding coursework, but their missions extend beyond that singular goal to developing active and engaged citizens equipped to handle the problems of a complex world and in training city, state, national, and international leaders in every field of endeavor, including the arts, government, science, and business.[9] In order to train active citizens and leaders for participation in a diverse nation and world, Amici must be able to compose an appropriately diverse student body.

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[9] *See, e.g.*, Harvard University, *Frequently Asked Questions* ("The Mission of Harvard College": "Education at Harvard should liberate students to explore, to create, to challenge, and to lead. The support the College provides to students is a foundation upon which self-reliance and habits of lifelong learning are built: Harvard expects that the scholarship and collegiality it fosters in its students will lead them in their later lives to advance knowledge, to promote understanding, and to serve society."), *available at* http://www.harvard.edu/faqs/mission-statement (last visited Aug. 12, 2012); Yale University, *University Mission Statement* ("Yale seeks to attract a diverse group of exceptionally talented men and women from across the nation and around the world and to educate them for leadership in scholarship, the professions, and society."), *available at* http://www.yale.edu/about/mission.html (last visited Aug. 12, 2012); Dartmouth College, *Mission* ("Dartmouth College educates the most promising students and prepares them for a lifetime of learning and of responsible leadership, through a faculty dedicated to teaching and the creation of knowledge."), *available at* http://www.dartmouth.edu/home/about/mission.html (last visited Aug. 12, 2012); Stanford University, *The Founding Grant with Amendments, Legislation, and Court Decrees*, at 24 (Stanford University's "chief object is the instruction of students with a view to producing leaders and educators in every field of

This Court has long embraced this facet of the educational mission of universities, and has recognized the role diversity plays in advancing it. In *Bakke*, for example, Justice Powell explained that "it is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S. at 313 (internal quotation marks omitted). Similarly, in *Grutter*, this Court held that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." 539 U.S. at 332; *cf. Brown* v. *Board of Educ. of Topeka*, 347 U.S. 483, 493 (1954) (education is "required in the performance of our most basic public responsibilities" and "very foundation of good citizenship").

This understanding of the broad educational mission of universities reveals the basic error in petitioner's insistence (at 27) that any attention to demographics as *a* factor in assessing diversity is "'outright racial balancing.'" *Grutter* recognized that universities train leaders and citizens for a heterogeneous society,

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science and industry"), *available at* https://ogc.stanford.edu/sites/ogc.stanford.edu/files/Founding%20Grant%20(equivalent%20to%20SU%20Articles%20of%20Incorporation)_22124_1.pdf (last visited Aug. 12, 2012).

and that diversity is vital to that function. It stands to reason that a university may pay some attention to the communities from which its students come and into which its students graduate in pursuing those goals.

In *Parents Involved*, by contrast, the challenged student assignment plans were "tied to each district's specific racial demographics, rather than to *any* pedagogic concept of the level of diversity needed to obtain the asserted educational benefits." 551 U.S. at 726 (plurality opinion) (emphasis added). The plans set a range of enrollment "solely by reference to the demographics of the respective school districts." *Id.* at 729 (plurality opinion). And as explained above, the programs did not employ individualized, holistic review in order to achieve diversity.

Those considerations are not at issue here, where a university has a pedagogic concept of diversity in mind, and as part of its educational mission also pursues *Grutter*'s approved goal of creating a "path to leadership" and citizenship for a "heterogeneous society." 539 U.S. at 332.[10] Indeed, as explained throughout this brief, producing the next generation of citizens and leaders is a core mission of Amici institutions. In aiming for a rich and robust concept of diversity consonant with those objectives, it would be illogical to exclude altogether any consideration of demographics, whether municipal, state, national, or international, depending upon the nature and mission of the institution.

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[10] *See* Laycock, *The Broader Case For Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1773 (2004) (*Grutter* embraced a broad justification for diversity that included "bringing more minority young people into the most selective schools and into positions of leadership" to secure the "legitimacy of selective institutions of higher education and the legitimacy of the nation's leadership"); Payton, *Post-*Grutter*: What Does Diversity Mean in Legal Education and Beyond?*, 35 Pepp. L. Rev. 569, 581-582 (2008) (explaining the significance of *Grutter*'s discussion of the relationship between diversity and democracy).

As Texas's flagship educational institution, UT's mission is focused in part on training the next generation of leaders for Texas. *See* Resp. Br. 5. That may well affect the manner in which UT assesses the diversity necessary to fulfill its mission. *See* Pet. App. 50a ("The need for a state's leading educational institution to foster civic engagement and maintain visibly open paths to leadership ... requires a degree of attention to the surrounding community."). But this aspect of a university's mission is not "racial balanc[ing], pure and simple." *Parents Involved,* 551 U.S. at 726 (plurality opinion). The essence of racial balancing is a goal that functions as a quota, seeking to secure a "specified percentage of a particular group merely because of its race or ethnic origin." *Grutter*, 539 U.S. at 329 (internal quotation marks omitted). Petitioner concedes that is not the goal of UT. *See supra* n.8. Nor, emphatically, is it the goal of these Amici. Amici do not employ quotas, and have no rigid baselines in mind with respect to diversity. Amici's educational objectives are to admit a student body that is diverse across myriad axes, that constitutes more than the sum of its parts, that excels academically, and that prepares a next generation of nationally and internationally engaged citizens and leaders who are equipped to succeed in a remarkably diverse world.

Petitioner largely ignores *Grutter*'s recognition of this paramount role of universities, which the Fifth Circuit found crucial to its analysis. *See* Pet. App. 50a-51a. Petitioner argues (at 29) only that "this Court has always rejected the use of race to advance the general welfare of society." The cases petitioner cites hold that remedying societal discrimination is not a compelling interest. *See, e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 499 (1989) ("amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota"); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) ("Societal discrimination ... is too amorphous a basis for imposing a racially classified remedy."). That is not even remotely the issue here. The compelling governmental interest in diversity in higher education is quite different from remedying generalized discrimination. The issue here is whether, in assessing diversity, a university may take into account the need (a) to foster conditions for providing the most stimulating learning environment possible and (b) to train effectively citizens and leaders for a heterogeneous society. Justice Powell's opinion in *Bakke* and the decision of this Court in *Grutter* answer that question affirmatively. A retreat now would be a substantial blow to the educational missions of Amici and many universities.

C. This Court Has Not Applied And Should Not Apply A Strong-Basis-In-Evidence Standard To The Unique Context Of Higher Education

Petitioner argues at length (at 31-37) that, under this Court's precedents, a strong-basis-in-evidence standard applies to university admissions programs, although she says little about the content of this standard. As a matter of precedent, petitioner's claim is wrong, as UT cogently explains (at 49). Amici write to emphasize why this Court should not, for the first time, apply such a standard to higher education.

First, the reasons the Court has applied a strong-basis-in-evidence standard in other circumstances carry no force here. "Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. The strong-basis-in-evidence standard has been used to identify when race may be used to remedy historical discrimination. *See Wygant*, 476 U.S. at 277-278; *Croson*, 488 U.S. at 498-499. Whether discrimination has occurred is an objective and measurable fact: For example, did the City of Richmond discriminate in the past in awarding government contracts? In that setting, it would make little sense simply to credit a good-faith judgment by the City that discrimination has occurred because the City would have no special claim to expertise regarding that fact.[11]

By contrast, the educational benefits of diversity and the degree of diversity necessary to obtain those benefits defy easy calculation. Judgments about educational benefits are necessarily at the core of the expertise of universities and inevitably implicate the First Amendment interests in a university's definition of its own educational mission, discussed further below. *See Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."). In this crucial respect, higher education is far afield from government contracting and public employment, in which the state actors employing the racial classifications would have no reasonable claim to any special expertise as to whether historical discrimination has occurred.

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[11] In *Ricci* v. *DeStefano*, 129 S. Ct. 2658 (2009), this Court applied this standard to determine whether a public employer's fear of disparate-impact liability was reasonable. In that setting, too, it arguably made little sense simply to credit the good-faith belief of the employer because the possibility of such liability lies squarely within the competence of the courts to evaluate—unlike the educational benefits to be obtained from particular admissions policies, an area in which the courts have no special expertise and have long deferred to universities' judgments.

Second, application of a strong-basis-in-evidence standard to universities' admissions decisions would threaten to undermine the First Amendment interests of universities, as well as the proper deference due university officials' educational judgments. This Court has long acknowledged the special role universities play in the First Amendment tradition. As Justice Powell explained, the First Amendment interests of a university includes the freedom " 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " *Bakke*, 438 U.S. at 312 (Powell, J.) (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)). This Court reiterated in *Grutter* that, "given the important purposes of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter*, 539 U.S. at 329.[12]

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[12] *See also Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring in part and concurring in the judgment) ("precedent support[s] the proposition that First Amendment interests give universities particular latitude in defining diversity"); Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 311 (1989) ("[T]he Supreme Court's decisions concerning academic freedom have protected principally and expressly a First Amendment right of the university itself ... largely to be free from government interference in the performance of

Although this "special niche" of universities has never meant and should not mean that they are immune from judicial review, a strong-basis-in-evidence standard could seriously impair universities' legitimate First Amendment interests. A constitutional rule that required decisions regarding diversity—for example, determinations about the value of diversity, the types of diversity necessary to advance a university's mission, and the contributions of various degrees of diversity to that mission—to be proven by surveys or data sets, and then second-guessed in court, would imperil the First Amendment interests of universities by cabining a university's ability to rely on the nuanced and expert judgments of its officials, faculty, and administrators in assessing such questions. *Cf. Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, ... they should show great respect for the faculty's professional judgment."). And a standard that would afford no or little deference to the educational judgments of universities would be contrary to this Court's recognition of the need to limit intrusive judicial inquiry of university decisionmaking. *See University of Penn.* v. *EEOC*, 493 U.S. 182, 199 (1990) (noting the "importance of avoiding second-guessing of legitimate academic judgments"); *Ewing*, 474 U.S. at 226 n.12, 227 ("Academic freedom ... thrives

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core educational functions."); *cf. Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 232 (2000) ("It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.").

on autonomous decisionmaking by the academy itself[.]").[13]

Third, application of a strong-basis-in-evidence standard to *Grutter*-like admissions policies could have a particularly substantial impact on Amici. Amici receive applications from far more academically excellent students than they could hope to admit, and they rely exclusively on individualized, holistic review. *See supra* pp. 7-8. In light of that, a standard that demanded rigorous empirical evidence regarding individual admissions decisions or decisions regarding the composition of a student body as a whole could subject Amici to frequent litigation over whether the standard is satisfied. The predictable result would be intrusive discovery and judicial micro-management of admissions decisions and policies. *See supra* n.6 (explaining why a reversal of *Grutter* would have a similar effect). None of this is to say that universities need not carefully evaluate issues of diversity, but often the most probative evidence bearing on the issues will be the expert educational judgments of university officials, admissions officers, and faculty—judgments based on decades of experience with holistic, individualized race-conscious admissions policies. The Constitution should not be read to foreclose reliance on those judgments.

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[13] This is not, as petitioner paints it (at 22), an argument for "unlimited deference to university administrators." Strict scrutiny is properly demanding, but it should be applied so as not to deprive university officials of the right to exercise responsibly their expert educational judgments. *See Grutter*, 539 U.S. at 328 (strict scrutiny "is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university").

In short, the framework adopted by this Court in *Grutter* supplies a workable and appropriate standard for reviewing race-conscious university admissions policies. There is no cause for replacing that framework with an ill-defined strong-basis-in-evidence standard that could interfere with the First Amendment interests of and educational judgments by universities and that would be sure to invite unnecessary litigation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

In the
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF SCHOLARS, CONNECTICUT ASSOCIATION OF SCHOLARS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, AND AMERICAN CIVIL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether *Grutter v. Bollinger*, 539 U.S. 306 (2003), can be reconciled with this Court's prior decisions interpreting the Equal Protection Clause of the Fourteenth Amendment and, if not, whether *Grutter* should be overruled.

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INTEREST OF AMICI CURIAE[1]

The California Association of Scholars ("CAS") and the Connecticut Association of Scholars ("CONNAS") are organizations composed of faculty members and other scholars living or working in California and Connecticut, respectively. As National Association of Scholars affiliates, CAS and CONNAS are devoted to higher education reform and believe they are in a special position to inform the Court about the pitfalls of deferring to the judgment of university administrators on the subject of race-preferential admissions policies.

The Center for Constitutional Jurisprudence ("CCJ") is the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American Founding to their rightful and preeminent position of authority in our national life. The CCJ advances that mission by conducting litigation and by filing amicus curiae briefs in cases of constitutional significance, including cases such as this in which the core principle of individual equality is at stake.

Reason Foundation ("Reason") is a nonpartisan, and nonprofit public policy think tank, founded in

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. To further Reason's commitment to "free minds and free markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Individual Rights Foundation ("IRF") was founded in 1993. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

The American Civil Rights Foundation ("ACRF") is a nonprofit legal defense foundation whose mission is to monitor and enforce civil rights laws at all levels of government. ACRF challenges government race and gender preferences, and most recently was named Intervener in the *BAMN v University of California* racial preference case. ACRF has a keen interest in enforcing race neutral laws and policies.

In this brief, *amici* call for *Grutter v. Bollinger*, 539 U.S. 306 (2003) to be overruled. Contrary to the assumption behind that case, race-preferential admissions policies are seldom, if ever, motivated by a desire to reap the educational benefits of student-body diversity. The diversity rationale is a mere pretext masking invidious discrimination.

SUMMARY OF ARGUMENT

The Court's traditional role in applying strict scrutiny has been to pull the American people back from the brink when they are tempted by the path of racial discrimination. *Grutter*'s deferential approach to academic authority, however, does just the opposite. A majority of Americans have consistently found the diversity rationale for race-preferential admissions policies—or indeed any other rationale—to be unconvincing. But in *Grutter* the Court nevertheless held that the diversity rationale was not just convincing, but also compelling. Rather than pulling the American people back from the brink, the Court dragged them kicking and screaming over it. Colleges and universities—institutions that are largely insulated from the mainstream political process—were given permission to continue their pattern of discrimination. The strong presumption in favor of race neutrality that is characteristic of the strict scrutiny doctrine was thus abandoned. See *infra* at Part I.A.

Laws and policies that make distinctions based on an individual's race should be approved only when the need for them is largely uncontroversial. Requiring anything less than substantial consensus is filled with hazard. Rather than take race off the table as the strict scrutiny doctrine is designed to do, a relaxed strict scrutiny standard virtually guarantees that racial politics will thrive. Legislatures, city councils, administrative agencies, college campuses and courts will be the scene of racial controversy and jockeying for position for years to come. *Id.*

Among other things, when the need for racial discrimination is largely uncontroversial, that need is likely to be the real reason for the discrimination. Consider, for example, the perennial law school hypothetical of the prison-yard race riot in which the guards temporarily segregate the prisoners by race. No one need question whether the guards have some sinister reason for doing what they do. Their motives are obvious—to restore order as quickly as possible and hence prevent injury. The same cannot be said for the diversity rationale for race-preferential admissions. The number of academics who candidly admit that the diversity rationale has nothing to do with their actual reasons for supporting race-preferential admissions is astonishing. Far more commonly they cite the need to compensate minorities for past or present societal discrimination. Even that justification is often pretextual. Unhappily, old-fashioned racial pork-barreling is often the best explanation for actual practice. Only under-represented minorities with political clout get included. See *infra* at Part I.B.

Yet *Grutter* has essentially immunized these race-preferential admissions policies from liability. Given the difficulties of mounting fact-specific litigation against each and every school in the nation that practices these admissions, the diversity rationale has become a convenient fig leaf allowing race-preferential policies to flourish. *Id.*

Additionally, the *Grutter* decision holds out the implicit promise that other controversial racially discriminatory policies instituted by a college or university (or by any institution that believes itself worthy of deference) may be approved as well. *Grutter* thus creates not just the need for litigation to examine universities for pretext, it also increases the number of laws and policies—from race-preferential financial aid to racially segregated dormitories and graduation ceremonies—that should be examined by the courts. *Id.*

Put more simply, "*Grutter*-deference" creates more racially sensitive legal issues than it puts to rest. The only thing that prevents the number of lawsuits from overwhelming the courts is the unfortunate fact that few victims have the resources needed to mount the fact-intensive institution-by-institution inquiry into pretext that *Grutter* implicitly requires. As a consequence, unconstitutional race discrimination has now sunk its roots deep into higher education.

There is no painless solution to the problem. If the Court follows *Grutter*, rather than reaffirming its prior tradition of non-deferential strict scrutiny, it will either create the need to examine all race-preferential admissions policies for pretext on a case-by-case basis or (more troublingly) it will shelter sham diversity policies from scrutiny on account of the difficulty in financing constitutional litigation that can affect at most only one institution. Regardless of which path is followed, *Grutter* will have raised the profile of racial politics in the law rather than lowered it.

The alternative is for this Court to overrule the *Grutter* decision and to re-establish what for an all-too-brief period in time was taken for granted—that race neutrality is the rule under the Constitution and race discrimination is the rare exception. In the long run, the latter alternative is much to be preferred. *Id.*

No one should imagine that individual universities—many of which have a long history of discrimination themselves—are in a position to solve the problem on their own. This is a collective action problem. By lowering admissions standards for minority students, top-tier schools get somewhat more minority students into their freshman classes than they would otherwise have (and receive rewards from funding sources for having done so). But second-tier schools must then also lower their standards, since the minority students who would have attended those schools under system-wide race-neutral admissions policies are now likely at a top-tier school. The problem is thus handed down to the next tiers without actually increasing the overall level of diversity. As a result, no school can opt out of this unfortunate system without facing the likelihood that it will have very few minority students. Given the pressure that accrediting agencies, public and private funding sources and student groups apply to encourage race-preferential admissions, opting out is not a practical strategy. See *infra* at Part I.C.

If race-preferential admissions are to be ended, the Court must undertake—in keeping with the highest American ideals of equality—to overrule *Grutter*. *See infra* at Part I.D.

ARGUMENT

I. *GRUTTER v. BOLLINGER* SHOULD BE OVERRULED.

A. Racially Discriminatory Laws and Policies Should Be Upheld as Compelling Only in Cases in which the Need for Them Is Largely Uncontroversial. A More Relaxed Standard of Review Encourages Divisive Racial Politics.

Gerald Gunther may have overstated his case when he famously described the Court's use of the strict scrutiny doctrine as "'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for* *a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). But, if so, he did not err by much. A very high standard of what qualifies as a compelling purpose was indeed the state of the law at the time.[2] More important, continuing to mandate a very high standard is the only way to accomplish the central task of equal protection jurisprudence—to take race off the table. *See* Ozran O. Varol, *Strict in Theory, But Accommodating in Fact*, 75 Missouri L. Rev. 1243 (2010) (criticizing *Grutter* and other recent cases for lowering the bar).

Strict scrutiny in the context of race is a legal doctrine designed to resolve doubts against discrimination and in favor of race neutrality. Public opinion in favor of discrimination should therefore be accorded no weight on judicial decisions made under a strict scrutiny standard. The duty of an independent judiciary is to stand up to such pressure.

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[2] In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), five members of the Court held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which flatly stated that "[n]o person ... shall, on the ground of race, color, or national origin, ... be subjected to discrimination under any program or activity receiving federal financial assistance," in reality bans only that portion of race and discrimination already banned by the Fourteenth Amendment. Justice Powell, a member of the majority, pointed to the fact that "[Congressional] supporters of Title VI repeatedly declared that the bill enacted constitutional principles." *Bakke*, 438 U.S. at 285 (Opinion of Powell, J.). But that is only because Congress, like Professor Gunther, understood the objections to race discrimination under the Constitution to be "fatal in fact." *Amici* believe that Title VI was intended to mean what it says. An alternative to overruling *Grutter* would be to overrule *Bakke* on Title VI. Such an approach would have the virtue of avoiding the constitutional issue.

This point ought to go double for the opinions of actual discriminators like the University of Michigan in *Grutter* and the University of Texas in this case. In *Grutter*, however, the Court appeared to endorse the view that courts should afford a "degree of deference to a university's academic decisions, within constitutionally prescribed limits." Such a notion is, of course, quite reasonable—so long as due emphasis is placed on the phrase "within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328. But such deference is jarringly out of place in the context of constitutionally-mandated strict scrutiny. Indeed, it is the opposite of strict scrutiny. A court cannot simultaneously defer to the judgment of a defendant that racially discriminates and put that defendant's discriminatory policies under strict scrutiny.

Public opinion in favor of race neutrality is quite another matter. A strong presumption against racially discriminatory laws and policies necessarily implies a strong presumption in favor of laws and policies that are race neutral. They are two sides of the same coin. Consequently, when the public strongly and consistently prefers race-neutral laws and policies to race-preferential ones, judicial deference really should come into play—deference not to the advocates of race discrimination but to the advocates of race neutrality. A discriminatory purpose can hardly be objectively compelling if it fails even to persuade most Americans. Judges who nevertheless find it to be compelling have acted non-judicially. They have substituted their own will for the Constitution's strong presumption in favor of race neutrality. *See* Gail Heriot, *Strict Scrutiny, Public Opinion and Racial Preferences on Campus: Should the Courts Find a Narrowly Tailored Solution to a Com-*

pelling Need in a Policy Most Americans Oppose?, 40 Harv. J. Legis. 217, 219 (2003) (arguing that deference to a public preference for race neutrality is appropriate, while deference to a public preference for racial discrimination is not, no matter how strong that preference might be).[3]

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[3] It is thus not *Amici*'s position that deference has no place in a constitutional analysis of a racially discriminatory policy. To the contrary, without appropriate deference and presumptions, the task of courts would be impossibly difficult. But strict scrutiny demands that the presumption (and hence the deference) goes to those who challenge racially discriminatory policies, not to the state.

Since *Grutter*, more scholarly research casting doubt on the diversity rationale has been published. Most devastating of all, of course, is the mismatch literature indicating that race-preferential admissions actually hurt the prospects of its supposed beneficiaries. See Gail Heriot, *et al*, Brief *Amici Curiae* in Support of the Petitioner, *Fisher v. University of Texas* (No. 11-345, filed Oct. 19, 2011); Richard Sander, *et al.* Brief *Amici Curiae* in Support of the Petitioner, *Fisher v. University of Texas* (No. 11-345, filed Oct. 19, 2011). But there are other examples. Using data from a structured random sample of over 4000 students, faculty and administrators, one study took an "indirect approach that asked members of the university community non-controversial questions about their perceptions and experiences, and then correlated their responses with an independent empirical measure of diversity." Stanley Rothman, Seymour Martin Lipset, & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 Int'l J. Pub. Opin. Res. 8 (2003). After controlling for numerous factors, it found that the predicted positive correlation between diversity and student, faculty and administrator evaluations of the educational and racial understanding atmosphere failed to appear. Instead, the clear and consistent pattern was toward negative correlations, especially in evaluating the quality of education offered. *See also* John R. Lott, Jr., *et al.*, *Peer Effects in Affirmative Action: Evidence from Law Student Performance*, 31 Int'l Rev. L. & Econ. 1 (2011) (empirical study demonstrating that black law

Of course, in a democracy, the majority's views are expected to prevail, so at first blush one might be surprised to find unpopular racial discrimination enshrined in policy at all. But politics is complicated, and the majority's views do not always carry the day in all the nooks and crannies of federal and state government. *See generally* Maxwell Stearns & Todd Zywicki, Public Choice Concepts & Applications in Law (2009). Universities, for example, have traditionally been insulated from the political processes; only rarely do they come under broad public scrutiny.

Race-preferential admissions policies are one of those issues where majority sentiment has not prevailed. The evidence that most Americans do not support discrimination in this context is exceedingly persuasive. *See* Paul M. Sniderman & Thomas Piazza, The Scar of Race (1993) (public opinion experts stating that the race-preferential policy agenda "is controversial precisely because most Americans do not disagree about it"). The majority are unpersuaded by the diversity rationale—or any other rationale—for race-preferential admissions. *See* Rasmussen Reports, *32% Favor Affirmative Action, 46% Oppose It* (July 13, 2010); David W. Moore, *Public: Only Merit Should Count in College Decisions*, Gal-

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students do not perform better in classes in which they have "critical mass" and that Hispanic law students possibly perform less well in classes with a "critical mass" of Hispanics).

While *Amici* believe that the weight of the literature shows that race-preferential admissions are bad policy, they fully understand why a court would hesitate to draw such a broad conclusion. Fortunately, there is no need. Indeed, this is the point behind strict scrutiny: *When in doubt, race neutrality must prevail.*

lup Poll Service (June 24, 2003). There is certainly no consensus in favor of race-preferential admissions; indeed the consensus among ordinary Americans is more to the contrary.[4]

Some states have statewide initiative processes that, though cumbersome and expensive, allow citizens to pass their own laws when they believe governmental processes have failed. *See* M. Dane Waters, The Initiative and Referendum Almanac (2003). The voters of California (1996), Washington (1998), Michigan (2006), Nebraska (2008), and Arizona (2010) have taken advantage of those statewide processes to pass by decisive and sometimes overwhelming margins initiatives that, among other things, prohibit race-preferential admissions policies in state universities.[5] Even so, advocates of race-neutral admissions face on uphill battle even in states that have adopted these initiatives. See Gail Heriot, *University of California Admissions Under Proposition 209: Unheralded Gains Face an Uncertain Future*, 6 Nexus J. Op. 163 (2001). Most states, however, including Texas, lack such a process. *Id.* Petitioner must rely upon courts to vindicate her rights.

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[4] There even appears to be a large majority of college professors opposed to the use of racial preferences in admissions. *See, e.g.*, Robert A. Frahm, *Debate Erupts Over UCONN Survey*, The Hartford Courant (Apr. 19, 2000) (describing results of survey commissioned by *amicus* CONNAS that showed professors opposed admissions preferences "by substantial margins").

[5] Only in Colorado (2008) has such an initiative been defeated. In Michigan, however, the voters' action has been overturned. *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary v. Regents of the Univ. of Mich.*, 652 F.3d 607 (6th Cir. 2011) (rehearing en banc petition pending). Unsurprisingly, but misguidedly, *Grutter* was cited to the Sixth Circuit as precedent requiring that the initiative be overturned. *See* Brief for the Plaintiffs-Appellants, *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary v. Regents of the Univ. of Mich.*, 652 F.3d 607 (6th Cir. 2011) (brief filed May 15, 2009). To race-preferential admissions supporters, *Grutter* declared the need for these policies to be compelling, and that should be that.

A standard that allows a court to find compelling a purpose that most Americans do not find minimally persuasive creates two problems. First, the lack of consensus will greatly increase the likelihood that the cited reason will in fact be a pretext for a purpose that is constitutionally impermissible—like racial pork barreling. Second, allowing controversial reasons to be found compelling will raise the possibility that other controversial policies that discriminate on the basis of race might be held constitutional too—not just on college campuses, but everywhere. *See, e.g.*, Monika Plocienniczak, *Pennsylvania School Experiments With "Segregation,"* CNN (Jan. 27, 2011) (concerning a plan to segregate high school homeroom classes by race and sex); Joe Gettinger, *Ethnic Dorms: A Double Edged Sword*, Stanford Review (Sept. 26, 2010).

A strong and clear presumption in favor of race neutrality, one that resolves doubts in favor of race neutrality, prevents thoroughly unjustifiable discriminatory policies from becoming entrenched. It is precisely for that reason that strict scrutiny was developed to place an exceedingly high presumption against laws and policies that discriminate on the basis of race. That standard requires deference not to university administrators who advocate race discrimination, but to the hundreds of millions of Americans who long for race neutrality.

B. Because Few, If Any, Race-Based Admissions Policies Are Actually Motivated by a Diversity Rationale, *Grutter* Merely Shifted the Issue from Constitutionality to Pretext, Effectively Insulating the Race-Based Policies from Legal Challenge.

It is usually unwise to take the justifications offered for race discrimination at face value. Race-preferential admissions policies are no exception to this rule. Lurking beneath the pretext of concern for the educational value of diversity is usually one or more of the motives explicitly rejected by Justice Powell in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-310 (1978) (Opinion of Powell, J.) (rejecting, among other things, past societal discrimination and a desire to increase the number of minority professionals as justifications for race-preferential admissions); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (also rejecting past societal discrimination as a justification for present discrimination); *see generally*, Brian Fitzpatrick, *The Diversity Lie*, 27 Harv. J.L. & Pub. Pol'y 385 (2003) (pointing out incompatibilities between diversity in theory and race-preferential admissions in practice).[6]

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[6] As Justice Kennedy pointed out, "This is not to suggest the faculty ... do not pursue aspirations they consider laudable and consistent with our constitutional traditions." *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). But law school faculty and this Court have proven themselves to be very far apart on issues of what those traditions mean. *See, e.g.*, *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47 (2006)

Some academics have been candid about this from the beginning. The year after *Bakke*, Columbia law professor Kent Greenawalt, a skeptic of race-preferential admissions, declared, "I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students ...." Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 Cal. L. Rev. 87, 122 (1979). Similarly, Harvard law professor Alan Dershowitz wrote:

> The raison d'être for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of "diversity'" demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals. In recent years, it has been invoked—especially by professional schools—as a clever post facto justification for increasing the number of minority group students in the student body.

Alan Dershowitz, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 407 (1979).

More recently, Harvard law professor Randall Kennedy, an affirmative action proponent, stated:

> Let's be honest: Many who defend affirmative action for the sake of "diversity" are actually motivated by a concern that is considerably

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(unanimously upholding Solomon Amendment against a concerted challenge by many in the legal academy).

> more compelling. They are not so much animated by a commitment to what is, after all, only a contingent, pedagogical hypothesis. Rather, they are animated by a commitment to social justice. They would rightly defend affirmative action even if social science demonstrated uncontrovertibly that diversity (or its absence) has no effect (or even a negative effect) on the learning environment.

Randall Kennedy, *Affirmative Reaction*, The American Prospect (March 1, 2003); *see also* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 34 (2002) ("[M]any of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds."); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 471-72 (1997) ("The purpose of affirmative action is to bring into our nation's institutions more blacks, more Hispanics, more Native Americans, more women, sometimes more Asians, and so on—period. Pleading diversity of backgrounds merely invites heightened scrutiny into the true objectives behind affirmative action."); Owen Fiss, *Affirmative Action as a Strategy of Justice*, 17 Philosophy & Pub. Pol'y 37 (1997) ("[T]wo defenses of affirmative action—diversity and compensatory justice—emerged in the fierce struggles of the 1970s and are standard today, but I see them as simply rationalizations created to appeal to the broadest constituency.... In my opinion, affirmative action should been seen as a means that seeks to eradicate caste structure by altering the social standing of our country's most subordinated group"); Daniel Golden, *Some Backers of Racial Preferences Take Diversity*

Rationale Further, Wall Street Journal (June 14, 2003) (quoting Columbia law school professor Samuel Issacharoff: "'The commitment to diversity is not real. None of these universities has an affirmative-action program for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint.'").

If courts wish to identify the motives for race-preferential admissions, they should look beyond the diversity rationale. Professor Erwin Chemerinsky, for example, has identified past discrimination as the "most frequently identified objective for affirmative action." Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 Ohio N.U. L. Rev. 1159, 1161 (1996). Others have cited other arguments that are unlikely to win judicial approval. *See, e.g.*, James D. Anderson, *Past Discrimination and Diversity: A Historical Context for Understanding Race and Affirmative Action*, 76 J. Negro Educ. 204 (2007); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 Cal. L. Rev. 683 (2004); Andrew Valls, *The Libertarian Case for Affirmative Action*, 25 Soc. Theory & Prac. 299 (1999).

Often the reasons are external. For example, some colleges and universities practice discrimination in admissions because their federally-appointed accrediting authorities so require. *See* California Association of Scholars, *et al.*, Brief *Amici Curiae* in Support of the Petitioner, *Fisher v. University of Texas* (No. 11-345, filed Oct. 19, 2011) (arguing that admissions policies adopted in whole or in part to appease accreditors or funding sources are not protected by *Grutter*-deference); Margaret Jackson, *Uni-*

versity of Colorado Medical School Heals Diversity Gap, Denver Post (April 21, 2012) ("The university has made a concerted effort to improve diversity among its students since its accrediting body—the Liaison Committee on Medical Education—cited the school for 'noncompliance' in 2010, when just 106 of 614 students were minorities").

Pressure from state government plays a significant (and non-academic) role too. More than 23% of medical school and 15% of law school admissions officers report that they have felt "significant" or "some" pressure to engage in affirmative action from state and local governments. Susan Welch & John Gruhl, Affirmative Action and Minority Enrollments in Medical and Law Schools 80, Table 3.3 (1998) ("Welch-Gruhl").

The federal government's sticks and carrots are also a major influence. Some schools report threats of legal action and threats to withhold funds; others report that the need to fill out federal paperwork effectively pressures them to engage in affirmative action. Welch-Gruhl at 80, Table 3.3. Recently, the Department of Health and Human Services ("HHS") has been in the process of developing eligibility criteria for the Centers of Excellence program ("COE") in health professions education for under-represented minorities ("URMs"). *See* 76 Fed. Reg. 68770 (Nov. 7, 2011); *see also* Public Health Service Act, Title VII, § 736, 42 U.S.C. § 293 (2011), as amended by the Patient Protection and Affordable Care Act, Public Law 111-148, § 5401 (2010) (establishing COE). HHS proposes to allocate any funds appropriated for COE to schools of medicine, dentistry, pharmacy, and graduate programs in behavioral or mental health that (1) have a significant number of URM students enrolled, including individuals accepted for enrollment; (2) have been effective in assisting URM students to complete their educational program and receive the degree involved; (3) have been effective in recruiting URM students to enroll in and graduate from the school, including providing scholarships and other financial assistance and encouraging URM students at all levels of the educational pipeline to pursue health professions careers; and (4) have made significant recruitment efforts to increase the number of URM individuals serving in faculty or administrative positions at the school. More specifically, HHS proposes to allocate funds to institutions that are in the top quartile in the proportion of minority graduates.

The pretext issue was not argued in *Grutter* or in *Gratz v. Bollinger*, 539 U.S. 244 (2003). It is likely the *Grutter* and *Gratz* plaintiffs wished for a decisive holding that would resolve the constitutionality of race-preferential admissions policies once and for all, rather than require victims to litigate the issue on a college-by-college basis. Since the latter sort of litigation would raise questions of fact for trial, it would require long-term financing that few high school students applying for admission to college are in a position to provide.

Few public interest law firms or foundations can offer help to these victims. Even if a victim were to prove at trial that a particular university's motives were unconstitutional, permanent relief would be unlikely. Universities are fluid organizations. New faculty members and administrators are constantly being added; old ones are retiring. A university whose motives have been proven to be unconstitutional at trial would certainly turn around and claim that it has seen the light. Its new faculty members and administrators, in the exercise of whatever rights to academic freedom *Grutter* appears to confer on them, would argue that in the future their reasons for race-preferential admissions will center on the diversity rationale. So long as *Grutter* is the law, even a crow-bar cannot dislodge these policies. Litigants like Petitioner are likely to be rare.

This is one among many reasons that *Grutter* should be overruled. It is not enough to rule that *Grutter* allows future plaintiffs to challenge race-preferential admissions policies for pretext. By employing a deferential standard to a university's policy, *Grutter* forces future plaintiffs either (1) to challenge race-preferential policies in a case-by-case manner that will be, by orders of magnitude, more difficult, more divisive and ultimately more likely to be without long-term effect; or (2) to accept the fact that they do not have the financial resources to mount such a challenge and hence reconcile themselves to race-preferential policies for which the diversity rationale is merely a pretext for other plainly unconstitutional motives.[7]

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[7] *Browder v. Gayle*, 352 U.S. 903 (1956) (per curiam), makes an interesting analogy here. *Browder* came to the Court on the heels of *Brown v. Board of Educ.*, 347 U.S. 483 (1954). *Brown* had relied on Kenneth and Mamie Clark's famous doll studies to demonstrate that separate is unequal in the context of education because it "generates a feeling of inferiority as to [black children's] status in the community." *Id.* at 494. *Browder* concerned laws requiring segregation on buses, not schools. It was not at all clear that *Brown*'s logic would apply. But in an opinion notable for its brevity, the Court held that *Brown* did apply,

Meanwhile, as this case illustrates, race-preferential admissions policies are becoming ever more broad and well-entrenched. *See* Althea Nagai, *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity (Oct. 17, 2006). Recently, in an interview with Columbia University president Lee Bollinger, Attorney General Eric Holder stated, "'Affirmative action has been an issue since segregation practices.'" "'The question is not when does it end, but when does it begin ... When do people of color truly get the benefits to which they are entitled?'" Yasmin Gagne, *Holder Talks Financial Crime, Affirmative Action at Low*, Columbia Spectator (Feb. 24, 2012).[8]

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thus signaling that it would not entertain case-by-case litigation over whether "separate but equal" is equal. Case-by-case litigation is as counterproductive in this context as it would have been in the context of Jim Crow. When it comes to race discrimination, strong and simple prohibitions are the best—a lesson the nation has had to learn the hard way. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

[8] There can be little hope that the guidelines interpreting *Grutter* and *Gratz* will work to rein in race-preferential admissions. See U.S. Dep't of Justice and U.S. Dep't of Educ., Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (Dec. 2, 2011). It is worth noting that the federal bureaucracy does not appear to take *Grutter*-deference seriously in any context other than race-preferential admissions. Last year, for example, new Department of Education regulations under Title II of the Americans with Disabilities Act went into effect that cut back on the authority of universities to remove from enrollment students who are threatening suicide. Ordinarily, one might expect that if deference is due to universities that engage in race discrimination, at least as much deference would be due to universities that conclude that a student with a mental illness is interfering with the education of others. But

C. Given Its History of Racial Discrimination, Higher Education Is an Unlikely Recipient of the Court's Deference on Issues of Race.

Education—particularly higher education—differs from more typical enterprises in at least two important ways. First, the quality of its services is difficult to measure. Second, in part because its benefits are believed to extend beyond students, it is heavily subsidized by government and charitable foundations. This makes it somewhat insulated from both competition and criticism and vulnerable to demands for various kinds of patronage.

As a consequence of these structural factors, education is prone to fads—some of which can become deeply rooted. Some are relatively harmless. *See* William R. Daggett, et al., *Color in an Optimum Learning Environment* (2008) (recommending that mathematics classrooms be painted indigo or blue and that social studies classrooms be painted orange, green or brown). Sometimes, however, they can have seriously harmful effects. *See* Paul A. Kirschner, *et al.*, *Why Minimal Guidance During Instruction Does Not Work: An Analysis of the Failure of Constructivist, Discovery, Problem-Based, Experiential, and In-*

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that would be incorrect. 28 C.F.R. 35.139. Instead, when an extension of *Grutter*-deference is argued for, it tends to be for an expansion of race-preferential treatment into non-academic contexts. *See, e.g.*, Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. Rev. 937 (2008) (expressing disappointment that *Grutter*'s "deferential form of strict scrutiny review" had not yet led to a re-examination of the law concerning racial-preferential public contracting).

quiry-Based Teaching, 41 Educ. Psychologist 75 (2006) (recounting the extreme popularity over the last half century of pedagogical methods that emphasize unguided or minimally-guided student learning and discussing the evidence that, at least for students without considerable prior knowledge, these methods are less effective than more guided learning).

Over their history, colleges and universities have often fallen prey to fashionable race discrimination. See *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (per curiam). Consequently, they are unlikely candidates to receive special deference on matters of race. *Cf.* Gary Becker, The Economics of Discrimination (1971) (arguing that institutions that are protected from competition, like government and government-protected monopolies, are more likely to engage in racial discrimination than institutions that are subject to direct market pressure).

Sometimes the pressure for race discrimination has come from the outside. For example, before 1950, the University of Texas was subject to the Texas Constitution's racial segregation requirement in education, and probably could not have integrated its classrooms had it wanted to. *See* Tex. Const. art. VII, §§ 7, 14 (1948); *Sweatt v. Painter*, 339 U.S. 629, 631, n.1 (1950); *see also* C. Vann Woodward, The Strange Career of Jim Crow 50 (3d rev. ed. 1974) (suggesting that the push for Jim Crow segregation came largely from poor Southern whites who used their political clout to disadvantage their black economic and social competitors); Welch-Gruhl at 80 (demonstrating that modern law and medical schools often view themselves as pressured to engage in race-preferential admissions).

Just as often, however, the pressure for racial discrimination has come from within the elite academy, its students and alumni. Consider, for example, the Jewish quotas that swept the Ivy League beginning in the 1920s. There is no definitive evidence that requires the conclusion that these quotas derived their support mainly from the well-educated. But what evidence there is strongly suggests that they did indeed reflect the prejudices and resentments of elites rather than of ordinary Americans. Boston Mayor James Curley, an official certainly known for his common touch, vehemently opposed Jewish quotas. Referring specifically to the case of Harvard, he declared: "If the Jew is barred today, the Italian will be tomorrow, then the Spaniard and the Pole, and at some future date the Irish." *See* Marcia Graham Synnott, A Social History of Admissions Policies at Harvard, Yale, and Princeton, 1900-1930, at 357-58, 365-66 (1974) ("Social History").[9]

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[9] Similarly, Samuel Gompers condemned Jewish quotas on behalf of the American Federation of Labor. Social History at 358. Indeed, newspapers and magazines from as far away as China carried critical stories. As an article in The Nation put it:

> To tell a Cohen, whose average on the college board examination was 90, that he cannot enter because there are too many Jews already, while a grade of 68 will pass a Murphy, or one of 62 a Morgan, hardly seems in line with the real interests of the college.

William T. Ham, *Harvard Student Opinion on the Jewish Question*, The Nation 226-27 (Sept. 6, 1922); *see also Harvard Faces Problem of Cutting Down Number of Students Attending By Refusing Admission to Jews*, North China Star 6 (Aug. 15, 1922);

It was well-educated Americans, not Mayor Curley's boisterous blue-collar supporters, who had the greatest incentive to resent the extraordinary success that Jewish students were having (and continue to have) in higher education. Jews were less than 4% of the American population in 1920. But by that time, Columbia University's entering class may have been as much as 40% Jewish, and the University of Pennsylvania's was similar. Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton 86-88 (2005) ("Karabel"). Within a few years, Harvard's entering class was 27.6% Jewish, and Yale's enrollment was 13.3%. *Id.* at 105, 114. Most of these students were from families that had only recently come to America, making their accomplishment all the more admirable.[10]

Down Hill from Harvard to Lowell, Boston Telegram (June 6, 1922) (cited in Social History at 356-58, 365-66).

[10] The resentment was by no means always subtle. To some Ivy Leaguers, these new immigrants and their offspring were upstarts, grinds or even "greasy grinds," all-too-eager to take the place of the established elite. One Harvard alumnus, writing to Harvard president A. Lawrence Lowell was openly contemptuous:

> Naturally, after twenty-five years, one expects to find many changes but to find that one's University had become so Hebrewized was a fea[r]ful shock. There were Jews to the right of me, Jews to the left of me, in fact they were so obviously everywhere that instead of leaving the Yard with pleasant memories of the past I left with a feeling of utter disgust ... and grave doubts about the future of my Alma Mater.

Karabel, *supra*, at 105 (quoting Dec. 17, 1925 letter).

Harvard's president at the time was A. Lawrence Lowell, also the vice president of the Immigration Restriction League, an organization steeped in that era's new scientific racism. He was determined to do something about what he called "the Hebrew problem," and argued it affected both student recruitment and alumni fundraising.[11] As he put it:

> The summer hotel that is ruined by admitting Jews meets its fate, not because the Jews it admits are of bad character, but because they drive away the Gentiles, and then after the Gentiles have left, they leave also. This happened to a friend of mine with a school in New York, who thought, on principle, that he ought to admit Jews, but who discovered in a few years that he had no school at all.

Id. at 88 (quoting May 19, 1922 letter to William Hocking).

At Lowell's behest, Harvard adopted a new exclusionary admissions process in 1926. Shortly thereafter, Yale's Dean Clarence Mendell paid a visit to Harvard's admissions director. He reported that Harvard was "now going to limit the Freshman Class to 1,000 .... They are also going to reduce their 25% Hebrew total to 15% or less by simply rejecting without detailed explanation. They are giving no details to any candidate any longer." *See id.* at 109.[12]

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[11] Lowell originally wanted to deal with the issue by publicly adopting a ceiling on Jewish enrollment. But when the faculty initially balked, he put forth a more subtle plan. "To prevent a dangerous increase in the proportion of Jews," he insisted that future admissions should be based on a "personal estimate of character on the part of the Admission authorities." Marcia Graham Synnott, The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900-1970, at 108 (1979) ("Half-Opened Door").

History repeats itself. Today the "problem" on some campuses is not just "too many whites," but "too many Asians." Asians are perceived as the new "upstarts" at highly competitive universities. One extensive study of admissions at elite private colleges found Asian applicants with perfect SAT scores of 1600 had the same chances of being accepted as white applicants with 1460s and African-American applicants with 1150s. Thomas Espenshade & Alexandria Walton Radford, No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life (2009). The authors caution that this research does not purport to reveal why this is so, since the data did not include so-called "soft variables" like extracurricular activities and teacher recommendations. But, in part as a response to Espenshade's findings, Asian students are now urged not to list themselves as Asian on their admissions applications to elite institutions. *Some Asians' College Strategy: Don't Check "Asian"*, USA Today (Dec. 3, 2011). There is a clear message being sent to Asian students: America is not the nation it purports to be.

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[12] The situation was not quite the same for blacks. Harvard, for example, takes a measure of pride in its reputation for relative openness to blacks, and all things considered, it did indeed have a better record than most institutions of the period. It was a record that was tarnished by Lowell, who segregated living and dining facilities apparently at the behest of Southern students and over the objections of many alumni. On the other hand, at Princeton, perhaps the least friendly to racial minorities of the Ivies, not a single black attended in the 20th century until 1945, and at least one was actively discouraged from enrolling. Still, even at Princeton, blacks occasionally attended in the 18th and 19th centuries. *See* Half-Opened Door at 47-53, 80-84; Karabel at 228, 232-36.

Ivy Leaguers did not imagine that black students would soon come to dominate business and industry. Even at Harvard, their numbers were small, perhaps as few as 165 total between 1871 and 1941. *Id.* Alumni felt no reason to worry, consciously or unconsciously, that blacks would crowd their children or grandchildren out of elite status. Black students were curiosities. Any "old guard" is likely at its worst when its members perceive that a group of newcomers may come to take a take a disproportionate share of the benefits that its elite institutions can confer. The group that presented that challenge at the time was Jews, not blacks. As a result, Lowell spent far more time attempting to exclude qualified Jewish students than he did attempting to exclude their black counterparts.

Amici are not arguing that college administrators bear ill-will toward Asians (or towards Scots-Irish, Cajuns or any other under-represented group that is ignored by fashionable diversity policies). While malice against Asians is not as unknown as it should be, *see* G.W. Miller III, *Asian Students Under Assault: Seeking Refuge from School Violence*, Philadelphia Weekly (Sept. 1, 2009), it is thankfully rare as a motivation for college administrators. Instead, there is simply a failure of empathy. As President William Clinton (mistakenly) has put it, "[Without race-preferential admissions], there are universities in California that could fill their entire freshman classes with nothing but Asians." Leo Rennert, *President Embraces Minority Programs*, Sacramento Bee (Apr. 7, 1995).

None of this has any effect on the overall level of diversity in higher education. It creates a frantic competition for under-represented minority students among schools, but it does not increase the overall numbers of such students attending college. Since most colleges and universities are non-selective, no high school graduate is denied a college education on the ground that his academic credentials are not as good as somebody else's.

Moreover, schools that would prefer not to discriminate are stymied. If they opt out of the racial spoils scramble, they may end up with "not enough" minority students, and hence face the ire of accrediting agencies, public and private funding sources, student organizations and their own internal diversity bureaucracy. Deference to this jerry-rigged structure is unwarranted.

D. When Principles Are Sacrificed for the Sake of Hoped-For Beneficial Consequences, Those Consequences Often Fail to Materialize.

Petitioner and several of her supporting *amici* have focused most of their briefs on distinguishing in small ways this case from *Grutter*. Other supporting *amici* have provided evidence of the unintended consequences of preferential admissions policies. Even this brief is making essentially a prudential argument. While it calls for *Grutter* to be overruled, it does so on the ground that *Grutter*-deference has so altered the doctrine of strict scrutiny as to make it structurally unable to vindicate the rights of future victims of race-preferential policies even in the cases where diversity is merely a pretext.

All of this is in contrast to the many *amicus* briefs in *Grutter* and *Gratz*, including one filed by *amicus* CCJ, that argued from first principles. Those principles should not, however, go wholly unremarked in this case. *Amici* believe that *Grutter*'s willingness to tolerate race discrimination is a violation of the nation's founding ideals. The fundamental creed upon which the nation was founded is that "all men are created equal." Declaration of Independence ¶ 2. This principle is, in Abraham Lincoln's words, a "great truth, applicable to all men at all times." Letter from Abraham Lincoln to H.L. Pierce (Apr. 6, 1859), in 3 Collected Works 374, 376 (1953). Notwithstanding this Court's subsequent erroneous claim to the contrary in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), "All men" meant all human beings—men as well as women, black as well as white. *See, e.g.*, James Otis, Rights of the British Colonies Asserted and Proved ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"), reprinted in B. Bailyn, ed., Pamphlets of the American Revolution 439 (1965); *id.* ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?"). These sentiments were codified in the first State constitutions established after the American colonies declared their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." Va. Dec. of Rights § 1 (1776), reprinted in 1 The Founders' Constitution 6 (P. Kurland & R. Lerner, eds., 1987). And the Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" Mass. Dec. of Rights (1780), reprinted in 1 The Founders' Constitution at 11.[13]

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[13] Even those founders who owned slaves recognized that slavery was inconsistent with the principle of equality articulated in the Declaration of Independence. "The mass of mankind has not been born with saddles upon their backs," wrote Thomas

The Founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result.[14] Indeed, James Madison described the "protection of different and unequal faculties" as "the first object of government." The Federalist No. 10, at 78 (Rossiter ed. 1961) (1788). Alexander Hamilton agreed, writing that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit.... The door ought to be equally open to all." The Federalist No. 36, at 217 (emphasis added).

With the eradication of slavery and the passage of the Fourteenth Amendment, the nation moved closer to its founding ideal of legal equality. Unfortunately, in one of its darkest moments, this Court held in *Plessy v. Ferguson*, 3 U.S. 537, 550 (1896), that when evaluating legal policies which separated Americans by race, "there must necessarily be a large discretion on the part of the legislature." Alone in dissent, Justice John Marshall Harlan rejected such deference and eloquently penned the judicial equivalent of the

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Jefferson, "nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God." Thomas Jefferson, Letter to Roger C. Weightman (June 24, 1826), in Jefferson: Writings 1516, 1517 (M. Peterson, ed., 1984).

[14] The modern distinction is best exemplified by President Lyndon Johnson's speech at Howard University on June 4, 1965: "[I]t is not enough just to open the gates of opportunity.... We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights*, in 2 Public Papers of the Presidents 1965, at 635, 636 (1966).

Declaration's creed: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.* at 559 (Harlan, J., dissenting).

Fifty-eight years later, in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court repudiated *Plessy*'s separate but equal doctrine and ultimately renewed America's dedication to what Martin Luther King would later describe as his dream, "that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'" Martin Luther King, Jr., I Have A Dream (1963), reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 217, 219 (James Washington ed. 1986).

There is no need to argue in this case about whether the ideal of racial equality applies to members of a racial majority as it does to members of a racial minority. Texas is now one among the nation's four majority-minority states, see Cameron Joseph, *Census Shows Minorities Outnumber Whites in Texas*, National Journal (Feb. 17, 2011).

But even were the circumstance in Texas otherwise, the constitutional command of equal treatment must apply to each person, as individuals. Unlike the majority in *Grutter*, Justice Douglas took this point to its logical conclusion when he wrote, "A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting); *see also Bakke*, 438 U.S. at 290 (Opinion of Powell, J.) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color").[15]

CONCLUSION

A generation ago, when race-preferential admissions policies were new, one of the greatest modern advocates of the passive judicial virtues, Alexander Bickel, wrote:

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.

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[15] In *United States v. Carolene Products Co.*, 304 U.S. 144, n.4 (1938), the Court acknowledged that discrete and insular minorities may wield little political power and hence find themselves victimized by the majority. But the opposite is also sometimes true: Discrete and insular minorities (whether they are racial or not) can sometimes wield more power than one would expect based on raw numbers. This is especially so when the majority status of those disadvantaged is superficial and illusory. For example, a college that gives race-based preferences to all racial groups except whites and Asians does not disadvantage whites and Asians generally, but only those whites and Asians who may apply and be refused admission on account of their race. *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (concerning a law that disadvantaged not Richmond's white minority generally, but white business owners seeking public contracts).

Alexander Bickel, The Morality of Consent 133 (1975). No one understood the importance the judicial restraint better than Bickel did. But he also recognized that race equality is one of the fundamental issues of our nation's history and that a coherent legal doctrine in this area is indispensable. The Court should return to its traditional strict scrutiny approach by overruling *Grutter* and re-establishing that permissible race discrimination is the rare exception—an exception that cannot apply to race-preferential admissions policies.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

In the Supreme Court of the United States

ABIGAIL N. FISHER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR CALIFORNIA INSTITUTE OF TECHNOLOGY, CARNEGIE MELLON UNIVERSITY, CASE WESTERN UNIVERSITY, EMORY UNIVERSITY, GEORGE WASHINGTON UNIVERSITY, NORTHWESTERN UNIVERSITY, RICE UNIVERSITY, TULANE UNIVERSITY, UNIVERSITY OF ROCHESTER, AND THE WASHINGTON UNIVERSITY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

This brief is submitted on behalf of amici curiae California Institute of Technology, Carnegie Mellon University, Case Western Reserve University, Emory University, George Washington University, Northwestern University, Rice University, Tulane University, University of Rochester, and The Washington University in support of respondents. Amici are among the most selective, well-regarded private research universities in the country, with strong undergraduate and graduate programs in the sciences, technology, engineering, and mathematics ("STEM") fields.

Each amicus believes that diversity within its student body and across all academic programs is essential to fulfilling its academic mission to provide the best education to its students, who are future leaders in their communities and in the nation. Diversity of perspectives, backgrounds, socioeconomic status, race, and ethnicity, among other characteristics, creates a dynamic campus life that benefits all students and the university as an institution. This dynamic educational experience is at the foundation of the American higher education system's sustained success, and a main reason amici attract the finest international students from around the world. Diversity within the university community also prepares students for life in a society of increasingly global dimension. Preparing students to succeed in an ever more competitive global economy—in which they will encounter and interact with persons of diverse races, ethnicities, and cultural backgrounds—is a core educational value of amici and is essential to the continued security and economic success of the United States.

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[1] The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Amici seek in their undergraduate admissions processes to achieve a broad range of diversity throughout their academic programs. Undergraduate admission at the amici universities is highly competitive, with many more well-qualified candidates applying than can be accepted. Amici undertake a holistic, individualized review of each candidate that takes into account many factors, of which race is only one, in order to determine how that candidate might contribute to the institution's learning environment. Because this Court's holding with respect to the constitutional parameters of the use of race as a factor in an individualized assessment of university candidates could later be applied to private colleges and universities under Title VI of the Civil Rights Act of 1964, amici have a considerable interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

A. Universities have a compelling interest in providing their students a diverse and challenging learning environment. This interest includes the university's interest in selecting a student body that reflects and will fulfill its academic mission. And, as this Court has previously recognized, such choices are at the core of universities' academic freedom, which has its roots in the First Amendment.

Like the University of Texas at Austin ("University of Texas") and many other universities, amici strongly believe that a rich diversity within their student bodies is essential to fulfilling their academic missions. The exchange of differing viewpoints and interaction between students of different backgrounds is a critical feature of the university experience that both enhances academic outcomes and better prepares students for success following graduation. The work environment into which today's students graduate is highly integrated, both locally and internationally. Graduates must be prepared to work collaboratively and productively with individuals from very different cultures and life experiences than their own.

The value of diversity within the student body lies not only in aggregate numbers of minorities attending the university as a whole, but also in the diversity that students experience within their chosen disciplines, where academic exchange is focused. Thus, universities have a compelling interest in achieving diversity in individual departments, schools, and colleges as well. This is perhaps best exemplified by the university's interest in diversity within the STEM fields of study, where certain minority groups have been historically underrepresented and studies demonstrate that the relative absence of other minority students has caused significant problems retaining those minority students who do enroll. In these fields, which depend on creative insights to solve problems, and where graduates will work in a highly globalized market, a lack of the diversity among the student population detracts from the educational experience of both minority and non-minority students who are enrolled. Moreover, in light of the critical role that the STEM fields play in our national security and economic vitality and the high demand for graduates in those areas, the attrition of students from underrepresented minorities means that our society is losing the valuable contribution these students could make.

B. Consistent with this Court's precedent, the amici universities have adopted holistic, individualized admissions policies that consider race as only one, non-determinative factor in assessing an applicant's candidacy. The amici universities strive for a student body that is diverse along many dimensions and based on an assessment both of the applicant's potential for success and how the applicant will contribute to the educational experience of other students. These policies complement other, race-neutral policies of the amici that are designed to enhance diversity, such as outreach to potential applicants and financial aid to those who are economically disadvantaged. The amici universities have, in short, done precisely what this Court has instructed was required of them in pursuit of their compelling interest in student body diversity.

The Court should reject petitioner's contention that a university's individualized consideration of candidates' many characteristics, including race among other factors, is not narrowly tailored to its compelling interest in diversity if the university could obtain a minimum threshold quotient of minority students through formulaic criteria such as Texas's "Top 10% Law."[2] In stark contrast to the careful consideration amici give each applicant, it is petitioner's approach that looks only at admitted students' race to determine whether "diversity" has been achieved. Petitioner's approach is the antithesis of the holistic, individualized assessment that this Court has heretofore required. Even if petitioner's argument were valid as applied to a public university largely drawing from a single state, such an approach is entirely impossible for smaller schools with nationwide applicant pools like amici. The number of students who would qualify under any formula would exceed the number of students a smaller school could accommodate. Moreover, such non-individualized criteria do not guarantee the type of genuine diversity among their student bodies that amici believe is essential to their academic missions. Exclusive reliance on numerical criteria can produce a stark lack of diversity, such as if, due to statistical anomalies or common backgrounds, the minority students admitted based upon a single criteria were overwhelmingly of one gender or grouped among a few academic interests.

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[2] Texas has amended its law, which no longer requires the University of Texas at Austin to admit all in-state students within the top ten percent of their high school graduating classes. See Tex. Educ. Code Ann. § 51.803 (as amended by S. 175, 2009 Leg., 81st Sess. (Tex. 2009)). To avoid confusion, we adopt petitioner's terminology.

When universities employ the kind of individualized, holistic assessment of applicants that this Court's precedent endorses, their subjective determinations about the likely contribution of one candidate or another to the university's academic mission are entitled to deference. When student admissions are the product of such assessments, it is impossible for courts to say that a particular disappointed applicant should have been admitted and another denied admission. Those choices ultimately reflect the university's fundamental First Amendment interest in academic freedom.

Petitioner's argument, if adopted, would have a dramatic adverse impact on the educational experience of amici's students. Petitioner offers no guidance for smaller, national schools, if they are precluded from considering race as one of many factors in a holistic assessment of individual candidates. Purely numeric approaches are infeasible for such schools, and petitioner offers no alternatives. Without the ability to consider race among other factors in selecting a diverse student body, diversity will be inevitably suffer, as will the educational experience of all students at the university.

ARGUMENT

I. A UNIVERSITY HAS A COMPELLING INTEREST IN SELECTING A DIVERSE STUDENT BODY TO FULFILL ITS ACADEMIC MISSION

A. A University's Selection Of Its Student Body Is A Critical Feature Of Its Academic Mission, Protected By The First Amendment

Since this country's Founding, in cases such as *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat) 518 (1819), this Court has acknowledged that academic freedom in the university setting is "a special concern of the First Amendment." *Grutter* v. *Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 314 (1978) (Powell, J., concurring)). "[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," the Court has recognized that "universities occupy a special niche in our constitutional tradition." *Id.* at 329. Indeed, this Court has often "extoll[ed] the unique, and uniquely important, role played by universities in the accumulation and advancement of knowledge and in contributing to public debate." Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 U.C.L.A. L. Rev. 1497, 1513 (2007).

Although the concept of "academic freedom" is often associated with the rights of individual faculty members, another aspect of that freedom is the "First Amendment right of the university itself * * * largely to be free of government interference in the performance of core educational functions." J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251, 311 (1999). Justice Frankfurter, for example, famously warned of the "grave harm resulting from governmental intrusion into the intellectual life of a university" and suggested that First Amendment protection of universities was needed to assure "the exclusion of [such] governmental intervention." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261-262 (1957) (Frankfurter, J., concurring).

A university's fulfillment of its academic mission, and therefore its protected realm of academic freedom, permeates all aspects of university life, including admissions decisions. As two South African universities struggling against government-imposed segregation eloquently stated, "[i]t is the business of a university to provide an atmosphere which is conducive to speculation, experiment, and creation." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting Albert Van de Sandt Centlivres, The Open Universities of South Africa 5 (1957)). Academic freedom therefore depends upon "'four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, *and who may be admitted to study*." *Ibid.* (emphasis added).

Because academic freedom is grounded in the First Amendment, this Court has shown considerable respect and deference to the university's exercise of academic judgment. In *Board of Regents of the University of Wisconsin System* v. *Southworth*, 529 U.S. 217 (2000), for example, the Court upheld a university's decision to impose a mandatory student activity fee in deference to the university's chosen means to fulfill its mission. The University was free to "determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Id.* at 233. And, "[i]f the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends." *Ibid.* Likewise, the Court has stressed that "[w]hen judges are asked to review the substance of a genuinely academic decision, such as [the expulsion of a student], they should show great respect for the faculty's professional judgment." *Regents of the Univ. of Michigan* v. *Ewing*, 474 U.S. 214, 225 (1985). Such decisions, which implicate the realization of a university's educational mission, deserve deference because they involve "complex educational judgments" over a discipline that "lies primarily within the expertise of the university." *Grutter*, 539 U.S. at 328.

Without question, "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). Indeed, a university's decision of whom to admit is fundamental to the university's self-definition and therefore lies at the core of its First Amendment interest in academic freedom. As Justice Frankfurter observed more than 50 years ago, "who may be admitted to study" is one of the "'four essential freedoms' of a university" necessary for a university to have sufficient independence to pursue its educational goals as it sees fit. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting Albert Van de

Sandt Centlivres, The Open Universities of South Africa 10-12). "[A] university must have wide discretion in making the sensitive judgments as to who should be admitted" so that the student body contributes to achieving the university's educational mission. *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

B. Universities Have A Compelling Interest In Achieving A Diverse Student Body, Which Improves The Educational Experience Of All Students

In the exercise of their First Amendment rights, amici have concluded that diversity, including racial diversity, among their student bodies is essential to accomplishing their educational mission. The exchange of differing viewpoints, which grow out of students' distinct backgrounds and experiences, is a foundational value of American universities. That diversity, and the dynamic environment it creates, has made the American higher education system the envy of the world. It is a common tenet among the amici universities that "[a] diverse university is a strong university." Scott Cowen, Tul. Univ., *From the President: Strength Through Diversity*, http://tulane.edu/news/releases/archive/2001/from_the_president_strength_through_diversity.cfm (last visited Aug. 9, 2012). Such diversity not only enhances students' experience while at the university, it also better prepares them for success in the world beyond. This Court's decisions rightly recognize the genuine "educational benefits * * * [that] flow from student body diversity," *Grutter*, 539 U.S. at 330, and that an educational institution therefore "may consider it a compelling interest to achieve a diverse student population," *Parents Involved in Cmty. Schs.* v.

Seattle Sch. Dist. No. 1, 551 U.S. 701, 797-798 (2007) (Kennedy, J., concurring).

The facilitation of interaction between students of diverse viewpoints and experiences is a fundamental educational value of most American universities, including amici. Carnegie Mellon, for example, understands that "[i]n the classroom, studio, laboratory, office and residence hall, a multitude of experiences, perspectives and beliefs will enrich all that we do." Jared Cohon, Carnegie Mellon, *President's Statement on Diversity* (2011), http://www.cmu.edu/enrollment/summerprogramsfordiversity/sams-president-stmt.html (last visited Aug. 9, 2012). Likewise, Northwestern University believes a diverse community is essential to its mission "because only by exploring issues with people of different backgrounds and viewpoints can we challenge our assumptions, test our ideas and broaden our understanding of the world." Daniel Linzer, Nw. Univ., *Diversity Statement from the Provost* (2011), http://www.northwestern.edu/about/diversity/statement-from-the-provost.html (last visited Aug. 9, 2012).

The amici universities' commitment to diversity in their student bodies reflects not only their values, but their common experience that a diverse environment enhances learning outcomes. The educational experience of every student is enriched through discussion in classrooms and interactions in the university community with people from varied backgrounds with different life experiences. All students benefit as "productive inquiry best takes place when individuals can explore and share their experience and thoughts as equal members of our community, uninhibited by prejudice or discrimination." Univ. of Rochester, *Statement of Educational Philosophy*, http://www.rochester.edu/diversity/philosophy.html (last visited Aug. 9, 2012). Research supports this conclusion. For example, a University of Michigan study analyzing the relationship between undergraduate students' experiences with diverse peers and their educational outcomes concluded that "diversity experiences would have a positive relationship with the learning outcomes." Patricia Gurin, et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 351 (2002). In particular, the study showed that "informal interactional diversity was especially influential in accounting for higher levels of intellectual engagement and self-assessed academic skills." *Ibid.* As George Washington University explains, "[b]y incorporating a broad range of human experiences and a rich variety of human perspectives, we enlarge our capacity for learning, enrich the quality and texture of campus life, and better prepare for life and leadership in a pluralistic society." Geo. Wash. Univ., *Diversity and Inclusion*, http://ci.gwu.edu/LifeatGW/DiversityInclusion/ (last visited Aug. 9, 2012).

In addition to promoting better learning outcomes, a diverse university community better prepares students for success in our increasingly diverse, even international, society. It is imperative to the academic mission of amici that they be able to offer a diverse academic and community experience for their undergraduate and graduate students, in order to prepare them for life outside of the university. The Washington University, for example, considers it one of the university's principal goals to "educat[e] students to live and work in an increasingly diverse world." Mark S. Wrighton, Wash. Univ., *Chancellor's Statement on Diversity and Inclusiveness*, http://diversity.wustl.edu/chancellorstatement/Pages/default.aspx (last visited Aug. 9, 2012). Indeed, this Court has likewise acknowledged that "student body diversity * * * better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Grutter*, 539 U.S. at 333.

The benefits of diversity accrue to all students, not only minority students. Through discourse and interactions in a broadly diverse community, students learn and develop the pluralistic skills that are essential for success in today's global marketplace, such as perspective-taking, conflict negotiation, and leadership skills. See Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615 (2008). "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 333-334; see *id.* at 387-388 (Kennedy, J., dissenting) ("[P]recedent * * * provide[s] a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task.").

Amici universities thus have a dual mission: They must ensure that their students are "achieving academic excellence," while also preparing their students "for life and work in a global society." Emory Univ., *College Statement on Diversity*, http://college.emory.edu/home/about/mission.html (last visited Aug. 9, 2012). Diversity within the student body is indispensable to fulfilling both aspects of their academic mission. As the California Institute of Technology affirms, "a multitude of perspectives is essential to all we do." Cal. Inst. of Tech., *Statement of Community*, http://diversitycenter.caltech.edu/statement.html (last visited Aug. 9, 2010).

C. A University Has A Compelling Interest In Diversity Throughout Its Academic Programs, Including Science And Technology Fields In Which Certain Minority Groups Are Particularly Underrepresented

In addition to crafting a diverse student body in the university as a whole, universities have a compelling interest in fostering diversity within individual academic programs and their classes. In a diverse classroom, "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Grutter*, 539 U.S. at 330. Studies have shown that heterogeneous groups are able to achieve greater insight in class discussions than homogeneous groups. Anthony Lising Antoni et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 Psychol. Sci. 507, 507-510 (2004). Because the heart of a student's academic experience and intellectual exchange is centered around classes in his or her academic program, a university with a student body that is diverse in the aggregate may, nonetheless, fail to achieve the benefits of this exchange if the individual academic programs lack diversity.

The benefits of diversity are not limited to certain disciplines, such as those in which social interaction is the focus, but extend as well to the hard sciences, where students may be seeking a single answer subject to scientific proof. As a leading physicist noted, "[a]lthough there may be one answer to a physics, chemistry or mathematics problem (based on the current state of knowledge), there are often multiple paths for arriving at that answer. In a broadly diverse classroom, all students thus benefit from hearing the different questions posed in the educational arena." S. James Gates, Jr., *Thoughts On Creativity, Diversity and Innovation in Science and Education* 3, 4 (2009), *available at* http://php.aaas.org/programs/centers/capacity/documents/Gates_Essay.pdf. Seemingly intractable questions in the fields of science, technology, engineering, and math (the "STEM fields") are answered by approaching old problems in a new way. The creativity that is essential to the STEM fields is enhanced through the exchange of diverse perspectives from students of different backgrounds. Exposure to different perspectives can influence both how students approach a problem and what problems they will tackle, such as diseases that disproportionately affect a particular group. Thus, diversity supports "the development of innovation in thinking of students in addition to enhancing each student's mastery of existing science." *Ibid.*

A diverse educational environment also fosters greater success in the STEM fields after graduation. The STEM fields increasingly require international collaboration. In 2010, for example, 32% of published academic STEM articles in the United States were internationally co-authored. Nat'l Sci. Bd., *Science and Engineering Indicators 2012, ch. 5-32, Outputs of S&E Research: Articles and Patents, available at* http://www.nsf.gov/statistics/seind12/pdf/seind12.pdf. A diverse STEM academic program is essential for students who will inevitably be required to work with a diverse group of colleagues on international teams, seeking global funding and business opportunities.

Universities have a particular interest in pursuing diversity in STEM fields, in which certain minority groups are distinctly underrepresented. According to one study, Underrepresented Minorities ("URMs"), which include individuals who self-identified as African-American, Hispanic, or Native American/Alaska Native, comprise just 11% of those who are employed in STEM occupations, which is only one-third of their representation in the school-age population (33%). Lisa Tsui, *Effective Strategies to Increase Diversity in STEM Fields: A Review of the Research Literature*, 76 J. Negro Educ. 555 (2007). This underrepresentation is even more pronounced among the newest entrants to those fields. Even though the number and proportion of doctoral degrees in STEM fields awarded to underrepresented minorities increased in both number and proportion from 2000 to 2009, African Americans, Hispanics, and American Indians/Alaska Natives still accounted for only 7% of all STEM doctoral degrees awarded during that period. Nat'l Sci. Bd., *Science and Engineering Indicators 2012, ch. 2-16, Undergraduate Education, Enrollment, and Degrees in the United States, available at* http://www.nsf.gov/statistics/

seind12/pdf/seind12.pdf. This problem persists in the STEM workforce. The National Science Foundation recently found that African Americans, Hispanics, and American Indians/Alaska Natives continue to be underrepresented in STEM fields compared with their proportions in the U.S. population. Nat'l Sci. Found., *Diversity in Science and Engineering Employment in Industry* (Mar. 2012), *available at* http://www.nsf.gov/statistics/infbrief/nsf12311/nsf12311.pdf.

The failure to attract URMs to the STEM fields threatens the nation's economic well-being and strength. "[STEM] workers drive our nation's innovation and competitiveness by generating new ideas, new companies, and new industries." David Langdon, et al., U.S. Dep't of Commerce, *STEM: Good Jobs Now and for the Future* 1 (2011), *available at* http://www.esa.doc.gov/sites/default/files/reports/documents/stemfinaljuly14.pdf. Yet there is an inadequate "supply and availability of STEM workers," *ibid.*, because "the U.S. education system too frequently fails to identify and develop our most talented and motivated students who will become the next generation of innovators." Nat'l Sci. Bd., *Preparing the Next Generation of STEM Innovators: Identifying and Developing Our Nation's Human Capital* 5 (2010), *available at* http://www.nsf.gov/nsb/publications/2010/nsb1033.pdf. It is therefore critical to the future economic strength of our country that we "extend STEM educational and career opportunities to women and minority groups that are underrepresented in these areas, so that all Americans can find quality jobs and lead our innovative economy in the decades ahead." Nat'l Econ. Council et al., *A Strategy for American Innovation* 15 (2011), *available* *at* http://www.whitehouse.gov/sites/default/files/uploads/InnovationStrategy.pdf. Indeed, as noted by the recent National Security Strategy, "America's long-term leadership depends on educating and producing future scientists and innovators" and to do so we must "expand STEM education and career opportunities for underrepresented groups." Obama Administration, *National Security Strategy* 9, 29 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_ security_strategy.pdf.

Underrepresentation of URMs in the STEM fields threatens, however, to become a self-perpetuating crisis for the entire nation. At the very time we most need the talents of all our most gifted science students, traditionally underrepresented minority students are avoiding, or even leaving, STEM fields. URMs disproportionately leave the college science pipeline because of a lack of "academic and social integration." Nat'l Acad. of Scis. et al., *Expanding Underrepresented Minority Participation* 130 (2011). Among other factors, the lack of "support from other minorities" and a feeling of being "academically and socially isolated," which is "more prevalent within STEM," contributes to the departure of minority students from STEM fields. *Id.* at 133-134. In other words, a lack of diversity in STEM academic programs serves as a self-reinforcing barrier to entry into or continuance in those programs by URM students.

Universities therefore have a compelling interest in selecting and retaining a diverse student body throughout their academic programs, including in the STEM fields. While petitioner urges less focus on diversity within individual academic departments, the lack of success in retaining URMs in the STEM fields suggests that even greater attentiveness must be given to achieving sufficient diversity within the STEM fields to end the feeling of academic and social isolation that currently exists. Without such efforts the universities —and society at large—will lose the benefit of these potential scientists' contribution.

II. HOLISTIC AND INDIVIDUALIZED ADMISSIONS POLICIES, LIKE THOSE OF AMICI, ARE NARROWLY TAILORED TO ACHIEVE A SCHOOL'S COMPELLING INTEREST IN DIVERSITY

A. To Be Narrowly-Tailored, Race-Conscious Admissions Programs Must Evaluate Applicants On An Individualized Basis, Not Merely By Racial Classifications As Petitioner's Reliance on Texas's Top 10% Law Does

This Court's precedent makes clear that a race-conscious admissions program *must* consider the applicant holistically and *as an individual.* The kind of diversity that the Court has recognized as a compelling state interest "encompasses a * * * broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.). As the Court explained in *Grutter* v. *Bollinger*, "[t]ruly individualized consideration demands that race be used in a flexible, non-mechanical way." 539 U.S. 306, 334 (2003). And, though he differed in his assessment of the Michigan program, Justice Kennedy agreed that, "[t]o be constitutional, a university's compelling interest in a diverse student body *must be achieved* by a system where individual assessment is safeguarded through the entire process." *Id.* at 392 (Kennedy, J., dissenting) (emphasis added). The admissions policies of amici do precisely that. Here, it is petitioner who argues for a rule that, insofar as diversity is concerned, looks no further than applicants' race.

Petitioner argues that consideration of race in a holistic admissions process is not narrowly-tailored whenever aggregate numerical diversity, looking only at race, reaches a threshold quota by other means. See Pet. Br. 38-40. Specifically, petitioner contends that those students admitted under Texas's Top 10% Law satisfy the minimum necessary quotient of African Americans and Hispanics in Texas's student body. *Id.* at 40.[3] Therefore, petitioner concludes, the University of Texas has no further compelling interest in considering the race of the remaining applicants as a factor in deciding which additional individuals to admit. Petitioner's reliance on Texas's Top 10% Law reduces students to simply representatives of a race and treats diversity as merely a question of whether students of a particular race have reached a minimum threshold.

This is antithetical to the individualized evaluation of students required by this Court in *Grutter* and *Bakke*. True diversity requires, as this Court's precedent provides, that students be assessed individually based on their likely contribution to the university's academic mission. Texas's Top 10% Law and similar formulaic rules do not allow for the kind of individualized assessment that the Court has required and that amici undertake in their admissions programs.

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[3] Petitioner does not disclose what percentage she believes is the minimum diversity quotient. Rather, she says only that "the reliably high level of minority enrollment produced by the Top 10% Law, already has" achieved Texas's compelling interest. Pet. Br. 40.

The Top 10% Law and similar numeric criteria are no guarantee of genuine diversity, even when the students admitted under those criteria are, in the aggregate, racially diverse. Such numerical criteria can produce a student body in which admitted students of one race are not diverse from one another in terms of other characteristics. They might, for example, be overwhelmingly female (or male) or overwhelmingly of the same socio-economic background.[4] Moreover, due either to statistical anomalies or common backgrounds, students of a particular minority group admitted under a formulaic process might be unduly concentrated in their academic interests, leaving individual departments, schools, or colleges within the university lacking in any diversity among their students.

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[4] In 2004, for example, 80% of the valedictorians in Boston public schools were girls. Anand Vaishnav, *Lopsided at the Top, Girls Outnumber the Boys Among Valedictorians*, Boston Globe, June 6, 2004, *available at* http://www.boston.com/news/education/k_12/articles/2004/06/06/lopsided_at_the_top/?page=full. On the other hand, in 2011, among those who took the SAT—the most prominent standardized national metric—there were nearly twice as many men (9,120) as women (4,683) who scored a perfect 800 in the mathematics portion of the test, even though more women than men took the exam. College Board, *SAT Percentile Ranks for Males, Females and Total Group* (2011), *available at* http://media.collegeboard.com/digitalServices/pdf/SAT-Mathemathics_Percentile_Ranks_2011.pdf. There is also a substantial socio-economic gap in SAT scores indicated by a strong positive correlation between family income and SAT score. College Board, *Total Group Profile Report*, tbl. 11 (2001), *available at* http://professionals.collegeboard.com/profdownload/cbs2011_total_group_report.pdf.

B. Even If Reliance On Strictly Numerical Criteria Were Appropriate For A Public University Drawing From A Single State, It Would Be Infeasible For Selective National Schools With Smaller Entering Classes

Adoption of a "Top 10%" rule or similar strictly numerical criteria would be particularly infeasible for smaller, private universities like amici. Smaller schools like amici could not possibly accommodate the top 10%, or even the top 1% of students of all graduating high school classes. Universities like amici draw students from across the nation, and foreign countries, and enroll only a few if any students from most localities. Each amicus university receives applications from far more qualified applicants than it can accommodate. For example, the California Institute of Technology received 5,225 total applications for the class of 2015, but accepted only 667 applications for a 12.8% admission rate. Caltech Undergraduate Admissions, *2011 Incoming Class Profile*, http://www.admissions.caltech.edu/applying/profile (last visited Aug. 9, 2012).

Moreover, because the student bodies are smaller in universities like amici, narrow reliance on any purely numeric selection criteria would frustrate diversity by making it the product of mere happenstance. Purely numeric selection criteria may, for example, produce certain areas of study, such as STEM fields, with very few URMs or women. While that would be a concern even for a larger school, see *supra* Part I.C, when the numbers of student slots involved are smaller, the likelihood that URM students admitted based on a single criterion will be concentrated in a few fields of study or will be otherwise non-diverse as a group is even greater. Only individualized consideration of all factors, including race, allows educators to select a student body that is truly diverse and contributes to the fulfillment of the university's academic mission. Reliance on purely numeric criteria is not only infeasible; it would fundamentally threaten the educational mission of small universities where every admissions decision takes into account the individual's potential contribution to the university community.

C. When Making Admissions Decisions, Amici Consider Applicants Holistically—Including Their Experience, Academic Interests, Socio-Economic Status, And Race—To Determine How Each Might Contribute To The Academic Mission

Amici evaluate each applicant holistically to determine how well the individual would help the university fulfill its academic mission. At Rice University, for example, applicants are considered both "individually and collectively," in order to determine who "will take fullest advantage of what [the school] ha[s] to offer, contribute most to the educational process * * *, and be most successful in their chosen fields and in society in general." Rice Univ., *Undergraduate Admission, Philosophy and Evaluation*, http://futureowls.rice.edu/futureowls/Philosophy _and_ Evaluation.asp (last visited Aug. 9, 2012). The university thus "seek[s] students * * * of keen intellect and diverse backgrounds who not only show potential for success at Rice, but who will contribute to the educational environment of those around them." *Ibid.* Diversity within a student body is important because it helps to create a "culture of inclusion that encourages relationships and interactions among people of different backgrounds, a culture that enhances human dignity, actively diminishes prejudice and discrimination and improves the quality of life for everyone in our community." Case W. Res. Univ., *CWRU Diversity Statement*, http://www.case.edu/diversity/about/administration.html (last visited Aug. 9, 2012). Those sentiments are common among the amici universities.

While amici share a commitment to diversity, they differ in how they evaluate the way individual candidates will contribute to their academic mission. All the amici agree that diversity within the student body is critical to providing students the best educational experience and prepare them for a diverse and globally integrated world. Among universities, diversity may take somewhat distinct forms, and different universities will evaluate a student's qualities and experiences differently, depending on the university's unique character. The kind of student body diversity that a particular school seeks will depend on factors such as its size, geographic location, historical or religious affiliations, and the nature and relative strengths of its academic programs. Within their schools' unique priorities, admissions officers must also consider the composition of the particular class to ensure that there are a wide range of matriculants of all types to enrich the learning environment and improve the quality of education for all students.

While amici agree that racial and ethnic diversity is an important part of overall educational diversity, and consider such diversity in their admissions decisions, race and ethnicity are only two of many factors in the construction of the academic community. When making admissions decisions, amici universities also consider, among other characteristics, diversity of background, sex, gender, gender identity, socioeconomic status, religion, nationality, sexual orientation, age, disability, and marital and family status. No single characteristic is dispositive for admission. As Rice University explains, the goal of its admissions process is to "craft a residential community that fosters creative, intercultural interactions among students, a place where prejudices of all sorts are confronted squarely and dispelled." Rice Univ., *Undergraduate Admission, Philosophy and Evaluation*, *supra*. Diversity helps the university to achieve these educational goals and to prepare its students for success beyond the university.

That amici take the race of applicants into account in selecting their incoming student bodies does not mean that amici favor or advantage one or more races over others. Rather, the race of an applicant is considered along with the candidate's other characteristics to determine the contribution that student would likely make to the university community. For example, a white student from a majority-minority high school might write an essay that illustrates how this combination of race and experience would make a particularly interesting addition to the dialogue on campus. The race of an applicant may place into context the applicant's other experiences or characteristics, and suggest whether the candidate will make a valuable contribution to the university's mission and the experience of other students.[5]

Admissions officers at the amici universities consider a wide range of information that provides them a sense of the student as an individual. Each of the amici universities has an admissions process that provides "truly individualized consideration" of its applicants. *Grutter*, 539 U.S. at 334. By way of example, all applicants to Case Western Reserve University must submit the "Common Application" (which includes a personal essay and a list of extracurricular and work activities), the "CWRU Supplement to the Common Application," an official high school transcript, a "Secondary School Report" (including a guidance counselor recommendation), an SAT or ACT score, and two teacher recommendations. Case W. Res. Univ., *Undergraduate Admission: Application and Checklist*, http://admission.case.edu/apply/application instructions.aspx (last visited Aug. 9, 2012). Applicants may supplement their applications with additional letters of recommendation, SAT II subject test scores, and an interview with a Case Western admissions counselor. If an applicant did not follow a traditional path to college, Case Western provides alternate application instructions for transfer, international, and home-schooled students. *Ibid.* Increasingly, amici utilize the online resources to allow applicants an opportunity to express their individual potential to contribute to academic and extra-curricular life. At the University of Rochester, for example, an applicant can submit "electronic media," including links to websites and online videos. Univ. of Rochester, *Apply to Rochester*, http://enrollment.rochester.edu/admissions/apply/freshmen/ (last visited Aug. 9, 2012).

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[5] Cf. *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-789 (2007) (Kennedy, J., concurring) (distinguishing "race-conscious measures to address" the issue of diversity from "treating each student in different fashion solely on the basis of a systematic, individual typing by race").

Admissions officers at the amici universities conduct a holistic review of everything submitted in an application. Amici "treat every application individually, taking great care to make our admission decisions fair, thorough and sensitive." Carnegie Mellon, *Especially for High School Seniors: What Do We Want to See?*, http://my.cmu.edu/portal/site/admission/persp_hss#our site (last visited Aug. 9, 2012). Amici expend substantial time and considerable expense in order to understand the applicant and how the individual would contribute to the university. At George Washington University, for example, "[e]very completed application is carefully reviewed by the Admissions Committee, which looks for students who have the academic preparation, personal qualities and motivation to thrive in GW's blend of classroom, campus and city experiences." Geo. Wash. Univ., *Freshman Admission*, http://www.gwu.edu/apply/undergraduateadmissions/applytogw/freshmanadmission (last visited Aug. 9, 2012). Under such a system, "individual assessment is safeguarded through the entire process." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting).

Amici strive to create a diverse and dynamic learning environment both at the university-wide level and within the various academic programs. In contrast to petitioner, who measures diversity only through aggregate numbers of minorities at the university level, amici recognize that much of the most intensive interaction and exchange of ideas takes place within academic disciplines. Thus, it is critical that diversity not be compartmentalized within a few departments, but rather that throughout the university's academic programs students can benefit from meeting and working with other individuals whose backgrounds, talents, life experience, beliefs, and world views differ from (and thereby challenge) their own. In order to facilitate this vigorous exchange, amici seek to admit a diverse group of students, including sufficient numbers of underrepresented minority students to reduce the feeling of isolation and permit these diverse voices to be heard. This diversity enriches the experience and benefits all students in the programs. Without it, students' educations would be less enlightening, and they would graduate into a heterogeneous and international economy without the tools to succeed.

D. If A University Employs An Individualized Approach To Admissions That Treats Race As Only One Non-Determinative Factor, The First Amendment Requires Deference To The School's Assessment Of Individual Students

A university's decision of whom to admit is an exercise of its First Amendment rights of academic freedom. The decision whether to admit one student or another is therefore entitled to deference by the courts when that decision is made on the basis of the kind of individualized assessment of which student will better advance the university's academic mission that this Court has previously endorsed. Each of the amici expends considerable resources and effort to comply with this Court's instruction that race can be considered in a "flexible, nonmechanical way," *Grutter*, 539 U.S. at 334, that "encompasses a * * * broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). When a university has followed that instruction, the school's individual determinations of which students will best contribute to diversity within the student body and fulfillment of the university's academic mission are entitled to deference as an exercise of the university's First Amendment rights.

It is a fundamental precept of the American educational system that, "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). "[B]y claiming 'the right to select those students who will contribute the most to the '"robust exchange of ideas,' a university seeks 'to achieve a goal that is of paramount importance in the fulfillment of its mission.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)). This "educational autonomy" is "grounded in the *First Amendment*," and its exercise is entitled to "a degree of deference." *Id.* at 328-329 (emphasis added).

This Court's precedent establishes a workable framework that respects both the university's First Amendment interests and the rights of students not to be excluded or categorized as no more than a representative of their race. The amici universities have adhered to that framework. They pursue numerous race-neutral methods of attracting a diverse student body, including outreach efforts to encourage applications and financial aid to assist those who are economically disadvantaged. In addition, they expend substantial time, effort, and resources to evaluate applicants for admission. They seek to understand the individual applicant's talent and potential contribution to the university. They consider many characteristics of the applicant, of which race is only one, non-determinative, part. See *Bakke*, 438 U.S. at 315 (opinion of Powell, J.); *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring) ("Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.").

When a university has employed an individualized, holistic approach to selecting its student body, consistent with this Court's precedent, the First Amendment requires deference to the school's subjective weighing of the likely contribution of individual students. When no single factor is determinative in a candidate being admitted or denied admission, it is difficult, perhaps even impossible, to say who among the disappointed applicants would have been the next admitted if one or another of the successful candidates had not been. For example, if the hypothetical last admitted student were a minority engineering student who plays violin and field hockey, it is difficult to know whether, if that student had not been admitted, the spot would have been filled by a majority engineering student who plays field hockey, a minority engineering student who organized charity events, or a majority English major from a disadvantaged home who was first violin in her summer orchestra. Each of these factors, and others, would have been considered in evaluating the candidate individually and in the context of the overall class. Under such an admissions program, virtually any disappointed candidate could make a claim that he or she would have been the next admitted, yet it would be nearly impossible for a court to decide that a particular plaintiff would have been admitted instead of another student but for the consideration of racial diversity. When a school has chosen its students individually, based not on racial quotas but on a holistic assessment of how each individual will contribute to the university, judicial review of those individual determinations directly implicates the "'essential freedom[]' of a university—to determine for itself * * * who may be admitted to study." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting Albert Van de Sandt Centlivres, The Open Universities of South Africa 5).[6]

Directing a university to employ a blind numerical system that precludes evaluation of applicants' individual characteristics would be no less an intrusion on the university's First Amendment rights. An arbitrary "Top 10%" rule, such as Texas's, is the antithesis of the individualized selection of students and assembly of a student body that is at the core of a university's academic freedom. Petitioner would have the Court forbid precisely the kind of holistic, individualized assessment of students that amici were previously told they "must" utilize in order to achieve their "compelling interest in a diverse student body." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting). When a university adopts, as amici have, a procedure that "safeguard[s]" individual assessment "through the entire process," *ibid*, the courts should defer to the university's specific determination of which students will best promote, individually and collectively, the school's academic mission.

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[6] Whether a university is engaging in a holistic assessment of individual candidates, as provided in this Court's precedent, is, of course, subject to judicial review. Deference is appropriate to the university's determination of *which* individual students will, individually and collectively, best further the school's academic mission.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

◆

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QUESTION PRESENTED

Whether this Court's jurisprudence regarding the Fourteenth Amendment's Equal Protection Clause, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permits the use of race in college admissions decisions.

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INTEREST OF THE *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

This case is important to Cato because it implicates the Institute's longstanding belief that all citizens should be treated equally before the law and that, accordingly, government's use of racial and ethnic classifications must be strictly circumscribed. Such classifications are, at the very least, in tension with the equal protection and due process guarantees of the Fifth and Fourteenth Amendments. Their use must therefore be subject to searching judicial review, not across-the-board deference.[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk.

SUMMARY OF THE ARGUMENT

"The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989). Yet "blind deference" is the only possible characterization of the Fifth Circuit's decision to uphold the University of Texas at Austin's ("UT" or the "University") policy of according special preference to applicants of certain races as "underrepresented minorities." Though acknowledging that racial classification by government is subject to strict scrutiny, Petition Appendix ("Pet. App.") 35a, the Fifth Circuit declined to scrutinize "the merits of the University's decision" to employ racial classifications. Instead, it simply presumed the University's "good faith" in both choosing to discriminate among applicants based on their race and implementing that choice through a "personal achievement score." Pet. App. 41a. Thus, under the lower court decision, a public university's mere assertion of a "diversity" interest, no matter the university's precise circumstances, trumps the individual applicant's right to be regarded as an individual by her government, rather than as a specimen of a particular race or ethnicity.

I. *Grutter v. Bollinger*, 539 U.S. 306 (2003), certainly does not compel that result. *Grutter* did not overrule this Court's equal protection cases requiring that a "strong basis in evidence" support the necessity of a governmental entity's use of racial classifications, even where its interest is one that the Court has recognized, in general terms, to be compelling. *See, e.g., Croson*, 488 U.S. at 500; *Miller v. Johnson*, 515 U.S. 900, 922 (1995). Absent such a showing in each instance, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493. Beyond serving to "smoke out" illegitimate motivation, a strong basis in evidence is essential to define the contours of the government's interest so as to make possible the narrow tailoring of racial preference that is required. *Id.* Only such specificity prevents general assertions of interest – for instance, a university's interest in diversity – from being used to "'justify' race-based decisionmaking essentially limitless in scope and duration." *Id.* at 498.

II. The importance of the strong-basis-in-evidence requirement is confirmed by UT's claim that its use of racial preferences was necessary to achieve a "critical mass" of underrepresented minorities. The evidence in *Grutter* demonstrated that, absent preferences, the University of Michigan Law School's minority student population would have plummeted to almost nothing. But UT has achieved real and substantial racial diversity – beyond that which Michigan accomplished with preferences – through Texas's race-neutral "Top 10% Law." For that reason, UT cannot demonstrate by a strong basis in evidence the necessity of its use of race or the scope of the preferences that it assigns to different minority groups. In reality, the University's racial preferences have only a *de minimis* effect on the composition of the student body, far from commensurate with the heavy toll that consideration of race exacts. This aspect of its diversity program cannot survive strict scrutiny.

III. The result would be the same even if UT could demonstrate that racial preferences are necessary to achieve a "critical mass" of underrepresented minorities. The concept of "critical mass" is arbitrary in every respect, such that its use can be supported in every instance by manipulation of the racial groups for which a "critical mass" is sought or the level at which "critical mass" is applied. "Critical mass" is antithetical to individualized consideration and the true pluralism that is the hallmark of diversity. Far from necessary to realize any legitimate end, "critical mass" is a hindrance to achieving "the harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting). In no application can it survive strict scrutiny.

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ARGUMENT

I. A University Must Demonstrate by a "Strong Basis in Evidence" that Its Use of Racial Classifications Is Necessary to Achieve a Compelling Interest

"'[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.'" *Croson*, 488 U.S. at 505 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting)). To that end, the Court's precedents require that the necessity of racial classifications be supported by a "strong basis in evidence," not just generalized assertions of interest. The concerns that motivate this requirement – racial neutrality, individual dignity, and accountability – apply with special force to public universities' use of racial classifications to achieve "diversity," a vague and potentially limitless goal that may provide cover for politically-motivated or invidious discrimination. Accordingly, public universities bear the burden of demonstrating the necessity of their consideration of race in each instance.

A. The Strong-Basis-in-Evidence Requirement Is Essential to Protect Individuals' Rights to Equal Dignity and Respect

The use of racial classifications by government threatens individuals' "personal rights to be treated with equal dignity and respect." *Croson*, 488 U.S. at 493 (internal quotation marks omitted). For that reason, the Court has long subjected the government's use of racial classifications to strict scrutiny. To defend its use of racial classifications, a governmental entity must not only identify a legitimate "compelling interest," but also demonstrate a "strong basis in evidence" that the consideration of race is necessary to further that compelling interest. *See, e.g., Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277 (1986) (plurality op.); *Croson*, 488 U.S. at 500. This requirement is essential to carrying out strict scrutiny of racial classification schemes in several respects.

1. Enabling the Court's independent judgment

Most directly, the strong-basis-in-evidence requirement enables a court to exercise its independent judgment as to whether racial classification is truly necessary. The "presumptive skepticism of all racial classifications" prohibits a court "from accepting on its face" a government's conclusion that such classification is necessary. *Miller*, 515 U.S. at 922 (citation omitted). Uncritical acceptance of the government's asserted interest "would be surrendering [the Court's] role in enforcing the constitutional limits on race-based official action." *Id.* This the Court "may not do." *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Nor may the Court rely on sketchy facts to overcome the presumption against the racial classification of citizens by their government. The equal protection inquiry requires a precise balancing of the overriding interest of racial neutrality with more transient interests, such as remediating historical discrimination or encouraging diversity. These competing interests "are not always harmonious" and "reconciling them requires . . . extraordinary care" on the part of governments seeking to employ race-conscious policies and, by extension, the courts reviewing those policies. *Wygant*, 476 U.S. at 277 (plurality op.); *see also Ricci v. DeStefano*, 129 S.Ct. 2658, 2675 (2009) (importing the "strong-basis-in-evidence standard" to Title VII, where there is the same "tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other"). Imprecision is necessarily incompatible with that task.

Moreover, "context matters" in applying strict scrutiny. *Grutter*, 539 U.S. at 327. Absent the showing of a strong basis in evidence, a court simply lacks the relevant context upon which to conclude that the use of racial classifications is necessary in a particular circumstance.

Croson demonstrates the factual rigor required to balance these factors. There the Court considered five "predicate facts" proffered by a city in support of a minority-contractor quota. The quota ordinance's claim of remedial purpose was "entitled to little or no weight," as were "conclusory" statements that there had been discrimination within the region's construction industry. 488 U.S. at 500. Reliance on disparities between the number of contracts awarded to minority firms, or membership in local contracting organizations, and the city's minority population was "similarly misplaced," where the "city [did] not even know how many [minority firms] in the relevant market are qualified to undertake" construction projects. *Id.* at 501-02. And a congressional finding that there had been nationwide discrimination in the construction industry had little probative value where "the scope of the problem would vary from market area to market area." *Id.* at 504. "None of these 'findings,' singly or together," the Court found, provided a strong basis in evidence supporting the use of racial preference. *Id.* at 500.

The city's burden, the Court explained, was to provide evidence of necessity by "identify[ing] [the prior] discrimination, public or private, with some specificity before [it] may use race-conscious relief." *Id.* at 504. But what the city presented was "a generalized assertion as to the classification's relevance to its goal" and "sheer speculation" as to the impact and existence of any prior discrimination. *Id.* at 499, 500.

Absent the requisite factual detail, the Court's task was "almost impossible." *Id.* at 507.

The Court's recent decision in *Ricci* is also illustrative. The *Ricci* Court rejected the government's argument that it could discard the results of a promotional exam on the basis of its belief that certifying the result could expose it to disparate-impact liability from black firefighters. 129 S.Ct. at 2681. "[A] prima facie case of disparate-impact liability – essentially, a threshold showing of a significant statistical disparity and nothing more – is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results." 129 S.Ct. at 2678. To prevail in its defense that certifying the results could expose it to disparate-impact liability, the city was instead required to produce strong evidence that its exams were not job-related and consistent with business necessity or that there existed an equally valid, less-discriminatory alternative. *Id.* at 2678. The city's evidence, however, consisted of little more than "a few stray (and contradictory) statements." *Id.* at 2680. Thus, there was "no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability." *Id.* at 2680-81.

For good reason, "any racial preference must face the most rigorous scrutiny by the courts." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring). The courts, in turn, are reliant on the strong-basis-in-evidence requirement to carry out that task.

2. "Smoking out" illegitimate use of race

A strong basis in evidence is necessary to demonstrate, in objective terms, that the use of racial classifications by government actually furthers legitimate interests. "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493 (plurality op.). Thus, the requirement of a factual showing of necessity "'smoke[s] out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.*

The Court has had ample grounds for suspicion on this score. In attempting to justify the necessity of its race-conscious anti-layoff policy, the school board in *Wygant* presented no contemporaneous evidence of prior discrimination and was reduced to "lodging" extra-record materials with the Court. 476 U.S. at 278 n.5 (plurality op.). The Court was appropriately wary of this *post hoc* effort: "If the necessary factual predicate is prior discrimination . . . then the very nature of appellate review requires that a factfinder determine whether the employer was justified in instituting a remedial plan." *Id.* at 278 n.5. On the facts before it, the Court could only conclude that the school board's motivation was outright racial balancing. *Id.* at 276; *see Croson*, 488 U.S. at 497-98 (discussing *Wygant*).

Similarly, the Court in *Croson* inferred improper motive from the absence of a strong basis in evidence to support particular aspects of the city's minority-contractor preference scheme. The city presented "*absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." 488 U.S. at 506. Yet these groups were awarded preferences. This "random inclusion of racial groups," unsupported by any evidence of prior discrimination, "strongly impugns the city's claim of remedial motivation." *Id.*

The *Croson* Court also found it relevant that the racial preferences, chiefly benefiting black contractors, had in fact been enacted by a majority-minority city council. *Id.* at 495 (noting that "blacks constitute approximately 50% of the population of the city" and that "[f]ive of the nine seats on the city council are held by blacks"). Given the absence of "[p]roper findings" regarding prior discrimination against black contractors, the Court could not dismiss the possibility that the city's preference scheme was simply the product of "racial politics." *Id.* at 510. "'If there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.'" *Id.* at 510-11 (quoting *Fullilove*, 488 U.S. at 539 (Stevens, J., dissenting)).

Most recently, the invidious results of racial politics were particularly pronounced in *Ricci*. The absence of any strong basis in evidence to support the city's asserted reason for scrapping its promotional exam – concern for disparate-impact liability – confirmed that its explanation "was a pretext and that the City's real reason was illegitimate, namely, the desire to placate a politically important racial constituency." 129 S.Ct. at 2684 (Alito, J., concurring).

The Court has also relied on the strong-basis-in-evidence standard in other cases to expose motivations that, although well-meaning, were nevertheless illegitimate. In *Miller*, for example, the Court identified and rejected the Justice Department's policy of "maximizing majority-black districts" through enforcement of Section 5 of the Voting Rights Act, rather than "grounding its objections [to proposed redistricting maps] on evidence of a discriminatory purpose." 515 U.S. at 924. Similarly, in *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (hereinafter "*Shaw*"), the Court found that "an interest in ameliorating past discrimination did not actually precipitate the use of race in [a state's] redistricting plan." In each case, what revealed the improper motivation was the absence of a strong basis in evidence to support race-conscious redistricting. *See id.* at 908 n.4 (discussing standard and evidence).

Because "[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system," *Adarand v. Pena*, 515 U.S. 200, 226 (1995) (quotation marks and citation omitted), the courts must be in a position to satisfy themselves that consideration of race serves a legitimate end. Nothing short of a strong basis in evidence allows them to do so.

3. Tailoring the use of race

The strong-basis-in-evidence requirement facilitates the evaluation of whether racial classifications are narrowly tailored. Under strict scrutiny, racial classifications are "constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326. Indeed, "[t]he purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Id.* at 333 (quoting *Croson*, 488 U.S. at 493). Absent a precise delineation of the government's compelling interest – and, in particular, the necessity of employing racial classifications – it may be "impossible to assess" whether the use of racial classifications "is narrowly tailored" to fit that interest. *Croson*, 488 U.S. at 507. In short, no court can possibly evaluate the relationship between race-conscious remedies and their purpose when that purpose is adduced only in the most general terms.

See Grutter, 539 U.S. at 388 (Kennedy, J., dissenting) (the use of racial classifications must be "supported by empirical evidence" to facilitate "rigorous judicial review, with strict scrutiny as the controlling standard"); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring) (explaining how "the district fails to account for the classification system it has chosen").

Further, it is precision in defining the government's compelling interest that prevents "race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498. As the *Croson* Court explained, "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It has no logical stopping point." *Id*. (internal quotation marks omitted). The permissible means to address that interest would likewise be without limit.

Imprecision in defining government's interest in employing racial classifications also undermines the requirement that it undertake "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. If race-conscious policies are to be permitted only as a "last resort," *Croson*, 488 U.S. at 519 (Kennedy, J., concurring), a reviewing court must be able to satisfy itself that no race-neutral alternative exists. This it cannot do where the governmental entity is free to define its "compelling interest" (including the necessity of the use of racial classifications) in terms calibrated to "fit" its preferred race-conscious policy, rather than the facts actually demonstrating the need for consideration of race. If the government may simply assert the necessity of racial classifications, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Id.* at 504.

4. Limiting racial stigma and hostility

When the use of racial classifications extends beyond what is necessary and narrowly tailored, the "unhappy consequence" is "to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). In particular, "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493. Instead of promoting inclusiveness and cross-racial understanding, they may bring about the perverse result of "reinforc[ing] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978) (Powell, J.).

A strong basis in evidence supporting the necessity of racial preferences limits this harm by preventing overinclusiveness in race-conscious policies. By forcing government to identify and work to achieve its interest with precision, such a showing ensures that these harms will be minimized or, where race-neutral means may be substituted, entirely eliminated. By contrast, imprecision – that is, adopting racial preferences that are not necessary to achieve a compelling interest in all applications – only amplifies the "inequity in forcing innocent persons . . . to bear the burdens" of what may understandably appear to be arbitrary or invidious classifications, *Bakke*, 438 U.S. at 298 (Powell, J.). This can only stoke racial divisiveness and hostility.

5. Transparency and accountability

The strong-basis-in-evidence requirement reinforces transparency and accountability where public institutions are involved. In light of the nation's experience, recent and historical, in racial relations, the use of racial classifications by government is understandably a matter of intense public interest. But racial classification schemes often lack the clarity and transparency necessary for public understanding and scrutiny. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 253-57 (2003) (presenting a mere "summary" of college's admissions guidelines); *Parents Involved*, 551 U.S. at 785-86 (Kennedy, J., concurring) (describing "problematic" discrepancies and ambiguities in a "complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools"); *see also Bakke*, 438 U.S. at 316-17 (Powell, J.)

(describing Harvard College's more straightforward diversity program).

As Justice Kennedy observed in his *Grutter* dissent, loose standards give universities "few incentives to make the existing minority admissions schemes transparent." 539 U.S. at 394. By facilitating transparency and disclosure, the strong-basis-in-evidence requirement empowers citizens to "hold . . . elected officials accountable for their positions," *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 916 (2010), usually well before the courts have an opportunity to pass judgment on challenged governmental action. And democratic accountability through the political process is the hallmark of "enlightened self-government," *id.* at 898, preferable in fundamental respects to remedial judicial action. By contrast, where "programs have not been openly adopted and administered . . . , they have not benefited from the scrutiny and testing of means to ends assured by public deliberation." Drew Days, III, Fullilove, 96 Yale L.J. 453, 458-59 (1987).

B. The Concerns Motivating the Strong-Basis-in-Evidence Requirement Apply with Special Force to Universities' Use of Racial Classifications to Achieve Diversity

"[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized," including the use of racial preferences in public university admissions. *Gratz*, 539 U.S. at 270. It follows that a public university's use of racial classifications must be supported by a strong basis in evidence that the consideration of race is necessary to achieve a legitimate and compelling interest. *Wygant*, 476 U.S. at 277 (plurality op.); *Croson*, 488 U.S. at 500; *Shaw v. Reno*, 509 U.S. 630, 656 (1993); *Miller*, 515 U.S. at 922; *Shaw v. Hunt*, 517 U.S. at 908 n.4, 910; *Bush v. Vera,* 517 U.S. 952, 910 (1996). While deference may be due to a school's choice of educational objectives, *Grutter*, 539 U.S. at 328-29, the Court has never suggested that public universities need not meet this basic evidentiary standard when they employ racial classifications to achieve student-body diversity. Indeed, this requirement carries special weight when diversity is offered as a justification for the use of racial classifications, because the problems of improper motive, unlimited duration, and imprecise tailoring are acute.

Diversity is particularly susceptible to abuse as a pretext for illegitimate purposes. The Court has had little difficulty determining when remedial purpose has been employed as a pretext for other ends, by focusing on evidence of prior discrimination and the lingering effects of such discrimination – both relatively straightforward factual inquiries. *E.g., Parents Involved*, 551 U.S. at 720-21; *Croson*, 488 U.S. at 499-500. By contrast, evaluating the necessity of racial preferences to accomplish a diversity goal is a more complex inquiry. Universities' views of the meaning of diversity, its specific benefits and the proper means of achieving it may differ; diversity programs operate on more complex statistical terrain than remedial efforts targeting a discrete number of racial groups; and courts may not simply look backwards at historical evidence to assure themselves that a firm basis exists for the use of racial classifications.

Absent clear and specific evidence of the need to consider race, it is impossible to distinguish invidious racial balancing from permissible diversity-related preference, so long as a university espouses a diversity interest and provides some measure of individual consideration. *See* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 Tex. L. Rev. 617, 543 (2007). This risk is not hypothetical: "Many academics at other law schools who are 'affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.'" *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (quoting Peter Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Policy Rev. 1, 34 (2002)). Only a clear accounting – in the form of strong evidence showing a need for racial preferences in light of the institution's circumstances and goals – can guard against the risk that a diversity program, even one justified using language from *Bakke* and *Grutter*, may in fact operate "as a cover for the functional equivalent of a quota system." *Bakke*, 438 U.S. at 318 (Powell, J.).

Greater factual scrutiny is also necessary to prevent claims of diversity from being "used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498. Though the *Grutter* Court "expect[ed]" that the use of racial preferences would no longer be necessary in 25 years, 539 U.S. at 343, its conception of universities' interest in diversity provides no apparent means of limiting the scope or duration of preferences. *See Ayres & Foster*, *supra*, at 543. But where universities are required both to justify with precision their asserted need and then to tailor their use of race narrowly to that need, such limits will reveal themselves, as an incident of the demonstration of a strong basis in evidence that the consideration of race is necessary. *Cf. Croson*, 488 U.S. at 506 (holding that city may not give preferences to particular groups for which there was "absolutely no evidence of past discrimination"). This requirement also facilitates the adaptation of diversity programs to account for progress along the way. "Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives." *Grutter,* 539 U.S. at 394 (Kennedy, J., dissenting). At some point, racial preferences would necessarily fall by the wayside.

" '[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.' " *Gratz*, 539 U.S. at 270 (quoting *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting)). In light of the heightened risk of pretext, universities claiming a diversity interest should not be absolved from having to demonstrate the factual necessity of racial preferences to achieve that end; if anything, judicial scrutiny should be more searching than for purely remedial programs.

C. Public Universities Must Demonstrate that Racial Preferences Are Necessary To Achieve Diversity

Commensurate with the heavy toll that consideration of race exacts, the strong-basis-in-evidence standard compels a public university employing racial classifications to come forward with evidence that justifies their use. "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." *Adarand*, 515 U.S. at 228. To that end, a public university bears the burden of demonstrating by a strong basis in evidence that racial classifications are necessary to achieve its educational objectives. This logically entails three discrete showings:

First, the university must demonstrate, by empirical evidence or precedent, that its particular conception of racial diversity among students actually furthers a legitimate educational objective. *See Grutter*, 539 U.S. at 388 (Kennedy, J., concurring). This showing is essential to uncovering pretextual use of the diversity rationale, identifying forbidden quota systems implemented in *sub rosa* fashion, and ensuring that the university's interest is, in fact, sufficiently compelling to warrant consideration of race.

Second, the university must present evidence that minority enrollment is sufficiently low as to necessitate the use of the "highly suspect tool" of racial classifications, *Croson*, 488 U.S. at 469, to achieve its legitimate educational objectives. In effect, this requires the university to apply its diversity theory to its unique situation, proving that an interest compelling in the abstract is also compelling in fact in this instance. *See Croson*, 488 U.S. at 505 ("We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another.").

To that end, a school espousing the "critical mass" theory of diversity approved in *Grutter* must present a strong factual basis that, prior to consideration of race, its student body lacks the "meaningful numbers" of minority students necessary to achieve the educational benefits of diversity. *Grutter*, 539 U.S. at 338. Moreover, the school must show that its use of racial preferences has more than a "minimal effect" and so is in fact superior to race-neutral alternatives; otherwise, consideration of race would hardly be "necessary." *Parents Involved*, 551 U.S. at 734. Racial preferences that have only a *de minimis* effect on minority enrollment fail this test. *Id.* Only in this way may the university carry its burden of proving that its use of race "outweigh[s] the cost of subjecting [thousands] of students to disparate treatment based solely upon the color of their skin." *Id.*

Third, the university must present evidence that validates each aspect of its use of racial preferences. *See Shaw*, 517 U.S. at 909 (before states may take race-conscious action to remedy prior discrimination, "they must identify that discrimination . . . with some specificity" because a "generalized assertion of past discrimination . . . provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy"). In particular, there must be a measure of consistency in the treatment of similarly situated minority groups for a court to conclude that preferences are in fact necessary in each instance. *Cf. Grutter*, 539 U.S. at 381-83 (Rehnquist, C.J., dissenting) (explaining how "disparate admissions practices with respect to [Hispanics, blacks, and Native Americans] demonstrate that [the university's] alleged goal of 'critical mass' is simply a sham"). Just as prior discrimination against black-owned businesses cannot support preferences benefiting Eskimos or Aleutian Islanders, *Croson*, 488 U.S. at 506, failure to achieve a "critical mass" of blacks through race-neutral means, for example, would not justify preferences for Hispanics. Such overinclusiveness "strongly impugns" a university's asserted interest, suggesting that improper considerations are at work. *Id.*

To the extent that a university is unable to make these most basic showings, it has no possible legitimate basis upon which to discriminate on the basis of race.

II. Even if the "Critical Mass" Concept Is Consistent with the Strong-Basis-in-Evidence Requirement, UT's Use of Racial Classifications Is Not

Even before addressing narrow tailoring, UT must demonstrate, by a strong basis in evidence, that its consideration of race is "necessary to further its compelling interest in securing the educational benefits of a diverse student body." *Grutter*, 539 U.S. at 333. Its showing falls far short.

Grutter held that a university "has a compelling interest in attaining a diverse student body," *id.* at 328, and that sufficient evidence supports the proposition that "a 'critical mass' of underrepresented minorities is necessary to further [that interest]." *Id.* at 333. This holding was said to be "in keeping with [the Court's] tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Id.* at 328. UT expressly relies on this theory of diversity and its endorsement in *Grutter*. Supplemental Joint Appendix ("SJA") 24a-25a.

Nowhere in *Grutter*, however, did the Court suggest that a university's present circumstances are irrelevant to proving the necessity of race-conscious admissions – that is, that a public university may satisfy its burden of demonstrating necessity merely by asserting its goal of enrolling a "critical mass" of minority students. To the contrary, the Court's decision rests on the uncontroverted factual determination that minority enrollment would have plummeted in the absence of racial preferences:

> Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a "'very dramatic,'" negative effect on underrepresented minority admissions. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. Under this scenario, underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.

Id. at 320 (citations omitted); *see also id.* at 340 (race-neutral alternatives would "require a dramatic sacrifice of diversity"). Thus, the points of contention in *Grutter* were the law school's interest in diversity as measured by "critical mass," *compare id.* at 328-33 (diversity is a compelling interest) *with id.* at 364-66 (Thomas, J., dissenting), and the narrow tailoring of its diversity program, *compare id.* at 333-43 (the law school's program is narrowly tailored) *with id.* at 389-94 (Kennedy, J., dissenting). None of the six opinions contended that, assuming the school's compelling interest in diversity and the narrow tailoring of its program, racial preferences were not necessary to achieving its asserted interest. *See Parents Involved*, 551 U.S. at 734-35 (explaining that, in *Grutter*, "the consideration of race was viewed as indispensable in more than tripling minority representation at the law school – from 4 to 14.5 percent").

By contrast, the uncontroverted evidence in the instant case is that UT was among the nation's most diverse universities in 2004, immediately before its reintroduction of racial preferences,[2] and that its consideration of race since then has had only a negligible impact on the racial composition of the student body, Pet. App. 107a (Garza, J.). Even proceeding under the assumption that its consideration of race is narrowly tailored to its asserted interest, UT fails to demonstrate that enrollment of minorities is sufficiently low as to necessitate the use of the "highly suspect tool" of racial classifications.

First, the University enrolls more than "meaningful numbers," *Grutter*, 539 U.S. at 338, of both black and Hispanic students under Texas's race-neutral Top 10% Law. The entering freshman class of 2004, for example, was 4.5 percent black (309 students), 16.9 percent Hispanic (1,149), and 17.9

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[2] *See, e.g.*, Press Release, *The University of Texas at Austin ranked fifth-best producer of degrees for minority undergraduates* (Jul. 12, 2005), *available at* http://www.utexas.edu/news/2005/07/12/rankings/.

percent Asian (1,218), out of a total of 6,796 students. UT, Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law* 6 (2008), SJA 156a. Indeed, through race-neutral means, the University had managed to restore minority enrollment levels "to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies." Larry Faulkner, President, UT, *The 'Top Ten Percent Law' Is Working for Texas* (2000), JA 343a. Even since the University reintroduced consideration of race for some admissions decisions, enrollment of minority students through *racial-neutral* means has continued to climb. *See* SJA 157a (reporting Top 10% Law admissions).

In light of the success of the Top 10% Law in achieving diversity, the University has failed to demonstrate that racial preferences are necessary to achieve a "critical mass" of underrepresented minorities. *Grutter* held that a total underrepresented-minority population (i.e., excluding Asians) of between 13.5 and 20.1 percent was sufficient to establish a "critical mass" to achieve the educational benefits of diversity. 539 U.S. at 336. In 2008, the year that Abigail Fisher sought admission to UT, blacks and Hispanics admitted under the race-neutral Top 10% Law constituted fully 22 percent of the student body and 29 percent of the portion of the incoming class admitted under the Top 10% Law. SJA 157a. (Including Asians, minority students comprised a majority of students admitted under the Top 10% Law in 2008. *Id.*) Under the logic of *Grutter*, these students constitute a "critical mass" sufficient "[t]o ensure . . . minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes." *Grutter*, 539 U.S. at 380 (Rehnquist, J., dissenting) (describing University of Michigan Law School's policies). The University having demonstrated its ability to achieve "critical mass" through race-neutral means, racial classifications become unnecessary to achieve diversity's benefits as identified in *Grutter* and embraced by UT. *See* SJA 24a (discussing *Grutter*).

Second, the University fails to show that its use of racial preferences has more than a "minimal effect" on student-body diversity, such that its consideration of race is in fact necessary. Judge Garza's opinion below demonstrates why this is so. In 2008, 80.9 percent (5,114) of Texas residents in the incoming freshman class were admitted under the Top 10% Law. Pet. App. 102a. The remaining 19.1 percent, or 1,208 students, were admitted based on their Academic Index ("AI") and Personal Achievement Index ("PAI") scores, the latter of which takes account of race as a "special circumstance." *Id.* Of the 363 in-state blacks enrolled (6 percent of in-state students), 58 (0.92 percent) were admitted based on their AI and PAI scores. Pet. App. 102a-03a. And of the 1,322 in-state Hispanic students enrolled (21 percent), only 158 (2.5 percent) were admitted based on their AI and

PAI scores. Pet. App. 103a. "[A]ssuming the University gave race decisive weight in each of these 58 African-American and 158 Hispanic students' admissions decisions" – which would be, in itself, unconstitutional, *Grutter*, 539 U.S. at 329 – "those students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman." Pet. App. 104a.

But even those small numbers overstate the contribution to diversity of the University's racial preferences. The University maintains that its consideration of AI and PAI scores is "holistic"; that race is but one of seven "special circumstances," which in turn comprise one of six PAI factors; and that race plays only a minor role, as a "factor of a factor of a factor of a factor." Pet. App. 104a. Even assuming that race is determinative in fully 25 percent of decisions – still a more-than-minor role – the University's consideration of race would yield only 15 additional black students (0.24 percent) and 40 additional Hispanic students (0.62 percent). Pet. App. 105a. Out of a class of 6,175 students, these numbers – which reflect a greater use of race than that to which the University admits – are *de minimis*. The "minimal impact . . . on school enrollment" of the University's racial classifications "casts doubt on the necessity of using racial classifications." *Parents Involved* at 734. Indeed, the infinitesimal effect of racial preferences in this instance throws into sharp relief the far-more-substantial "cost of subjecting [thousands] of students to disparate treatment based solely upon the color of their skin." *Id.*

Third, the University fails to justify the scope of its racial preferences and, in particular, its choice to accord preferences to Hispanic applicants while denying them to Asians, who comprise a smaller portion of the student body. The entering freshman class of 2008 contained 1,249 Asian students and 1,338 Hispanic students, roughly in line with the numbers in each group over the preceding five years. SJA 156a. The former racial group, Asians, apparently amounts to a "critical mass," such that racial preferences are unnecessary. Meanwhile, the University maintains preferences for the latter group, Hispanics, despite their greater enrollment. The number of Hispanic students thus necessarily exceeds what the University considers to be a "critical mass," which renders its use of preferences "gross[ly] over-inclusive[ ]." *Croson*, 488 U.S. at 506. The inconsistency in the University's treatment of different racial groups "'leave[s] one with the sense that the racial and ethnic groups favored by the [preferences] were added without attention to whether their inclusion was justified by evidence. . . .'" *Id.* (quoting Days, Fullilove, *supra*, at 482).

Rather than demonstrate by a strong basis in evidence that its use of racial preferences is necessary to achieve legitimate educational goals, UT attempts to deflect attention from the success of the race-neutral Top 10% Law in increasing the enrollment of underrepresented minorities. But the University may not assume the need for racial classifications; it must prove their necessity. This it has failed to do.

III. Attaining a "Critical Mass" of Minority Students Cannot Be a Compelling Interest Because It Cannot Be Supported By a Strong Basis in Evidence

Although *Grutter* accepted it, "critical mass" as a theory or measure of diversity is incompatible with strict scrutiny and, in particular, the strong-basis-in-evidence requirement, because it admits no logical stopping point and is unsusceptible to any demonstration of necessity. A theory sufficiently capacious to support the use of racial preferences in every instance *proves* their necessity in none.

The concept itself may be stated simply: "Critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. *Grutter* provided no further definition and limited the concept in only one respect: a "critical mass" program may not reserve "a certain fixed number or proportion of opportunities . . . for certain minority groups." *Id.* at 335. In other words, a university may not announce the precise "critical mass" of any particular racial group that it hopes to attain.

Even so limited, "critical mass" applies in entirely arbitrary fashion to those groups whose participation it claims to promote, such that the necessity of extending preferences to any particular group is equally arbitrary. One problem is the inherent factual complexity of race, which is hardly more amenable to division into discrete "masses" than the "binary conception" the Court rejected as arbitrary and "extreme" in *Parents Involved*. 551 U.S. at 735. Chief Judge Jones's dissent from rehearing *en banc* describes the insusceptibility of Texas's diverse population to facile categorization:

> Texas today is increasingly diverse in ways that transcend the crude White/Black/Hispanic calculus that is the measure of the University's race conscious admissions program. The state's Hispanic population is predominately Mexican-American, including not only families whose Texas roots stretch back for generations but also recent immigrants. Many other Texas Hispanics are from Central America, Latin America and Cuba. To call these groups a "community" is a misnomer; all will acknowledge that social and cultural differences among them are significant.

Pet. App. 175a.

Yet "White/Black/Hispanic" is essentially where the University drew its lines, *see* SJA 156a, and may well continue to do so without end. Defined with sufficient precision, no racial group need ever achieve a "critical mass," and the continuing necessity of racial classification could never be in doubt. Even should this Court strike down the University's preferences for Hispanics as over-inclusive, *see supra* § II, while upholding the "critical mass" concept, the University would stand on *terra firma* achieving the same result through separate preferences aimed at establishing "critical masses" for Mexican-Americans, Cuban-Americans, etc. It could thus continue to deny preferences to "Asian" applicants, broadly defined, while still favoring underrepresented Eskimos.

And, of course, the assignment of race to individual applicants, for purposes of tabulating a "critical mass" and applying preferences, may be no less arbitrary. *E.g.*, Laura Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 Fordham L. Rev. 843, 898 (1997) ("Harvard Law School hired its first woman of color, Elizabeth Warren, in 1995.").

As well, a "critical mass" may be applied at any possible level where students may interact with one another. *Grutter* measured diversity at the "student body" level, 539 U.S. at 318, while UT asserts an interest in achieving a "critical mass" within every classroom and every major. Pet. App. 66a. Indeed, under the *Grutter* rationale, UT's goal may actually be more closely tailored to the aim of "encourag[ing] underrepresented minority students to participate in the classroom and not feel isolated." 539 U.S. at 318. But it is impossible to extract from that generalization any firm sense of necessity on which a court might pass judgment. Anything goes.

And overriding all is the problem that treating public university students as components of one or another "critical mass" is contrary to any legitimate educational interest in "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races." *Id.* at 330 (internal quotation marks omitted). Students who are diverse in fact – like all individuals – are lumped together in a "mass" and treated as interchangeable with others who share the same badge of race or ethnicity. And this badge is all too often affixed by a government official who lacks understanding of the complex historical, genealogical, and cultural nuances that define and delineate various groups, racial and otherwise. Taken as a measure of diversity, "the concept of critical mass is a delusion. . . ." *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

Because "critical mass" is incompatible with individualized consideration, *see Bakke*, 438 U.S. at 317-18 (Powell, J.), it retards the "beneficial educational pluralism," *id.* at 317, that true diversity would promote. Far from necessary to achieve any legitimate end, it stymies our progress as a nation toward "the harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting). In no application can it survive strict scrutiny.

◆

CONCLUSION

The Court "should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. UT's rationale for classifying its applicants according to their races is not compelling. Unsupported by any basis in evidence, it is a sham.

For the foregoing reasons, this Court should reverse the decision of the court of appeals.

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May 29, 2012

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

In The
SUPREME COURT OF THE UNITED STATES

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the system of admissions employed by the University of Texas's undergraduate college in 2008 violate the Equal Protection Clause?

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INTEREST OF AMICI CURIAE[1]

The Center for Individual Rights is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in this Court. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government, particularly in admissions systems of institutions of higher education. It represented the plaintiffs in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

In *Grutter*, this Court, relying on Justice Powell's *Bakke* opinion, held that universities are entitled to some deference in determining whether attaining a diverse student body is a goal so compelling to their mission that they are entitled to consider and weigh the race of applicants in determining whether those applicants should be admitted. *Grutter*, 539 U.S. at 329 ("'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'") (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 318-

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[1] This brief is filed with the parties' consent evidenced by blanket consent letters filed with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

319 (1978) (opinion of Powell, J.).

This deference was supported by two pillars. First, that "academic freedom" is a compelling interest entitling universities to consider race in selecting its student body. Second, that a system of admissions that considered race along with other possible diversity factors was substantially different from a system that set aside seats for minorities, or that used points to attain a given racial/ethnic mix.

This Court should reconsider these assumptions and the deference to the academy that they led to. The notion of "academic freedom" in Justice Powell's opinion is inconsistent with much other authority from this Court. Not only has this Court not yet reconciled this conflicting authority, no such reconciliation is possible. "Academic freedom" is a dangerous and uncertain basis for justifying the consideration of race in admissions.

Moreover, the line between a system that considers race in a "dispositive" way and one that considers it as one of many factors is evanescent and elusive. Both logic and experience since 1978 demonstrate that the two types of systems are far more alike than different. Whatever importance this Court chooses to place on it, it does not deserve to be the basis for a presumption of good faith that essentially eviscerates the strict scrutiny standard. To the contrary. Experience with racial preferences suggests that the harm to the "beneficiaries" of those preferences is far worse than assumed, and warrants a return to true strict scrutiny.

ARGUMENT

Academic freedom, while an important value and, to some degree, protected by the First Amendment when asserted by private individuals or entities, has never been an adequate justification for discriminatory or exclusionary policies by public entities. Moreover, as any number of Justices on this Court have pointed out, the distinction between a valid "plus" system and an illegal system is mostly one of candor, in which a lack of candor is rewarded. These are inappropriate bases to lower the scrutiny by which this Court should examine any use of race by state institutions.

I. THE PROBLEMATIC RELIANCE ON "ACADEMIC FREEDOM" IN *BAKKE*

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court found that the admissions program of the University of California Medical School at Davis, which set aside 16% of the places for incoming students for educationally or economically disadvantaged minorities, violated Title VI of the Civil Rights Act of 1964. *Id.* at 269-72. Five Justices, however, concluded that race could be considered in Davis's admissions process under some circumstances. No single theory, though, explained why that was so. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218 (1995) ("Bakke did not produce an opinion for the Court."); *cf. Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting) (the *Bakke* majority for overturning the lower court's injunction against any use of race was "divided over the application of the Equal Protection Clause--and by extension Title VI--to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for any particular substantive interpretation of Title VI.").

Justice Powell, in an opinion only for himself, applied strict scrutiny to the Davis program. He concluded that "academic freedom," although not a specifically enumerated constitutional right, was a "special concern" of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). The Regents specifically wanted their institutions to select a group of students who would contribute to a robust exchange of ideas, and argued that "ethnic diversity" was a means of achieving that goal. *Id.* at 313-15. While rejecting the argument that Davis's specific program of reserving spaces for disadvantaged minorities was necessary to achieve the robust exchange of ideas that the Regents allegedly wanted, Justice Powell did state that race and ethnicity could be considered as "plus" factors by universities seeking to achieve that goal. Justice Powell opined that a state interest in a robust exchange of ideas would not justify the consideration of race to achieve the ethnic diversity promoted by UC Davis, but could justify its consideration to achieve a diversity which "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

The first thing to note about Justice Powell's compelling interest of academic freedom is how different it is from the generally-understood notion of academic freedom. Academic freedom is committed to the robust exchange of ideas, *Keyishian v. Bd. of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967), with no ideas deemed better than others simply because they are more widely held. Yet Justice Powell *rejected* Davis's idea of how a university should select its students in order to maximize learning for all. *Id.* at 315 ("[P]etitioner's argument that [ethnic diversity] is the only effective means of serving the interests of diversity is seriously flawed."). Accordingly to Justice Powell, Davis's view of proper class formation "focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Id.* (emphasis in original). Justice Powell preferred Harvard's use of race in admissions to achieve diversity. *Id.* at 316-17; *cf. Grutter*, 529 U.S. at 324 ("Justice Powell was, however, careful to emphasize that *in his view* race 'is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.'") (emphasis added) (quoting *Bakke*, 438 U.S.at 314).

Thus, Justice Powell had a very constrained and idiosyncratic vision of academic freedom: the freedom to imitate Harvard.

In *Grutter*, this Court first mentioned Justice Powell's rationale and its grounding in academic freedom. *Grutter*, 539 U.S. at 324. It further stated that "[o]ur conclusion that the Law School has a compelling interest in a diverse student body is informed by *our view* that attaining a diverse student body is at the heart of the Law School's *proper* institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" 539 U.S. at 329 (emphasis added) (quoting *Bakke*, 438 U.S. at 318-319). Thus, again, this Court suggested that the exercise of "academic freedom" protected by the First Amendment was subject to approval by this Court as "proper"; only *after* such imprimatur came does the Court then go on to presume the good faith of the institution.

This notion of academic freedom contrasts with the much more limited notion of academic freedom provided in cases like *Runyon v. McCrary*, 427 U.S. 160 (1976). There, of course, the Court rejected a First Amendment argument by a segregationist *private* school to the effect that it had the right to select its students in a way that would not undermine its segregationist message. *Id.* at 176.

When *Runyon* is considered with Justice Powell's *Bakke* opinion and this Court's opinion in

Grutter, this Court's jurisprudence appears to reach the counterintuitive conclusion that the First Amendment provides better protection for *public* institutions to engage in race-consciousness in admissions than it does for private ones. *But see Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006) ("It is not clear, for example, how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters. *See, e.g., Trs. of Dartmouth Coll. v. Woodward*, 4 Wheat. 518, 17 U.S. 518, 629, 4 L.Ed. 629 (1819). One does not generally think of the First Amendment as protecting the State from the people but the other way around — of the Amendment protecting individuals from the State."); *Hopwood v. Texas*, 78 F.3d 932, 943 n.25 (5th Cir. 1996).

Worse, it suggests that the Court's deference to, and protection of, "academic freedom" of institutions depends upon those institutions adopting ideas with which a majority of the members of this Court agree.

This Court should abandon the notion that "academic freedom" – whether to choose a more racially diverse student body, to choose a more generally diverse student body, or to choose a more homogenous student body – is a compelling governmental interest that supports the use of race to determine who is admitted to a public school. The current course diminishes two crucial parts of the Constitution: the First Amendment (by suggesting that some ideas are entitled to more protection than others) and the Equal Protection Clause (by abandoning the principle of equal treatment in favor of implementing fashionable academic theories). No good can come of continuing on it.

Rather, the determination of whether the state has a compelling interest should come from rigorous evidence that the use of race leads to substantial improvements in the educational process. That assessment should be made, in the same fashion, for *any* use of race, be it preferences to attain a diverse student body or race-segregated elementary schools (to cite another currently-fashionable educational theory). No state actors, not even university administrators, are entitled to deference in their use of race.

II. THIS COURT'S CURRENT "NARROW TAILORING" JURISPRUDENCE ENCOURAGES STEALTH

In *Bakke*, Justice Powell distinguished between a "plus" system and the system employed by the Davis Medical School (reserving some spots for qualified, disadvantaged minorities). In *Grutter* and *Gratz*, this Court distinguished between the "point" system employed by the University of Michigan's undergraduate school of Literature, Science, and Arts and the more "holistic" system employed by that university's law school.

In both cases, a minority of the Justices of this

Court found that these distinctions elevated form over substance. *Bakke*, 438 U.S. at 379 (Brennan, J., concurring in the judgment in part and dissenting in part) (there was no basis "for preferring a particular preference program simply because in achieving the same goals that (Davis) is pursuing, it proceeds in a manner that is not immediately apparent to the public."); *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting) ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed college affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.").

Similarly, most lower courts have found the distinction between a goal and a quota difficult to discern. *Middleton v. City of Flint*, 92 F.3d 396, 412-13 (6th Cir 1996) ("[W]e note that quotas and preferences are easily transformed from one into the other.") (*citing Bakke*, 438 U.S. at 378 (Brennan, concurring and dissenting)); *Hopwood*, 78 F.3d at 948 n 36 (noting that "even if a 'plus' system were permissible, it likely would be impossible to maintain such a system without degeneration into nothing more than a 'quota' program") (*citing Bakke*, 438 U.S. at 378 (Brennan concurring in the judgment in part and dissenting in part)); *Valentine v. Smith*, 654 F.2d 503, 510 n.15 (8th Cir 1981) ("Any distinction between goals, quotas, and targets is primarily semantic.") (*citing Bakke*, 438 U.S. at 378 (Brennan concurring in the judgment in part and dissenting in part)).

This is particularly so given Justice Powell's suggestion that weights applied to race and other diversity factors "may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class," *Bakke*, 438 U.S. at 318, and his somewhat vague references to the degree to which a school could look at numbers. *Id.* at 316 (quoting Appendix to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amicus Curiae, Regents of the University of California v. Bakke, No 76-811, *2-3 (filed Jun 7, 1977)). Examining the mix, and varying the weight given to race (or membership in a given race) can only be for one purpose: to achieve a proper racial mix. *But cf. Grutter*, 539 U.S. at 335-36 (holding that the law school's attempt to achieve a "critical mass" of underrepresented minorities, its attention to numbers, and its consultation with daily reports that provided racial breakdown of its incoming class did not change its "flexible admission system" into a "rigid quota").

For Justice Powell, at least, a system that considered race explicitly, but along with other factors, *was not even racially discriminatory*. *Bakke*, 438 U.S. at 318-19 (opinion of Powell, J.) (stating that "a facial intent to discriminate" does not "exist[] in an admissions program where race or ethnic background is simply one element--to be weighed fairly against other elements--in the selection process"; in such a system, "good faith would be presumed.").[2] Further, there would be "a presumption of legality and legitimate educational purpose," and "there is no warrant for judicial interference in the academic process." *Id.* at 319 n.53.

Justice Powell's opinion, and its adoption in *Grutter*, suggest a much different kind of strict scrutiny than the searching one this Court previously had described. It is based on the notion that there is a substantial difference between the Harvard and University of Michigan Law School systems on the one hand, and the Davis Medical School and UM Literature, Science and Arts system on the other. As any number of Justices of this Court have recognized, though, those systems, and the manner in which they consider race, are far more alike than they are different.

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[2] It would seem that *Grutter* at least formally (albeit implicitly) rejected this argument. *Grutter* purported to apply strict scrutiny to the University of Michigan Law School's admissions system. *Grutter*, 539 U.S. at 327 ("we turn to the question whether the Law School's use of race is justified by a compelling state interest"); *id.* at 334 ("Contrary to Justice Kennedy's assertions, we do not 'abando[n] strict scrutiny . . .'"). The application of strict scrutiny implies that the Court found intentional discrimination. *Wisconsin v. City of New York*, 517 U.S. 1, 19 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government."). But, as noted in the text, *Grutter* adopted Justice Powell's deference to university administrators and thus applied a much different strict scrutiny than the searching one that the Court previously had applied.

As a consequence, university administrators can comply with the law simply by avoiding the specific tools that this Court has condemned, and by declaring that their use of race is part of a "holistic" process of evaluation. Since there is no way for anyone outside the process ever to assess that declaration, strict scrutiny devolves into a simplistic scrutiny of the admissions' officers ability to place the correct labels on their process. No evaluation is made of whether the preferences are small or large, and what consequences that might have for the academic performance of the students. As shown in the next section, there is increasing evidence that the extent of the preferences is having deleterious, rather than salubrious, effects on the education process.

III. EXPERIENCE WITH RACIAL PREFERENCES BY UNIVERSITIES FURTHER MILITATES IN FAVOR OF A SEARCHING STRICT SCRUTINY

Justice Powell assumed that the preferences he envisioned, regardless of size, would not preclude the beneficiaries of these preferences from competing academically. Increasing evidence suggests that when the size of the preferences are large – as is true more often than not in higher education – Justice Powell's assumption fails. This consideration must be accounted for both in the level of scrutiny chosen and its application.

In determining the proper level of scrutiny for so-called benign racial preferences (that is, ones in which certain favored groups are benefitted), this Court has considered both the harm to the disfavored groups *and* the favored groups. *E.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 228 (1995) ("'Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries'") (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516-17 (1989) (Stevens, J., concurring)) (brackets as in *Adarand*). *Cf. Bakke*, 438 U.S. at 360 (Brennan, J., concurring and dissenting) (The Court has "recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority.").

As set forth in the petition-stage amicus brief of Richard Sander and Stuart Taylor, there is increasing evidence that the so-called beneficiaries of racial preferences are actually harmed by them. Indeed, the evidence provided by Sander and Taylor suggest that these beneficiaries are producing weak educational outcomes: failure to pass professional competency exams, poor grades, or just plain dropping out. This Court ought to consider that evidence in determining the kind of scrutiny that racially-preferential policies like those at issue here deserve.

The harm, it deserves mention, is twofold. First, of course, when the beneficiaries of racially-preferential policies are unable to achieve minimal educational or professional goals, that harms them. *Cf. Grutter*, 539 U.S. at 372 (Thomas, J., dissenting) ("These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions."). But by creating a class of beneficiaries who conspicuously fail to achieve those goals when admitted to particular schools, preferential policies reinforce and compound the very stereotype of inferiority that those policies were intended to overcome.

Members of preferred groups who did not need any preference at all are unfairly stigmatized, to be sure. *See id.* at 373 ("[T]he Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. . . . [B]ecause of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the 'beneficiaries' of racial discrimination"). When members of preferred groups drop out of school or fail a professional competency exam, there is, in addition, an even worse stigma attached to them: that of incompetence. And this is so even though the evidence now suggests that they would have been far more successful had they attended schools with students of comparable academic talents.

CONCLUSION

This Court should examine the University of Texas's admissions system with the searching, strict scrutiny traditionally applied in cases involving racial classifications. If it does so, it will find that system wanting for the reasons that petitioner supplies.

Accordingly, for the foregoing reasons, and those set forth by petitioner and the other *amici* supporting petitioner, this Court should reverse the judgment of the court below.

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Respondents.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of the National Bar Association, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, and the National Native American Bar Association (collectively, "*Amici*"). *Amici* are bar associations whose members are predominantly minorities. *Amici* are partners in the Coalition of Bar Associations of Color, which was established in 1992. Members of the coalition meet annually to discuss issues of mutual concern and to advocate in support of shared interests with the executive branch and with elected officials.

The National Bar Association is the largest and oldest association of predominantly African-American attorneys and judges in the United States. The National Bar Association was founded in 1925 when there were only 1,000 African-American attorneys in the entire country and when other national bar associations, such as the American Bar Association ("ABA"), did not admit African-American attorneys. Throughout its history, the National Bar Association consistently has advocated on behalf of African Americans and other minority populations regarding issues affecting the legal profession. The National Bar Association represents approximately 44,000 lawyers, judges, law professors, and law students, and it has over eighty affiliate chapters throughout the world.

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[1] In accordance with Supreme Court Rule 37.6, *Amici Curiae* note that the position they take in this brief has not been approved or financed by Petitioners, Respondents, or their counsel. Neither Petitioners, Respondents, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. Pursuant to Supreme Court Rule 37.3, *Amici Curiae* state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

The Hispanic National Bar Association is a nonprofit, nonpartisan, national professional association that represents the interests of over 100,000 attorneys, judges, law professors, legal assistants, and law students of Hispanic descent in the United States, Puerto Rico, and U.S. Virgin Islands. The Hispanic National Bar Association has thirty-eight affiliated bars in various states across the country. The Hispanic National Bar Association's continuing mission is to improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession.

The National Asian Pacific American Bar Association is the national association of Asian Pacific-American attorneys, judges, law professors, and law students, representing the interests of more than sixty state and local Asian Pacific-American bar associations and over 40,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, the National Asian Pacific American Bar Association has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. The National Asian Pacific American Bar Association believes that there is a compelling governmental interest in achieving diversity in higher education and supports upholding the use of race-conscious admissions programs in education. The National Asian Pacific American Bar Association opposes the use of Asian Pacific Americans as a wedge group in debates about affirmative action.[2]

The National Native American Bar Association is the oldest and largest association of predominantly Native-American attorneys in the United States.[3] The National Native American Bar Association was founded in 1973 when the first group of Native-American attorneys was entering the legal profession. The National Native American Bar Association's core mission since its inception has been to promote the development of Native-American attorneys. Native Americans comprise one of the smallest groups of attorneys of color in the nation, totaling approximately 2,500. The National Native American Bar Association is committed to increasing the number of Native-American students who attend college and continue their education to attend law school. The National Native American Bar Association and its chapters are involved in pipeline initiatives to promote the recruitment and retention of Native-American law students and law faculty. And an initiative of the National Native American Bar Association is to increase the appointment of Native Americans to the state and federal judiciaries; there are currently no Native-American Article III judges.

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[2] The National Asian Pacific American Bar Association joins this brief filed by its partners in the Coalition of Bar Associations of Color instead of a brief filed by its longtime partner, the Asian American Center for Advancing Justice ("AAJC"). Both the Coalition of Bar Associations of Color and AAJC have a longstanding commitment to serving the needs of Asian Pacific Americans and all communities of color, and the National Asian Pacific American Bar Association supports both briefs.

[3] Native American includes American Indian, Alaska Native, and Native Hawaiian.

Amici have a deep interest in this case because the legal profession, which has had a long history of discrimination against racial minorities, is strengthened by racial and ethnic diversity. Diversity benefits all sectors of the legal profession, including both minority and non-minority members of the judiciary, lawyers, and clients. Diversity has these benefits because a diverse legal profession is better able to create and test new and innovative legal principles and ideas. For both minority and non-minority lawyers and judges, a diverse legal profession creates heightened sensitivity to the particular legal problems that minorities confront and the contexts for those legal challenges. A diverse legal profession also broadens the availability and effectiveness of legal representation, including by facilitating the provision of legal services to historically underserved communities.

Race-conscious college admissions programs enhance educational opportunities for minorities, thus creating a pipeline for greater minority participation in law schools and then through all levels of the legal system. Consequently, race-conscious college admissions programs are integral to achieving a critical mass of minorities in law schools and promoting diversity throughout the legal profession, which is a compelling governmental interest.[4] Accordingly, the University of Texas's program should be upheld.

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[4] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

This Court has long held that there is a compelling governmental interest in achieving and maintaining diversity in our Nation's educational system, and accordingly it has upheld race-conscious admissions programs directed at obtaining a "critical mass" of minority students.[5] This Court has recognized that diversity in the educational system not only has significant benefits for both minority and non-minority students' educational experiences but also creates a necessary pipeline for diversity in the Nation's professional ranks.

In *Regents of the University of California v. Bakke*, for example, this Court's plurality opinion stated that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[6] More recently, in *Grutter v. Bollinger*, this Court noted that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[7]

There is no profession that benefits from diversity and civic engagement more than the legal profession because "law schools represent the training ground for a large number of the Nation's leaders," and "legal learning and practice . . . cannot be effective in isolation from the individuals and institutions with which the law interacts."[8] Since the Court decided *Bakke* and *Grutter*, the profession has made great strides to diversify legal institutions, including private law firms and the judiciary.

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[5] *Regents of the University of California v. Bakke*, 438 U.S. 265, 269 (1978) (opinion of Powell, J.); *Grutter*, 539 U.S. at 343.

[6] 438 U.S. at 312 (opinion of Powell, J.) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

[7] 539 U.S. at 332.

Progress, though, should not be confused with success. Racial minorities continue to be woefully underrepresented in virtually all segments of the legal profession, with certain racial minorities continuing to have almost no representation. For example, while African Americans equal more than 12% percent of the population, only 1.71% percent of law firm partners are African American.[9] Similarly, Hispanic Americans represent approximately 16% of the population, but only 1.92% of law firm partners,[10] and Asian Pacific Americans account for 4.76% of population, but only 2.36% of law firm partners.[11] Moreover, although Native Americans make up nearly 1% of the population, nationwide, there are too few Native-

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[8] *Id.* (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)); *Sweatt*, 339 U.S. at 634.

[9] *ACS Demographic and Housing Estimates*, American Community Survey 1 Year Estimates, US Census Bureau (2010), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_DP05&prodType=table ("2010 Population"); *NALP Bulletin, Women and Minorities in Law Firms – By Race and Ethnicity* (Jan. 2012), *available at* http://www.nalp.org/women_minorities_jan2012.

[10] 2010 Population, *supra*; *NALP Bulletin*, *supra*, at 1.

[11] 2010 Population, *supra*; *NALP Bulletin*, *supra*, at Table 2.

American partners for the National Association of Law Placement ("NALP") to have included them in its study of minority legal employment.[12]

There is a similar lack of diversity in the judiciary. For example, in 2009, only 12.8% of judges sitting on state supreme courts nationwide were minorities.[13] And these statistics are even more dire when viewed at the individual state level. For example, in New Mexico, where minorities account for 57% of the population, minorities made up only 15% and 18% of intermediate and trial court judges, respectively.[14]

Because of the continuing need to foster diversity in the legal profession, programs that enhance the opportunities for members of racial minorities in higher education – like the one at the University of Texas – are necessary. Indeed, if such programs were abolished, the impact on diversity in higher education would be significant. When race-conscious admissions programs were abolished in California, for instance, the population of racial minorities suffered as their admission into colleges and universities plummeted. In turn, the number of racial minorities entering into post-graduate education was disproportionately low, with fewer racial minorities ultimately entering the legal profession.

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[12] 2010 Population, *supra*; *NALP Bulletin*, *supra*, at 1.

[13] Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts* 39 Seton Hall L. Rev. 1203, 1215 (2009).

[14] Ciara Torres-Spelliscy et al., *Improving Judicial Diversity*, Brennan Center for Justice 1, 49 (2010), *available at* http://brennan.3cdn.net/31e6c0fa3c2e920910_ppm6ibehe.pdf.

California's experience indicates that, if this Court were to overturn the University of Texas's race-conscious admissions program (and other similar programs), there likely would be a significant drop in the number of racial minorities admitted into colleges and universities, ultimately and necessarily reducing the number of racial minorities who enter law school and the legal profession. *Amici* thus support the constitutionality of the University of Texas's race-conscious admissions program, which furthers the compelling governmental interest in diversity both in education and in the legal profession.

ARGUMENT

I. A COMPELLING GOVERNMENTAL INTEREST EXISTS IN CREATING AND MAINTAINING DIVERSITY IN THE LEGAL PROFESSION

Lawyers play a central role in our government and the administration of our judicial system. Because of the pervasive nature of the legal system and its impact on the Nation's citizenry and history, this Court has recognized that it is important to ensure the inclusion and success of minority attorneys in every facet of the legal profession.[15]

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[15] *See e.g.*, *Grutter*, 539 U.S. at 332.

The Court's recognition of the importance of diversity in the legal profession is well supported by academic studies.[16] Scholars have identified at least four distinct benefits of creating diversity in the legal profession.

First, providing racial minorities access to the legal profession brings to the bench their unique perspectives on the law. As Justice O'Connor said of former Justice Thurgood Marshall:

> Although all of us come to the court with our own personal histories and experiences, Justice Marshall brought a special perspective . . . . Justice Marshall imparted not only his legal acumen but

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[16] *See, e.g.*, David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, Court Review, Fall 1999, at 24, 26; *see also* Michelle J. Anderson, *Legal Education Reform, Diversity and Access to Justice*, 61 Rutgers L. Rev. 1101 (2009); Christine Chambers Goodman, *Modest Proposal In Deference To Diversity*, 23 Nat'l Black L.J. 1 (2010); Anjali Chavan, *The "Charles Morgan Letter" And Beyond: The Impact Of Diversity Initiatives On Big Law*, 23 Geo. J. Legal Ethics 521 (2010); David A. Harvey, *A Preference for Equality: Seeking the Benefits of Diversity Outside the Educational Context*, 21 BYU J. Pub. L. 55 (2007); W. Anthony Jenkins, *Diversity Matters: Here and Now*, 90 Mich. B.J. 14 (2011); Kevin R. Johnson, *The Importance Of Student And Faculty Diversity In Law Schools: One Dean's Perspective*, 96 Iowa L. Rev. 1549 (2011); Nancy Scherer, *Diversifying The Federal Bench: Is Universal Legitimacy For The U.S. Justice System Possible?*, 105 Nw. U. L. Rev. 587 (2011); Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 Nw. U. L. Rev. Colloquy 283 (2012); Denelle J. Waynick, *Diversity – Still a Business Imperative*, 272 N.J. Law. 66 (Oct. 2011).

> also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[17]

Likewise, Judge Leon Higginbotham, Jr. recognized that judicial diversity "creates a milieu in which the entire judicial system benefits from multi-faceted experiences with individuals who came from different backgrounds."[18] Similarly, Judge Harry Edwards of the D.C. Circuit has stated that "it is inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them."[19]

Second, diversity in the legal profession is critical to ensuring the legitimacy of the judicial system because diversity fosters public confidence in the judicial system. As one scholar explained:

> Diversity initiatives embody an effort to overcome bias, address discrimination, and pursue equality, all core values of the

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[17] Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992).

[18] Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 Duke L.J. 1028, 1037 (1993).

[19] Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, Princeton University, 1, 4 (Nov. 11, 2011), http://ssrn.com/abstract=1674052 (quoting Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329 (2002)).

> legal profession and the rule of law. The United States occupies a special place among the nations of the world because of its commitment to equality, broad political participation, social mobility, and political representation of groups that lack political clout and/or ancestral power . . . . [W]ithout a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from mechanisms of justice.[20]

An ABA report similarly noted that "[a] more diverse and representative legal profession will not only foster greater public confidence in the law, but even more fundamentally it will help to ensure fairness in the justice system."[21] For this reason, the ABA report called the diversification of the legal profession the greatest challenge for the legal profession in the twenty-first century.[22]

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[20] Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why* 24 Geo. J. Legal Ethics, 1079, 1101 (2011) (quoting Am. Bar Ass'n, *Presidential Diversity Initiative, Diversity in the Legal Profession: The Next Steps* (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf ("*Presidential Diversity Initiative*")).

[21] Kevin Gooch, *Embracing the Opportunities for Increasing Diversity Into the Legal Profession: Collaborating to Expand the Pipeline (Let's Get Real)*, ABA Post-Conf. Rep. 1, 6 2006 http://www.americanbar.org/content/dam/aba/migrated/2011_build/diversity/pipelinepostreport.authcheckdam.pdf ("*Embracing the Opportunities*").

[22] *Id.* at 6.

The benefits of diversity are particularly important in the judiciary because judges are among the most visible representatives of the legal system. As one scholar put it: "Diversity on the bench is intimately linked to the American promise to provide equal justice for all. Judges are the lynchpins of our system of justice."[23] That is, "[j]udges are not the exclusive providence of any one section of society . . . . [T]hey must provide justice for all."[24]

Third, diversity in the legal profession enhances the scope and quality of legal representation for many individuals who are racial minorities. Given this country's history of discrimination, it is crucial that a client have the ability to choose a lawyer with whom he or she feels comfortable. It is not simply that the availability of such lawyers affects the quality of representation that a minority client receives; it may determine whether that person seeks legal assistance at all. "Effective access to legal representation not only must exist in fact, it must also be perceived by the minority law consumer as existent so that recourse to law for the redress of grievance and the settlement of disputes becomes a realistic alternative to him."[25]

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[23] Torres-Spelliscy et al., *supra*, at 1.

[24] *Id.* (quoting Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 Fordham Urb. L.J. 125, 145 (2007)).

[25] Erwin N. Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 517 (1975)).

Fourth, access to the legal profession creates access to the Nation's government because this Nation's political leaders often are drawn from the ranks of the legal profession. As the ABA has noted, "[a]dvancing diversity and inclusion in the . . . government is especially important. These fields not only administer, but also represent democratic rule of law in our multicultural society. The absence of diversity and inclusion in . . . government can malign the legitimacy of not only lawyers, but also of the law itself."[26]

Indeed, of the forty-three men who have served as our Nation's president, twenty-five have been lawyers; of those, only one has been a racial minority.[27] Additionally, twenty-five of our Nation's current governors hold law degrees; of those, only three are minorities.[28] Further, lawyers have long been the single largest occupational group in Congress. In the 112th Congress, 55 senators and 167 representatives are lawyers.[29] Despite the small proportion of people of color serving in the United States Congress, many of these lawmakers also have legal backgrounds. Indeed, of the forty-three African-American members of Congress, nineteen are lawyers.[30] Both current Hispanic-American members of the Senate and eight of the current twenty-five Hispanic Americans in the House of Representatives have law degrees.[31] And one of the two Asian Pacific-American Senators and three of the seven Asian Pacific-American representatives are attorneys.[32] These statistics show that access to this Nation's leadership is substantially influenced by access to the legal profession.

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[26] *Presidential Diversity Initiative, supra*, at 33.

[27] *Presidential Occupations*, http://www.infoplease.com/ipa/A0768854.html (last visited July 30, 2012).

[28] *Governors of the American States, Commonwealths and Territories*, National Governors Association 1 (2012), *available at* http://www.nga.org/files/live/sites/NGA/home/governors/current-governors/col2-content/list---governors-links/book-of-governors-biographies%40/BIOBOOK.PDF.

[29] Jennifer E. Manning, *Membership of the 112th Congress: A Profile*, Congressional Research Service 1, 4 (2011), *available at* http://www.senate.gov/reference/resources/pdf/R41647.pdf.

Given the pervasive nature of the legal profession, ensuring diversity in the legal profession is a compelling governmental interest. As discussed below, race-conscious admissions programs at the collegiate level play a critical role in furthering this compelling interest.

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[30] *Congressional Demographics Ethnicity: African American*, Congress.org, http://www.congress.org/congressorg/directory/demographics.tt?catid=all (last visited Aug. 6, 2012) (follow hyperlinks to individual members).

[31] *Congressional Demographics Ethnicity: Hispanic*, Congress.org, http://www.congress.org/congressorg/directory/demographics.tt?catid=ethnic&group=Hispanic (last visited Aug. 6, 2012) (follow hyperlinks to individual members).

[32] *Congressional Demographics Ethnicity: Asian*, Congress.org, http://www.congress.org/congressorg/directory/demographics.tt?catid=ethnic&group=Asian (last visited Aug. 6, 2012) (follow hyperlinks to individual members).

II. DIVERSITY IN THE LEGAL PROFESSION HAS NOT YET REACHED "CRITICAL MASS"

Significant efforts have been made to achieve diversity in the legal profession. Private law firms have openly advocated for diversity in their ranks, and the judiciary has become more diverse with more racial minorities being appointed or elected to the federal and state judiciaries.

Nonetheless, due in part to this Nation's long history of discrimination, minorities still have a disproportionately low level of participation in the legal profession. The result of such low participation is that a critical mass of racial minorities in the legal profession has not been reached. Reaching this critical mass requires educational pipelines of the sort created by race-conscious admissions programs like the University of Texas's program. Absent such pipelines, minority participation in higher education would dramatically decline, which would deplete diversity in the legal profession. As a result, there remains a compelling governmental interest in achieving and maintaining critical mass in the legal profession, and race-conscious admissions programs are a proper means to achieve that goal.

A. Minorities Historically Have Been Excluded From Educational Opportunities And The Legal Profession

To understand the continuing need for programs that advance diversity, it is important to understand the historical context of minority participation in this Nation's educational system. Discrimination against African Americans, Hispanic Americans, Asian Pacific Americans, and Native Americans in education and other areas was pervasive in the formative years of this Nation. The lack of educational opportunity for minorities, including at the college level, meant that few minorities could move through the ranks into law schools and, ultimately, into the legal profession.[33]

Historically, even long after the Civil War and emancipation, education of African Americans was permitted, but often only in segregated schools located in "old buildings, generally in filthy and degraded neighborhoods, dark, damp, small, and cheerless, safe neither for the morals nor the health of those who are compelled to go to them, if they go anywhere, and calculated to repel rather than to attract them."[34] Moreover, these schools received only 12% of public school funds despite being tasked with educating approximately one-third of the school-aged population.[35]

As a result of this discrimination, in 1940, only one-half of one percent of all attorneys in the United

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[33] *See* Floyd D. Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 Miss L.J. 259, 280, 285, 290 (2010); *Embracing the Opportunities*, *supra*.

[34] August Meier & Elliot Rudwick, *From Plantation to Ghetto* 109-14 (1966).

[35] Louis R. Harlan, *Separate and Unequal: Public School Campaigns and Racism in the Southern Seaboard States, 1901-1915* 9-15 (1958).

States were African American, and discrimination against those few attorneys was rampant.[36] For example, most racial minorities were excluded from bar associations. Until 1943, the ABA excluded African Americans from membership.[37] And as late as 1950, a representative of the ABA testified in opposition to an attempt by African Americans to secure admission to the all-white University of North Carolina School of Law.[38] Indeed, *Amicus* the National Bar Association was founded in 1925 because African Americans were excluded from the ABA.[39] It was not until 1943 that the ABA allowed African Americans to join its ranks.[40]

Like schools for African Americans, schools for Hispanic Americans "were usually segregated, overcrowded, and lacked adequately trained teachers."[41] The segregation of Hispanic Americans often was "justified" because of language differences.[42]

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[36] Derek Bok et al., *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 1 (1998).

[37] Am. Bar Ass'n, 68 *Annual Report of the American Bar Association* 110 (1943).

[38] *See Epps v. Carmichael*, 93 F. Supp. 327, 329 (M.D.N.C. 1950).

[39] *National Bar Association (1925-)*, BlackPast.com, http://www.blackpast.org/?q=aah/national-bar-association-1925 (last visited Aug. 6, 2012).

[40] *Id.*

[41] Guadalupe San Miguel, Jr., *"Let All of Them Take Heed": Mexican Americans and the Campaign for Educational Equality in Texas, 1910-1981* 11 (1987).

[42] *See, e.g.*, Robert Alvarez, Jr., *Familia: Migration and Adaptation in Baja and Alta California, 1800-1975* 154 (1987).

Similarly, Asian Pacific Americans faced racial discrimination in education. For example, in segregation era Mississippi, authorities treated Chinese Americans as "colored" and therefore prohibited them from attending all-Caucasian schools.[43] The Mississippi Supreme Court upheld the prohibition, reasoning that the word "colored" should be construed broadly to include children of "yellow" races.[44] Courts affirmed, applying the separate-but-equal doctrine of *Plessy* v. *Ferguson*[45] and other similar decisions.[46]

Native Americans fared no better in education. The few schools established for their benefit sought to "assimilate," rather than educate.[47] This discrimination took place in spite of the United States's pledge in more than 100 treaties to provide educational services and facilities to Native Americans, in exchange for land.[48]

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[43] *See* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans*, 5 Asian L.J. 181, 202 (1998); *see also* Sucheng Chan, *Asian Americans: An Interpretive History* 58 (1991).

[44] *Rice v. Gong Lum*, 104 So. 105, 110 (1925).

[45] 163 U.S. 537 (1896).

[46] *See, e.g., Gong Lum v. Rice*, 275 U.S. 78, 86-87 (1927).

[47] L. Tsianina Lomawaima, *They Called It Prairie Light: The Story of the Chilocco Indian School* 4 (1994).

[48] Donna Dehyle & Karen Swisher, *Research in American Indian and Alaska Native Education: From Assimilation to Self-Determination*, *in* 22 Review of Research in Education 113, 114 (1997).

This Court first began to break down these discriminatory barriers in public legal education – and thereby move toward recognizing diversity as a compelling interest – in the 1940s. In *Sweatt v. Painter*, the Court ordered the admission of African Americans to the University of Texas Law School on the ground that the quality of the education available there was "superior" to that available at Texas's law school for African Americans.[49] Since *Sweatt*, the Court repeatedly has approved the constitutionality of state efforts that actively seek to ensure diversity in educational institutions for the benefit of all students – minority and non-minority alike.[50] And these decisions by the Court have spurred other institutions to make efforts to address discrimination.

Understanding the value of diversity in the legal profession, law schools have made efforts to diversify both their student bodies and their faculties. Like the University of Texas, many law schools have instituted race-conscious admissions programs.[51] Further, law schools have "sought to hire racial minorities . . . and [are] more committed to the success of their diverse faculty members both in terms of promotion to tenure . . . and in terms of appointments in leadership positions such as appointments as Associate Deans and Deans . . . ."[52]

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[49] 339 U.S. at 633-34.

[50] *See, e.g.*, *Bakke*, 438 U.S. at 315; *Grutter*, 539 U.S. at 330.

[51] *See, e.g.*, *Grutter*, 539 U.S. 306.

[52] Wald, *supra*, at 1085-86.

Likewise, the ABA has made efforts to promote diversity in the legal profession. Since 1980, the ABA has required all law schools to demonstrate "a commitment to providing full opportunity for the study of law and entry into the profession of qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms."[53]

Similarly, private law firms have made significant efforts to diversify their ranks. Most law firms have implemented recruiting policies that foster diversity in their associate and partner ranks. Indeed, one of the benchmarks employed to measure a law firm's success is the ability to hire a diverse group of attorneys.[54]

B. Critical Mass Has Not Been Achieved In The Legal Profession

Despite these efforts to diversify the legal profession, a critical mass of racial minorities still does not exist. Legal scholars have confirmed the continuing lack of a critical mass and continue to advocate for race-conscious admissions programs as a means to provide a stronger pipeline of minorities into the legal profession.

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[53] Am. Bar Ass'n, *Standards for Approval of Law Schools* 36-37, Standard 211 (2000).

[54] *See Vault Law Firm Rankings 2013: The Best Law Firms For Diversity*, *available at* http://www.vault.com/wps/portal/usa/rankings/individual?rankingId1=36&rankingId2=36&rankings=2&regionId=0.

Stanford Law School professor Deborah Rhode, for example, recently wrote:

> One irony of this nation's continuing struggle for diversity and gender equity in employment is that the profession leading the struggle has failed to set an example in its own workplaces. In principle, the bar is deeply committed to equal opportunity and social justice. In practice, it lags behind other occupations in leveling the playing field.[55]

Similarly, University of Louisville law professor Laura Rothstein noted the same trend, connecting it with the need to build a stronger pipeline for minorities:

> A century of legalized racism, followed by decades of institutionalized racism, has resulted in the underrepresentation of minorities . . . in the legal profession . . . . Recognition of the need to open the door, give a chance, and provide opportunities that can make a difference highlight the value of institutional efforts to "shape the tributary" or "build the pipeline."[56]

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[55] Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 Geo. J. Legal Ethics 1041, 1041 (2011).

[56] Laura Rothstein, *Shaping the Tributary, the Why, What and How of Pipeline Programs to Increase Diversity in Legal*

Sarah Redfield, a law professor at the University of New Hampshire School of Law, likewise concluded:

> For at least the past three decades, the legal profession has grappled with diversity issues, yet true diversity and inclusion eludes the practice of law . . . . Simply put, too few underrepresented minorities are progressing in school and moving successfully through the pipeline. Too few are graduating from high school and progressing to and succeeding in college. Too few are achieving LSAT scores and GPAs that meet the standards for admission to law school, all too few to contribute to a diverse profession.[57]

The statistics regarding the representation of minorities in the legal profession bear out these scholars' conclusions. According to a January 2012 NALP bulletin, the number of Native-American associates in private practice nationwide is too low to be reported. NALP further reported that African Americans comprise only 4.29% of associates nationwide.[58] Even in geographic locations where African Americans represent a larger segment of the overall population, they are still underrepresented in

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Education and the Legal Profession, 40 J.L. & Educ. 551, 552 (2011).

[57] Sarah Redfield, *The Educational Pipeline to Law School – Too Broken and Too Narrow to Provide Diversity*, 8 Pierce L. Rev. 347, 353, 358 (2010).

[58] *NALP Bulletin*, *supra*, at Table 1.

the associate ranks. For example, African Americans represent approximately 6% of the associates in the Detroit area (where 82.7% of the population is African American) and only slightly above 1% of the associates in San Diego, California (where 6.7% of the population is African American).[59]

Hispanic Americans have similarly low participation in the associate ranks, representing only 3.83% of associates nationwide and close to 0% in certain markets.[60] For example, Hispanic Americans represent less than 2% of the associate ranks in fifteen of the forty-four markets surveyed by NALP.[61] This includes legal markets where there is a relatively high Hispanic population, such as Las Vegas, Nevada (where Hispanic Americans make up 31.5% of the population, but only 1.18% of associates) and San Diego, California (where Hispanic Americans constitute 28.8% of the population, but only 3.2% of associates).[62]

Although Asian Pacific Americans have stronger representation in associate ranks – nationwide, they account for approximately 5% of the population but 9.65% of associates[63] – this average is skewed by the high percentage of Asian Pacific-American associates in cities with high Asian Pacific-American populations. For example, in San Jose, California, where 32% of the population is Asian Pacific-American, there is a correspondingly high percentage of Asian Pacific-American associates: 27.36%.[64] The nationwide average of Asian Pacific American associates also does not reflect that in some cities with a significant Asian Pacific-American population, the percentage of Asian Pacific-American associates is comparatively low. For example, although 33% of the population in San Francisco, California, is Asian Pacific American, only 17.41% of associates are Asian Pacific American.[65]

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[59] *Id.*; *State & County Quick Facts – Detroit (city), Michigan*, United States Census Bureau, http://quickfacts.census.gov/qfd/states/26/2622000.html (last revised June 6, 2012); *State & County Quick Facts – San Diego (city), California*, United States Census Bureau, http://quickfacts.census.gov/qfd/states/06/0666000.html (last revised June 6, 2012).

[60] *NALP Bulletin*, *supra*, at Table 2.

[61] *Id.*

[62] *Id.*; *State & County Quick Facts – Las Vegas (city), California*, United States Census Bureau, http://quickfacts.census.gov/qfd/states/32/3240000.html (last revised June 6, 2012), *State & County Quick Facts – San Diego (city), California*, *supra*.

These statistics are even lower at the partner level. Racial minorities comprise only approximately 6% of partners at law firms nationwide, with many markets having no minority partners at all in any reviewed law firms.[66] Indeed, only 1.71% of partners at the law firms surveyed by NALP are African American; and in only nine of the forty-four legal markets surveyed by NALP did the percentage of partners that are African American exceed 2%.[67] Similarly, Hispanic Americans comprise only 1.92% of partners at the law firms surveyed by NALP; and in only fourteen of the forty-four markets surveyed did the percentage of Hispanic-American partners exceed 2%.[68] In eighteen of those markets, the percentage of Hispanic-American partners was below 1%.[69] Finally, Asian Pacific Americans represent only 2.36% of partners at the law firms surveyed by NALP, and in only ten of the forty-four markets surveyed did the percentage of Asian Pacific-American partners exceed 2%.[70] Again, the number of Native-American partners is too low for NALP to report.[71]

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[63] 2010 Population, *supra*; *NALP Bulletin*, *supra*, at Table 2.

[64] *NALP Bulletin*, *supra*, at Table 1; *State & County Quick Facts – San Jose (city), California*, United States Census Bureau, http://quickfacts.census.gov/qfd/states/06/0668000.html (last revised June 6, 2012).

[65] *NALP Bulletin*, *supra*, at Table 2; *State & County Quick Facts – San Francisco (city), California*, United States Census Bureau, http://quickfacts.census.gov/qfd/states/06/0667000.html (last revised June 6, 2012).

[66] *NALP Bulletin*, *supra*, at Table 1.

With regard to judicial diversity, since the implementation of race-conscious admissions programs, judicial diversity has increased, but the percentages still fail to achieve a level of diversity that would constitutionally mandate ending the pipeline that has fed this progress. In 2009, the total percentage of minority judges sitting on state supreme courts was 12.8%.[72] Even this representation of racial minorities, though, is disproportionally low. Where minorities represent the majority of the population, they are still severely underrepresented.[73] For example, in Arizona, where 40% of the population was non-Caucasian in

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[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 1.

[72] Acquaviva & Castiglione, *supra*, at 1215.

[73] *Id.*

2010, no state Supreme Court justices were minorities, only 18% of judges on the intermediate-level court were minorities, and only 16% of trial court judges were minorities.[74] Similarly, in New Mexico, where only 57% of the population was non-Caucasian in 2010, only 40% of state Supreme Court judges were minorities, and only 15% and 18% of intermediate and trial court judges, respectively, were non-Caucasian.[75] Similarly, racial minorities are underrepresented in the federal judiciary.[76]

III. ELIMINATING RACE-CONSCIOUS COLLEGE ADMISSIONS WOULD SIGNIFICANTLY REDUCE DIVERSITY IN THE LEGAL PROFESSION

To ensure the creation and maintenance of a critical mass of racial minorities in the legal profession, a pipeline must be maintained to allow qualified minorities the opportunity to earn admission to college and then law school and ultimately to enter the legal profession. When states have eliminated race-conscious admissions programs entirely, the results have been disastrous. Without race-conscious admissions programs, racial minorities' college enrollment plummeted, and, by extension, minority law school admissions fell dramatically. This resulted in a narrowing of the pipeline into the legal profession, which significantly reduced the number of racial minorities who became lawyers.

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[74] Torres-Spelliscy et al., *supra*, at 49.

[75] *Id.*

[76] *See* Michelle Olson, *Federal Appellate Judges: Gender and Race Stats*, Appellate Daily (Oct. 1, 2011, 10:41 pm), https://docs.google.com/file/d/0B9afsss8C6tWN2M4Mzk5MTctOGYzMi00MGU4LTgwODEtMDMzYjg2NTYzOTE3/edit?hl=en; Russell Wheeler, *The Changing Face of the Federal Judiciary* 11 (2009).

In July of 1995, the Regents of the University of California adopted Resolution SP-1, which eliminated "race, religion, sex, color, ethnicity, or national origin as criteria for admission" to the university system.[77] In November of 1996, California voters approved Proposition 209, which amended California's state constitution to prohibit the consideration of race, religion, sex, color, ethnicity, or national origin in admissions.[78]

The impact of these policies was immediate. Between 1995, when Resolution SP-1 was adopted, and 1998, when both Resolution SP-1 and Proposition 209 took effect, the number of in-state African-American, Hispanic-American, and Native-American students admitted to the University of California, Berkeley dropped 58%.[79] When Proposition 209 officially took effect for the entering class of Fall 1998, the admission rates of minorities on all California campuses declined, including by as much as 50% at the University of

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[77] University of California – Office of the President, *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies* 7 (March 2003). Resolution SP-1 was rescinded in May 2001. *Id.* at 7 n.7.

[78] *Id.* at 7.

[79] Erica Perez, *Despite Diversity Efforts, UC Minority Enrollment Down Since Prop. 209*, California Watch 1, (Feb. 24, 2012) http://californiawatch.org/dailyreport/despite-diversity-efforts-uc-minority-enrollment-down-prop-209-15031.

California, Berkeley and the University of California, Los Angeles.[80]

Admissions numbers continue to drop steadily. For example, just between 2002 and 2003, admissions rates fell 15% for African Americans, 3% for Hispanic Americans, 9.2% for Native Americans, and 2% for Asian Pacific Americans.[81]

To this day, the percentage of minorities admitted to and enrolled in California law schools remains materially lower than the percentage admitted and enrolled before the implementation of Proposition 209.[82] This decrease in minority enrollment has had a corresponding effect on the legal profession in California, with fewer attorneys of color entering the ranks. In fact, one study determined that the elimination of race as a factor in admissions would result in at least a 50% net loss of new minority attorneys.[83]

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[80] *Id.* at 2.

[81] *See* Carl G. Cooper, *Increasing Pipeline Opportunities in the Legal Profession for Minorities*, The Metropolitan Corporate Counsel (Vol. 15, No. 3, March 2007).

[82] Perez, *supra*, at 1. This decrease in enrollment applies to Asian Pacific Americans, as well as African Americans, Hispanic Americans, and Native Americans. That Asian Pacific Americans have seen a decrease in admissions following the passage of Proposition 209 refutes the "model minority" myth, which contends that Asian Pacific Americans stand to gain the most from the demise of race as a factor in college and law school admissions. *See* Stephen Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. Rev. 1583, 1629 (1999) (asserting that Asian Pacific Americans derive the greatest benefit when race-conscious admissions policies are eliminated); *see also* Frank Wu, *Yellow: Race in America Beyond Black and White* 49, 74-77 (2001) (describing the "model minority" myth generally). In fact, only one racial group showed marked increases in enrollment following the passage of Proposition 209; Caucasian Americans accounted for 59.8% of law school enrollment during the three years before Proposition 209; they made up 71.7% of law school students in California after the ban. *See* William C. Kidder,

California's experience shows that eliminating race-conscious admissions programs for racial minorities has immediate and significant effects, reducing the number of people of color entering the legal profession. Without a robust pipeline, fewer racial minority candidates obtain access to college and, in turn, law school and the legal profession. This results in a lack of diversity in the legal profession. Thus, given the continuing need to foster diversity, there continues to be a compelling governmental interest in collegiate diversity as a means to further a pipeline to achieve diversity in the legal profession.

IV. CONCLUSION

Diversity is of paramount importance in law schools because they "represent the training ground for a large number of the Nation's leaders" and "legal learning and practice . . . cannot be effective in isolation from the individuals and institutions with

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Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts, 7 Asian L.J. 29, 43-45 (2000).

[83] *See* Jesse Rothstein & Albert H. Yoon, The National Bureau of Economic Research, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?* 4 (2008).

which the law interacts."[84] Moreover, diversity strengthens the legal system as a whole: it ensures that numerous perspectives will be heard; it ensures that the legal system has legitimacy in the eyes of society; it increases access to legal representation for all; and it prepares our Nation's leaders. Diversity in the legal profession can only be fed by the flow of talented and qualified students through college and law school; and this pipeline is maintained, in part, by race-conscious college and law school admissions. Accordingly, race-conscious admissions programs remain a necessary and compelling governmental interest.

Amici therefore respectfully join Respondents in requesting this Court uphold the University of Texas's program.

August 13, 2012

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[84] *Grutter*, 539 U.S. at 332 (citing *Sweatt*, 339 U.S. at 634).

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

In The
Supreme Court of the United States

◆

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

◆

BRIEF OF *AMICI CURIAE* COALITION OF BLACK MALE ACHIEVEMENT INITIATIVES IN SUPPORT OF RESPONDENTS

◆

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INTEREST OF *AMICI CURIAE*

Amici are a group of Black Male Achievement Initiatives and centers (BMIs) located in regions across the United States and individuals who have worked to advance diversity in higher education.[1] (Listed in App. A). *Amici* are deeply interested in the outcome of this case, which could dramatically narrow the pathways to college for Black males who are already underrepresented at selective universities. *Amici*'s judgments are based on years of social science research and service working for the advancement of Black male youth.

◆

SUMMARY OF ARGUMENT

The meaningful inclusion of young men and women from a breadth of racial and ethnic backgrounds is critical to a university's ability to obtain the benefits of a diverse learning environment and to assist the nation in its preparation of students for future civic and leadership roles in a multicultural world. Banning holistic race-conscious review in college admissions will impede that inclusiveness, particularly as it relates to Black males. Studies rarely disaggregate racial and ethnic college admissions and enrollment data by gender, obscuring the fact that – even with the use of holistic race-conscious review – the numbers of African American males at selective universities are already abysmally low. The elimination of that tool will make this crisis even worse.

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici curiae* affirm that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members or their counsel, has made a monetary contribution to the preparation or submission of this brief.

African Americans continue to be disproportionately isolated from educational, economic and social opportunity to a degree not experienced by any other racial or ethnic group. States have a compelling interest in reducing conditions that impair the equal opportunity for advancement of a cognizable group of their residents. Failure to improve these conditions imperils the well-being of all residents. These enduring patterns of social inequality will worsen if pathways to academic opportunity for African American students are narrowed, which they will be if holistic race-conscious college admission processes are terminated too soon. Holding open the doors to a college education for a state's most disadvantaged residents is a critical tool for reducing social disparity within its borders.

◆

ARGUMENT

The nation's leading colleges and universities, like the University of Texas at Austin (UT), must be permitted to use every constitutionally available means to identify, admit and successfully integrate members of historically underrepresented minorities to their flagship and other campuses. Public colleges and universities have struggled to include meaningful numbers of Black and Latino students in their entering classes, particularly Black males. Holistic review of the files of applicants, including the consideration of race, has been one of the most potent tools for keeping the doors of our universities open to these students and attracting them inside. This Court should reaffirm once again the constitutionality of that essential tool.

I. HOLISTIC RACE-CONSCIOUS REVIEW REMAINS NECESSARY FOR THE MEANINGFUL INCLUSION OF UNDERREPRESENTED MINORITIES IN COLLEGE STUDENT BODIES.

Diversity is a critical component of excellence in higher education. The quality of the college learning environment is enriched for all when students from various racial and ethnic backgrounds have the chance to study and grow together. *See* Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 Psychol. Sci. 507, 509 (2004). Because many of our communities remain highly segregated by race, the provision of diverse educational settings is one of the most important roles played by public universities and colleges in our society. Student body diversity deepens cross-racial understanding, breaks down harmful stereotypes, and prepares students for effective participation in a global marketplace. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003). The inclusion of meaningful numbers of underrepresented minorities on our college campuses provides exposure to racial, ethnic and cultural difference that is necessary to prepare students of all races and ethnicities to assume leadership roles and to participate fully in the civic life of their state and local communities, activities that will grow in importance as the nation's demographics continue to shift. For these reasons and more, this Court has repeatedly held that student body diversity is a compelling state interest justifiably pursued through holistic race-conscious admissions policies. *See Grutter*, 539 U.S. at 330; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Although racial and ethnic heritage is not the only type of diversity important to a heterogeneous student body, it is a key ingredient of it. A racially and ethnically diverse learning environment contributes to more than the well-being and prosperity of its direct beneficiaries; integrated classrooms are fundamental to the nourishment of good citizenship and the health of our democracy. To that end, this Court has held that a university may constitutionally seek to admit a "critical mass" of underrepresented minority students, whose presence in meaningful numbers help it attain the benefits that only integrated learning environments can produce. *Grutter*, 539 U.S. at 329-33.

More than 50 years after this Court's historic decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), many Americans continue to live in communities profoundly segregated by race. Although suburban diversity is growing, this trend has only produced a slight decline in the rate of African American/White segregation, which now stands at 0.59 as measured by the dissimilarity index. *See* John R. Logan & Brian J. Stultz, Project US2010, *The Persistence of Segregation in the Metropolis: New Findings from the U.S. Census* (2011).[2] This means that a stunning 59% of African Americans would have to move from their current homes to be evenly distributed in communities across the country. Studies tracking more recent minority migration into inner suburban communities also suggest that these diversifying suburbs are experiencing greater fiscal stress and are at risk of re-segregation. *See* Sheryll Cashin, THE FAILURES OF INTEGRATION (2004); Myron Orfield & Thomas Luce, *America's Racially Diverse Suburbs: Opportunities and Challenges* (2012).[3] Segregation in our public school systems in recent decades is also on the rise.

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[2] Available online at http://www.s4.brown.edu/us2010/Data/Report/report2.pdf.

[3] Available online at http://www.law.umn.edu/uploads/e0/65/e065d82a1c1da0bfef7d86172ec5391e/Diverse_Suburbs_FINAL.pdf

See Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* (2009).[4]

These disappointing realities make the role played by the nation's leading institutions of higher learning in bringing students of all races and ethnicities together more important than ever before, particularly as we move toward the year the United States will become a "majority minority" nation. *See* Jennifer M. Ortman & Christine E. Guarneri, *United States Population Projections: 2000 to 2050* (2009).[5] Despite the country's growing minority populations, colleges offer many students their first real opportunity to interact with peers of other races. Without the benefit of first-hand interracial friendships and interactions, perceptions of minorities are often based on popular culture and distorted images in the media, which can reinforce harmful stereotypes and deepen racial misunderstanding. *See* Heinz Endowment's African American Men and Boys Task Force, *Portrayal and Perception: Two Audits of News Media Reporting on African American Men and Boys* (2011).[6]

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[4] Available online at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf.

[5] Available online at https://www.census.gov/population/www/projections/analytical-document09.pdf.

[6] Available online at http://www.soros.org/sites/default/files/portrayal-and-perception-20111101.pdf.

Studies conducted by the nation's leading social psychologists have shown how automatic negative associations linked to race can unconsciously influence behavior, even in persons with deep egalitarian values. *See* Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005). Implicit biases operate without the full awareness of their holders, often to the detriment of minorities. Studies reveal that these implicit mental "short cuts" can be particularly harmful to Black males when people unconsciously associate Black men with danger and criminality. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876, 876-77 (2004).

Regular contact among the races helps to disrupt these harmful stereotypes and to promote cross-racial understanding. Integrated campuses of higher learning enable these contacts to occur and foster the development of leaders and citizens motivated to act in ways that promote a democratic, inclusive and just society. *See* Ximena Zúñiga et al., *Action-Oriented Democratic Outcomes: The Impact of Student Involvement with Campus Diversity*, 46 J. C. Student Dev. 660 (2005) (showing interaction with diverse peers and diversity-related curricular and co-curricular activities reduce student prejudice and promote inclusiveness).

A. Black males are especially vulnerable to exclusion from postsecondary educational opportunities without the use of every available constitutional tool to include them.

Although there is a compelling need for inclusion of students of many races and ethnicities on college campuses to fully secure the benefits of a diverse learning environment, we focus here on the national crisis currently affecting young Black men and boys that threatens the ability of UT and other selective universities to include them in meaningful numbers. Of all social groups, young African American males suffer some of the greatest impediments to college matriculation and degree attainment. Banning race-sensitive holistic review of applications will make this situation even worse.

Most of the research discussed in the briefs of the parties and *amici curiae* analyzes data of selective universities and colleges disaggregated by race and ethnicity, but not data disaggregated by race, ethnicity and gender. This obscures the reality that young Black males are currently grossly underrepresented in the student bodies of selective universities across the nation, even where race-conscious holistic admissions procedures are available to facilitate their inclusion in meaningful numbers. *See* Michael J. Cuyjet, *African American Men in College*, vii, 7-13 (2006) (discussing Black male underrepresentation and their resulting "invisibility" on college campuses); Shaun R. Harper, Dellums Commission, *Black Male*

Students at Public Flagship Universities in the U.S.: Status, Trends, and Implications for Policy and Practice (2006) (discussing 2-to-1 imbalance of Black women to Black men).[7] Mechanical, race-blind admissions will reduce their numbers even further.

Throughout the nation's history, the subordination and life experiences of Black males have been unique, and common stereotypical portrayals of African American men can only truly be dispelled through personal interaction. *See* Harper, *supra*, at 11-12. On campuses where many of the African American males are highly visible athletes, it can be particularly difficult to promote the perception of Black males as intellectuals and campus leaders in non-sport activities. *See id.* at 14-15. Black males must be included in numbers that extend beyond mere tokenism to underscore that students of all races have the intellectual capability to succeed.

B. The barriers to educational opportunity affecting young Black males are severe.

Two years after this Court's decision in *Grutter*, an article published in the *New York Times* described the deepening social and economic plight of young Black men in America. *See* Erik Eckholm, *Plight Deepens for Black Men, Studies Warn*, N.Y. Times,

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[7] Available online at http://www.jointcenter.org/sites/default/files/upload/research/files/FullHarper%20-%2025%20pages.pdf.

March 20, 2006, at A5. The studies on which the article relied showed that the status of African American males has been worsening on multiple metrics for decades at rates significantly greater than those affecting White and Hispanic males. *See also* BLACK MALES LEFT BEHIND (Ronald B. Mincy ed. 2006). Without access to higher education, these social inequities will worsen.

From birth, young Black males face complex systemic barriers to opportunity. They are more likely to live in the most disadvantaged environments in the nation, more likely to begin life under the most difficult circumstances (i.e., grow up in poverty, suffer disproportionate early childhood health disparities, be raised in single parent homes with reduced resources), more likely to lack successful same-race/gender role models, and more likely to be the victims of violence than any other group in the nation. *See* Erika Harrell, Bureau of Justice Statistics, BLACK VICTIMS OF VIOLENT CRIME (2007) (reporting that although Blacks account for 13% of the U.S. population in 2005, they were victims in nearly half of all homicides).[8]

These early life barriers to opportunity produce grave and disparate outcomes. Research shows that since the 1980s, the average life outcomes of Black men and boys in the United States have steadily declined as the probabilities of their academic failure, chronic unemployment and incarceration have grown at an alarming pace. They are increasingly isolated in segregated, high-poverty high schools, with less than half of all Black males graduating on time. In 2007-08, the national graduation rate for Black males was 47%; the corresponding rate for White males was 78%. *See* The Schott Foundation for Public Education, *Yes We Can: The Schott 50 State Report on Public Education and Black Males* (2010) [hereinafter "*Yes We Can*"].[9] In a number of urban centers, the numbers have been grimmer still: Milwaukee and Baltimore reported one year that fewer than one out of three of their Black male students made it to graduation. *See* The Schott Foundation for Public Education, *Given Half a Chance: The Schott 50 State Report on Public Education and Black Males* (2008) [hereinafter "Half a Chance"].[10]

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[8] Available online at http://bjs.ojp.usdoj.gov/content/pub/pdf/bvvc.pdf.

The ripple effects of a failure to finish high school are severe for all dropouts, but they are especially punishing for young Black men. In 2004, while 34% of White high school dropouts were unable to find a job, 72% of Black male dropouts were jobless. *See* Eckholm, *supra*. Without reliable work, high school dropouts can turn to illicit activity and spend time in state or federal prison, a likelihood increased by expansive drug policy, targeted policing and mandatory sentencing. Criminal conviction during early adulthood inflicts severe economic consequences on these youths for the remainder of their lives. *See* Harry J. Holzer et al., UCLA Center for the Study of Urban Poverty, *How do Crime and Incarceration Affect the Employment Prospects of Less Educated Young Black Men?* (2002); Andrew Sum et al., Northeastern University Center for Labor Market Studies, *The Educational Attainment of the Nation's Young Black Men and Their Recent Labor Experiences* (2008).[11]

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[9] Available online at http://blackboysreport.org/bbreport.pdf.

[10] Available online at http://www.soros.org/sites/default/files/schottreport_20080723.pdf.

Of equal concern, due to widely unequal early educational experiences, many young Black males who do push forward in school underachieve relative to their peers in grades and on standardized tests – a reality that, in the absence of adequate encouragement and support, can diminish their college aspirations and chances of admission, particularly if only traditional merit-based criteria are applied. *See* Sharon Lewis et al., The Council of the Great City Schools, *A Call for Change: The Social and Educational Factors Contributing to the Outcomes of Black Males in Urban Schools* (Oct. 2010).[12] The College Board reports that in 2011, four out of five African American high school students were either left out of an AP subject for which they had potential or attended a school that did not offer the subject. *See* The College Board, *The 8th Annual AP® Report to the Nation* (2012).[13]

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[11] Available online at http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1010&context=clms_pub.

[12] Available online at http://graphics8.nytimes.com/packages/pdf/opinion/A-Call-For-Change.pdf.

A variety of in-school barriers appear to dampen Black male high school students' perceptions of themselves as "college material" as well. Nationwide, White males are more than twice as likely as Black males to be placed in Talented/Gifted classes, and Black males are more than twice as likely to be tracked as "special needs." *See* Schott, *Yes We Can*, *supra* at 35. African American males are also far more likely to be suspended or expelled for subjective acts (disrespect or unruliness) and punished more severely than White males for similar conduct. *See* American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 Am. Psychologist 852 (2008); Daniel J. Losen, The Civil Rights Project at UCLA, *Discipline Policies, Successful Schools, and Racial Justice* (2011).[14] These discretionary judgments heighten the danger that Black youth will not return to school.

Early academic experiences such as these dramatically reduce the pool of Black male high school graduates who will even be eligible for consideration for college admission. As these sobering numbers reflect, Black males who persist to complete high school and apply for college admission are the exception, not the rule.

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[13] Available online at http://media.collegeboard.com/digitalServices/public/pdf/ap/rtn/AP-Report-to-the-Nation.pdf

[14] Available online at http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB_FINAL.pdf.

While scholars have advanced a number of theories about the possible causes of academic underachievement by underrepresented minorities, consensus eludes. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 531-33 (2002) [hereinafter "Confronting the Condition"] (discussing theories and arguing that *regardless* of the causes, states must be able constitutionally to include Black students in the classes of the nation's best schools); Shaun R. Harper & Charles H. F. Davis III, *They (Don't) Care About Education: A Counternarrative on Black Male Students' Responses to Inequitable Schooling*, 26 Educ. Found. 103 (2012) (discussing several theories). Although we take the view in Part II of this brief that historical and structural forces explain today's achievement gaps, regardless of the underlying cause or causes, selective colleges and universities must be able to include African Americans in their student bodies while the country continues to work to reduce these gaps.

C. Admissions officers properly consider myriad qualities when calculating the value Black male applicants can add to an entering class.

More fundamentally, universities rightly reject the notion that test proficiency and GPAs provide an adequate picture of a prospective student's ability to succeed in college and add value to an entering class. Admissions officers search for students who exhibit many valuable traits, including empathy, engagement, commitment, drive, perseverance, emotional intelligence, maturity and creativity. These and other desired qualities reveal themselves not through SATs and GPAs, but through personal essays, letters of recommendations, job histories, and more – and universities must be permitted to search for them. *See* The Kirwan Institute for the Study of Race & Ethnicity, *A Common Guide to Understanding Democratic Merit*, http://kirwaninstitute.osu.edu/docs/Applied%20Democratic%20Merit.pdf (last visited Aug. 6, 2012).

Universities also strive to admit students who are able to communicate with others different from themselves and who can build bridges across those differences for the common good. Research has shown that academic biographies convey more about the social advantages or disadvantages applicants enjoyed as children than their "diversity fluency" or future participatory or leadership potential. *See* Lani Guinier & Gerald Torres, *The Miner's Canary* (2002). Universities rightly weigh perseverance, communication and leadership skills, alongside pedigree. Despite the discouraging messages that Black male students frequently receive, many exhibit what education scholars label "resilience." *See, e.g.*, Caren Floyd, *Achieving Despite the Odds: A Study of Resilience Among a Group of African American High School Seniors*, 65 J. Negro Educ. 181 (1996). While aware that educational inequities have impacted their prospects (inexperienced or detached teachers, low expectations of their performance, under-resourced facilities, a shortage of same-race male teachers, efforts to misplace them in special education programs, discouraging advice from college counselors), these students possess a strong belief in college as "the great equalizer" and a "hope in degrees unseen." *Id.*

In 1903, Dr. W.E.B. Du Bois cautioned the nation: "Throughout history, the powers of single black men flash here and there like falling stars, and die sometimes before the world has rightly gauged their brightness." *The Souls of Black Folk*, in *Writings* 357, 365 (The Library of America 1986) (1903). Today, admissions officials comb through files searching for signs of that brightness, gauging the potential of aspiring Black male collegians who, despite lagging standardized test scores and GPAs, can add immeasurable value to their college campuses. Through holistic race-conscious admissions practices, a small percentage of these applicants earn entry to some of the nation's leading universities each year, based on the belief that their academic preparation and life experiences will enable them to succeed at college level work and enable them to enrich the learning environment for all. Carefully conducted admissions decisions such as these are worthy of this Court's deference and support. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (noting that the attainment of a diverse student body sits at the heart of a university's proper institutional mission).

D. Without flexible race-conscious review many young Black males will be shut out of the nation's most selective colleges and universities where their numbers are already disturbingly small.

Petitioner suggests that race-conscious holistic admissions procedures are no longer necessary and that race-blind procedures will suffice to secure adequate numbers of Black and Latino students on college campuses. Pet. Br. at 20-21. This claim is belied by data revealing that selective universities and colleges have in fact labored to enroll meaningful numbers of underrepresented minorities in their freshman classes when prevented from considering the race of applicants along with multiple other factors. *See* Marta Tienda et al., *Closing the Gap?: Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action*, 40-44 (2003) (documenting a decline in the enrollment of African American and Latino students after *Hopwood* *v. Texas*, 78 F.3d 932 (5th Cir. 1996), at Texas's two most selective universities).[15]

For Black males in particular, the picture on the ground is dramatically different from that painted by Petitioner: data show disturbingly low enrollments of Black males on the campuses of selective universities. While the rates of college admissions by other groups have risen over the years, Black male admission rates have not. In 2002, Black males comprised 4.3% of the total of all students enrolled in all institutions of higher education in the U.S., the same percentage that they accounted for in 1976. *See* Harper, *supra*, at 2 (documenting that Black men remain "strikingly underrepresented" among collegians, enrolled in numbers now essentially the same as 30 years ago).

As a percentage of the student bodies at *selective* flagship universities – among the nation's largest campuses – the figures are even lower. A 2006 study surveying the percentage of Black males at the nation's 50 public flagship universities discovered that "the average black male enrollment rate at these institutions was a stunning 2.8%. *Id.* at 3-4. *See also* BLACK AMERICAN MALES IN HIGHER EDUCATION: DIMINISHING PROPORTIONS (Henry T. Frierson et al. eds. 2009); *What Would Happen If the Nation's Most Selective Private Universities Were Required to Abandon Affirmative Action Admissions*, J. Blacks Higher

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[15] Available online at http://theop.princeton.edu/reports/wp/closing_the_gap.pdf.

Educ., July 31, 2000, at 6, 7 (noting that if grades and standardized tests were the sole admissions criterion, black enrollment would fall *below* 2%). The same year, White males earned ten times the number of degrees awarded to their Black male counterparts, at every degree level. *Id.*

Indeed, even with the use of holistic race-conscious admissions processes, the percentages of Black males in the entering classes of leading colleges and universities like UT have been distressingly low. Unfortunately, data made available by public colleges and universities rarely disaggregate the numbers of Black male applicants and enrollees, from those of Black female applicants and enrollees, or others. *See id.* at 1 ("black students have long been treated as a monolithic group and data are not disaggregated by gender in most published research"). This practice has hidden the extraordinary depth of the educational crisis young Black males face today. *See id.* at 2 (reporting that across all racial/ethnic groups the college enrollment gender gap is widest among Black students, with young Black women outnumbering their Black male peers nearly two to one); *see also* Cuyjet, *supra*, at 7.

A small group of education scholars, however, have begun to investigate the low admissions, enrollments and degree attainment of Black males. *See, e.g.,* Shaun Harper, *supra*, at 7; Ronald Roach, *Where are the Black Men on Campus?*, Black Issues in Higher Educ., May 10, 2001, at 18. *See also* The Schott Foundation for Public Education, *Yes We Can*, *supra*; The Schott Foundation for Public Education, *Half a Chance*, *supra*; The Schott Foundation for Public Education, *Public Education and Black Male Students: The 2006 Report Card* (2006).[16] Their reports help illuminate the difficulties selective universities have experienced (but not broadcast) including and retaining African American males in meaningful numbers in undergraduate student bodies.

It is only when the numbers of enrolled Black males are separated from those of enrolled Black females that the distressingly low numbers of Black males included in UT's entering classes are revealed.

The U.S. Department of Education Integrated Postsecondary Education Data System (IPEDS) appears to be the only site where disaggregated data is made publicly available. In our review of this data, *see* App. B, we focused on full-time (rather than part-time) students who were enrolled in UT's entering freshman classes (rather than the entire student body totals so often used). Freshman students are often housed in dormitories separated from upper-class students and frequently take introductory-level classes with other freshmen during their first year of study. A sharper focus on entering class data helps to reveal the paltry number of Black males being included in that group.

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[16] Available online at http://www.schottfoundation.org/drupal/publications/Schott_06_report_final.pdf.

Based on IPEDS data, at UT-Austin, Black females have outnumbered their Black male counterparts every year from 1994 to 2009, with the more recent years showing larger gender gaps, reflecting increased barriers to opportunity for young Black males in the United States.[17]

The data also shows that the Top 10% system only partly succeeded in including Black males in UT's freshman classes after the devastating impact of the 1996 *Hopwood* ban. *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In the two years prior to *Hopwood*, UT enrolled 125 Black males in its entering class (1994 and 1995). After *Hopwood* banned the consideration of race in 1996, this number fell by more than 50 students: in Fall 1997, UT enrolled only 73 Black males among the first-time full-time students in its freshman classes (of 6,945), and only 81 Black males in its Fall 1998 freshman class (of 6,598). With the help of the Top Ten Percent admissions beginning in 1998, Black male freshman numbers increased somewhat, but they never reached pre-*Hopwood* high of 125. After *Grutter*, however, and UT's return to holistic review, the enrolled number of Black males in the entering classes began to rebound. The 114 enrolled in Fall 2004, was followed by 122 in

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[17] While the trend of female freshman outnumbering male freshman is true across all racial groups, nationally, the gap is greatest for Black men and Black women. *See* Harper, *supra*, at 2.

Fall 2005, 144 in Fall 2006, and 164 the following year. (Fall 2008 and 2009 brought another drop, but this drop corresponded to a notable decrease in overall full-time undergraduates admitted at UT those same years.)

In percentages, the IPEDS data show that enrollment of Black male first-time freshmen was higher in the post-*Grutter* years (varying from 1.69% to 2.21% between Fall 2004 to Fall 2009) than it was in the seven years preceding *Grutter* (Fall 1997 to Fall 2003), even dipping as low as 1.05% in the Fall of 1997 (before getting some assistance from the Top 10% law that took effect the next year). *See* App. B.

As this disaggregated data shows, even with holistic race-conscious review procedures, UT has labored to enroll meaningful numbers of Black males in its freshman classes. Looking at the most recent year for which IPEDS data is available – Fall 2009 – only 1.79% of UT's full-time first-time undergraduates were Black males (129 Black male freshmen out of 7,199 enrolled full-time freshmen). That UT managed to include only 129 Black male freshmen in a class that size is stunning. The inclusion of so few Black males in the entering class hinders opportunities for interracial interaction and stereotype dismantling and limits the likelihood that Black male freshmen will cross paths with each other in the classroom as well, which introduces the risk of tokenism and feelings of isolation. A larger peer group for Black males would create a broader support system to encourage their academic endeavors and sustain other facets of their overall well-being.

Moreover, the pattern of small Black male enrollments is not confined to UT; it is repeated in the entering classes of other large public flagships as well. (Appendix B includes IPEDS data for Black male freshmen enrollments at The Ohio State University, one of the nation's largest campuses). Without the help of holistic race-conscious procedures, these dismal numbers will be reduced even further.

E. Low Black male undergraduate enrollments lead to low graduate and professional school enrollments.

Unsurprisingly, small numbers of underrepresented minorities at the undergraduate level compound the diversity challenges experienced by leading universities and colleges at the graduate and professional degree level. *See* Liliana M. Garces, The Civil Rights Project at UCLA, *The Impact of Affirmative Action Bans in Graduate Education* (2012) (showing that bans on race conscious admissions procedures in states adopting Top Percent plans resulted in marked diversity declines in graduate programs).[16] Graduate study is essential for students to develop proficiency in a specific discipline, and the graduate learning environment is greatly enriched for all by the diversity of its student body through whom the robust exchange of ideas and exposure to differing perspectives takes place. The use of race-conscious admissions procedures is a critical tool to identify and nurture the talents of members of groups traditionally excluded from graduate level study.

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[16] Available online at http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-impact-of-affirmative-action-bans-in-graduate-education/garces-impact-affirmative-action-graduate-2012.pdf.

Perhaps there is no greater cause for concern than that generated by the profoundly limited numbers of Black male teachers being produced by graduate schools of education. Since this Court's 1954 decision in *Brown v. Board of Education*, the number of African American teachers in the United States has declined by 66 percent. In 2009, only 7 percent of all American teachers were African American, despite the fact that Blacks comprised approximately 17 percent of the nation's student body. Moreover, of that teaching force, African American males accounted for only 1 percent, with the majority in junior and senior high schools. This means that an African American boy can attend school from kindergarten to sixth grade with a very high chance of never encountering a Black male teacher. *See* Jawanza Kunjufu, *Black Boys and Special Education – Change is Needed!*, Tchrs. of Color (last visited Aug. 6, 2012), http://www.teachersofcolor.com/2009/04/Black-boys-and-special-education-change-is-needed/. A study of Black male faculty (at all ranks) at the nation's 50 public flagship universities in 2004 revealed similar scarcity: they comprised only 1.1 percent of full-time faculty. *See* Harper, *supra*, at 6.

Flexible race-conscious admissions procedures following this Court's detailed guidelines in *Grutter* and *Parents Involved* have not been a total solution to these challenges, but admissions officials at universities like UT report that they have helped include Black males and others in their undergraduate and graduate programs. Without this tool, these distressingly small numbers will plummet even further.

F. Top Percent systems prevent experienced admissions officials from identifying many students who are capable of succeeding and who will add value to an entering class.

Given the difficulty higher education institutions have had including Black males in meaningful numbers in their entering classes, admissions processes that are *more* individualized and less mechanical are preferable because they enable admissions officers to consider the special qualities exhibited by some of the Black male applicants who defeat the odds described above. *See Parents Involved,* 551 U.S. at 797 (Kennedy, J.) (stressing that individualized, non-mechanical assessments of applicants are preferable to group-level automated decisions).

Admissions officials at UT have described at length what led them to conclude that only by supplementing its Top 10 Percent process with the holistic review procedures approved in *Grutter* can they reach their diversity goals. *See* University of Texas at Austin, *Proposal to Consider Race and Ethnicity in Admissions* 23-25 (2004) [hereafter "UT Rep."].[19] After years of experience with the Top 10 Percent admission system and after conducting a careful review of how its students perceived the diversity of the learning environment created under that system, UT concluded that minority students felt racially isolated on campus and that majority students also thought that there were insufficient minority students within the student body to achieve the benefits that a diverse learning environment could yield. *Id.* at 21-22.

The experiences of UT's students comport with that of students elsewhere and refute Petitioner's confidence that underrepresented minorities at UT have reached a "critical mass." *See* Harper, *supra*, at 1 (documenting that many Black students report being the only non-White person, or one of few, in most of their classes, particularly at large flagship universities). Given the especially small numbers of Black males currently enrolled even with the use of *Grutter*-narrowly tailored procedures, this sense of racial isolation is readily understood.

Top percent admissions strategies prevent flexible review of how an applicant's unique body of experiences and talents might contribute to the intellectual and social life of an academic institution. As UT's experience shows, carefully conducted holistic race-conscious review remains an essential tool for attaining meaningful student body diversity.

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[19] Available online at http://www.utexas.edu/student/admissions/about/admission_proposal.pdf.

This Court should defer to that judgment.

II. THE DEGREE OF RACIAL ISOLATION THAT CONTINUES TO IMPEDE BLACK ACCESS TO OPPORTUNITY CONSTITUTES A SEPARATE COMPELLING STATE INTEREST TO WHICH STATES ARE EMPOWERED TO RESPOND THROUGH NARROWLY TAILORED RACE-CONSCIOUS MEANS.

Although the argument was not advanced by the university or *amici* in *Grutter,* language in Justice O'Connor's opinion suggests that a compelling governmental interest beyond student body diversity might have been identified to justify Michigan Law School's holistic race-conscious admissions process. *See Grutter*, 539 U.S. at 328 ("[R]espondents assert *only one* justification for their use of race in the admissions process: obtaining the educational benefits that flow from a diverse student body. . . .") (emphasis added) (internal citation and quotation marks omitted). Columbia Law professor Jack Greenberg has written about a different state interest under a framework he refers to as "social conditions." *See* Greenberg, *Confronting the Condition*, *supra*, at 522, 556-80 (arguing that when faced with an extremely harmful social condition, a state may act to reduce it, in the interest of all of its residents). We advance a similar argument here in supplemental defense of UT's holistic review process, by regarding those procedures as an example of state action that can be taken to avoid the social harms that result from the extreme racial isolation Justice Kennedy wrote about in *Parents Involved*, 551 U.S. at 797-98.

This compelling state interest justifies the narrow consideration of race *not*, as this Court has rejected in the past, "to remedy the disadvantages cast on minorities by past racial discrimination." *Bakke*, 438 U.S. at 310 (opinion of Powell, J.); *id.* at 325 (opinion of Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Rather, it addresses a present condition suffered by a cognizable part of a state's population that leave members of that group racially isolated, undermining the well-being of the state's entire populace. *See* Greenberg, *Confronting the Condition*, *supra*, at 556-72; *see also Parents Involved*, 551 U.S. at 797-98 (opinion of Kennedy, J.).

Race-conscious actions that address such a compelling state interest violate no equal protection guarantee, provided the means used to pursue the interest are sufficiently narrowly tailored. UT's careful holistic admissions process meets this standard. *Grutter*, at 327 (observing that although all government considerations of race are subject to strict scrutiny, "not all are invalidated by it").

A. Limitations on opportunity in the nation are deeply structural and remain highly racialized.

Educational opportunity and economic prosperity have a geography in the United States, and that geography is uneven. Segregated neighborhoods across the nation provide widely variant opportunities critical to the promotion of healthy child development and life success. *See* Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993). Some neighborhoods are the sites of high performing schools, safe streets, robust job centers, strong healthcare facilities, well-resourced libraries, and stable and affordable housing. These are the neighborhoods in which children thrive, where the incomes and wealth of the next generation tend to build upon and surpass that of their parents. In sharp contrast, other neighborhoods are the sites of failing schools, scarce job opportunities, high crime rates, distant healthcare facilities, vacant property, and poor and unstable housing. In these neighborhoods generations of young Americans and their families languish, and the odds of children moving up the economic ladder are significantly reduced. *See* Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 Am. Rev. Soc. 167, 197-99 (2003).

Although poor children of all races suffer when exposed to such negative neighborhood conditions, research shows that Black and Hispanic children are far more likely to live in areas of "high poverty" or "concentrated poverty" (20 or 40 percent or more of the residents live below the poverty line, respectively) than White children. Sixty-six percent of Black children born between 1985 and 2000 grew up in high poverty neighborhoods, compared to only 6 percent of White children. *See* Patrick Sharkey, The Pew Charitable Trusts, *Neighborhoods and the Black-White Mobility Gap* (2009).[20] A study in 2008 showed that Black and Latino children were more than twelve times as likely as White children to be both poor and living in neighborhoods where poverty was the norm. *See* Dolores Acevedo-Garcia et al., *Toward a Policy-Relevant Analysis of Geographic and Racial/Ethnic Disparities in Child Health*, 27 Health Affairs 321, 327 (2008).

Isolation in low-opportunity neighborhoods diminishes positive health outcomes, educational achievements and economic prosperity to the detriment of entire communities and regions, making such isolation the proper subject of targeted state action.

Research has shown, for example, that the isolation of underrepresented minorities in neighborhoods of concentrated poverty correlates highly with their disproportionately poor health outcomes and helps explain enduring racial and ethnic health disparities. *See* David R. Williams & Chiquita Collins, *Racial*

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[20] Available online at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/PEW_SHARKEY_v12.pdf.

Residential Segregation: A Fundamental Cause of Racial Disparities in Health, 116 Pub. Health Rep. 404 (2001); Thomas A. LaVeist et al., Joint Center for Political & Economic Studies, *Segregated Spaces, Risky Places: The Effects of Racial Segregation on Health Inequalities* (2011).[21] Racial and socioeconomic isolation frequently distance marginalized populations from community healthcare resources and high-quality health care providers. *See* Williams & Collins, *supra*, at 411.

Residents of marginalized neighborhoods also frequently possess limited access to healthy food options, which can lead to meals with unbalanced nutrition, which is related to increased chance of obesity, and in turn, chronic health conditions, such as diabetes, hypertension, heart disease, and stroke. A recent study of community conditions and health outcomes in Cook County, Illinois, for example, found the life expectancy of its residents varied by as many as 18 years, depending on the census tract in which they had the advantage or disadvantage to live. The tracts with the lowest life expectancies were home to a higher percentage of people of color and low-income residents. *See* Joint Center for Political & Economic Studies, *Place Matters for Health in Cook County: Ensuring Opportunities for Good Health for All*

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[21] Available online at http://www.jointcenter.org/sites/default/files/upload/research/files/Segregated%20Spaces-web.pdf.

(2012).[22] These and other research findings suggest that social disadvantage in the United States today is largely structural. That is, community-level, place-based risk factors, such as limited access to healthcare and healthy, fresh foods and the supermarkets that stock them, are predictive of dramatic health inequalities. All of the residents of a state end up paying for the costs of these disparities.

B. Severe racial isolation continues to impede the access of Black Americans to opportunity.

Although the prospects of all children are diminished by the negative effects of distressed neighborhoods, we focus in this section on the crisis that affects Black populations, particularly Black men and boys.

Over the last two decades, the nation's leading philanthropic foundations have launched Black male achievement studies and campaigns in response to worsening statistics about the extreme isolation and negative life outcomes of Black men and boys. Consider, for example, 21st Century Foundation's Black Men & Boys Initiative; Project 2025 Network for Black Men & Boys; Kellogg Foundation's National Task Force on African-American Males; Open Society

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[22] Available online at http://www.jointcenter.org/sites/default/files/upload/research/files/Place%20Matters%20for%20Health%20in%20Cook%20County.pdf.

Foundation's Campaign for Black Male Achievement; Mitchell Kapor Foundation's Black Boys College Bound Initiative; Association of Black Foundation Executives' Black Men and Boys Initiative; Knight Foundation's Black Male Engagement; the Heinz Endowments African American Men and Boys Initiative. The Schott Foundation for Public Education began to issue its "State Report Cards" after concluding that the educational experiences of Black males in the United States constituted a national crisis.

During roughly the same period, state and federal authorities established commissions and task forces to study the economic, political, social and educational exclusion of Black men and boys from the American mainstream. Examples include the Report of the Task Force on the Education of Maryland's Black Males (2007), the Task Force on the Condition of African American Men in Illinois (2009), the Indiana Commission on the Social Status of Black Males (2009-2010), and the Ohio Commission on African American Males (1989).

Each of these philanthropic and state investigations acknowledged that many young Americans other than Black male youth face serious life course obstacles in need of attention, but all recognized as well that the depth and breadth of the negative life outcomes experienced by Black males were sufficiently grave to warrant independent investigation and policy prescription.

During the nation's early history, inequalities between White and Black Americans emanated primarily from overt discrimination backed by law and social practice. The lingering effects of that shameful history, however, provide only a partial explanation for the stubborn persistence of African American disadvantage today. Other sources of racial inequality flow from a complex system of structures that perpetuate disadvantage, often unintentionally and without sign of racial animosity. *See* john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. Rev. 791, 794-806 (2008).

These structures include neighborhoods: African Americans reside in poor, low-opportunity neighborhoods at significantly higher rates than Whites; neighborhoods characterized by inferior housing, low-performing schools, and inadequate numbers of recreation centers, grocery stores and health care facilities. Social science research shows that the isolation of African Americans in poorly-resourced neighborhoods has contributed to the White/Black health gaps of great concern to state and federal governments. National morbidity and mortality data reveal that African Americans have had consistently higher rates of illness and lower survival rates across multiple health areas, including chronic disease, communicable disease, injury, maternal health, and child health. *See CDC Health Disparities and Inequalities Report – United States, 2011*, Centers for Disease Control & Prevention, Morbidity & Mortality

Weekly Rep., Jan 14, 2011. Residential isolation influences these health disparities both directly and indirectly. For example, African Americans segregated in communities with the lowest opportunities and resources are disproportionately exposed to unhealthy environmental conditions, such as higher pollution, which is associated with higher rates of asthma among Black children. *See* Williams & Collins, *supra*, at 409.

Social and behavioral scientists have also found that prolonged exposure to extremely disadvantaged neighborhoods during childhood negatively impacts cognitive ability and primary and secondary educational outcomes, impeding access to college and economic mobility. *See* Patrick Sharkey & Felix Elwert, *The Legacy of Disadvantage: Multigenerational Neighborhood Effects on Cognitive Ability*, 116 Am. J. Soc. 1934, 1935-36 (2011) (reviewing the literature). The depths of this crisis, particularly for Black youth, are perhaps best revealed by 2010 finding that the average African American male had performed below the basic level in every grade and every subject on the National Assessment of Education Progress for the past 20 years. *See* Marlon C. James, *Never Quit: The Complexities of Promoting Social and Academic Excellence at a Single-Gender School for Urban American* [sic] *American Males*, 1 J. African Am. Males Educ. 167, 168 (2010). And as noted in Part I, in 2007-08, fewer than half of all Black males graduated with their high school cohort.

States are rightly motivated to address these low proficiency ratings and high dropout rates for many reasons, including that boys who fail to complete high school often resurface in the justice system. Data from the National Council on Crime and Delinquency (NCCD) show that while Black youth make up about 16 percent of the nation's youth population, they account for 30 percent of juvenile court referrals, 38 percent of youth in juvenile facilities, and 58 percent of youth in adult prison. The Sentencing Project, which calculated state rates of incarceration by race and ethnicity, found that Black youth are incarcerated at six times the rate of White youth, while Latino youth are incarcerated at double the rate of White youth. *See* Marc Mauer & Ryan S. King, The Sentencing Project, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (2007).[23] In the absence of effective policy interventions to disrupt these patterns, the Bureau of Justice Statistics estimated in 1997 that one in every four Black men could expect to spend some time in prison during his lifetime. By 2005, the estimate was one in three. *See* Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth*, 58 Soc. Probs. 257, 257 (2011).

Targeted, ameliorative state steps designed to disrupt these patterns are preferable to harsh "zero tolerance" policies which disproportionately impact minority youth and provide the entry point to the "school-to-prison pipeline." Studies show that youth who are expelled, suspended or drop out of high school are far more likely to become incarcerated later in life, an enormous drain on state resources and waste of human productivity. *See* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 939 (2003).

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[23] Available online at http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf.

A college degree is a proven pathway away from the "school-to-prison pipeline." In 2008, adult Black males represented only 5% of the total college student population, but 36% of our nation's prison population. *See* William J. Wilson, *Being Poor, Black and American*, Am. Educator, Spring 2011, at 10, 17. Although the chance of incarceration is higher for all young men who fail to complete high school, the rate for Black male high school dropouts, of 18.2%, was 300% higher than all male high school dropouts (at 6.2%). By contrast, Black male college graduates had institutionalization rates virtually identical to all American males (0.3% for Black male college graduates and 0.2% for all male college graduates). *See* Sum et al., *supra*.

The nation's expanded reliance on the justice system to respond to bad decision making by the young has exposed large numbers of Blacks and Hispanics to harmful long-term employment consequences. Incarceration severely depresses the job prospects and wage trajectories of all ex-inmates irrespective of race, but research shows that Black men are hurt the most. One study found that a criminal conviction erected an all but insurmountable obstacle for Black men searching for work: while 17% of White ex-offenders received call back interviews, only 5% of Blacks did. Pager, *supra*, at 955. Another study showed that the wages of Black ex-inmates who managed to find work grew at a rate 21% slower than those of White ex-inmates. Lyons & Pettit, *supra*, at 263.

Research also shows that race continues to affect employment opportunities in the United States even absent the complicating effect of a criminal record. According to Bureau of Labor Statistics, in May 2012, the nation's unemployment rate was 8.2%. The jobless rate for Whites was below the national average, however, at 7.4%, while the rate for African Americans was nearly twice that, at 13.6%. Disaggregated by gender, the picture for Black males was even bleaker, at 15%. Teenagers between 16 and 19 experienced the highest levels of joblessness of all, particularly youth of color: the jobless rate for White teens was 23.5 percent, but for Latino youths it was 31 percent, and for Black teens, 44.2 percent. Researchers have documented that identically qualified White and Black "testers" for real entry-level jobs experience strikingly different call-back rates. In audit studies, only 14% of the Black testers with no criminal record received call-back interviews, compared to 34% of the White testers with no criminal record. Even more disturbing, White testers *with* a criminal record fared better than Black testers without one. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 Annals Am. Acad. Political & Soc. Sci. 195 (2009).

Social science also suggests why these patterns of inequality are so formidable: the negative impact of growing up in a highly disadvantaged neighborhood may be more than life-long: research suggests it may significantly diminish the prospects of economic mobility for multiple generations. More than 70% of Black children who grow up in the poorest quarter of America's neighborhoods remain in those neighborhoods as adults. *See* Sharkey & Elwert, *supra*, at 1935-36 (arguing that to fully understand inequality we must understand the history of disadvantages experienced by families over generations).

Decades of racial isolation in the nation's most disadvantaged communities have fueled White/Black income and wealth gaps as well, erecting further impediments to better lives. Studies show that the wealth gap between Whites and African Americans has more than quadrupled over the course of a generation. See Thomas M. Shapiro et al., Institute on Assets & Social Policy, *The Racial Wealth Gap Increases Fourfold* (2010).[24] Census Bureau figures show that in 2010 the median household net worth for

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[24] Available online at http://iasp.brandeis.edu/pdfs/Racial-Wealth-Gap-Brief.pdf.

White Americans was $110,729; for African Americans it was $4,995.

In summary, the racial and economic isolation of Black citizens present enormous challenges to the states and the nation. These enduring patterns of social inequality will worsen if pathways to academic opportunity for Black youth are blocked, which they will be if holistic race-conscious college admission processes are terminated too soon. Holding open the doors to a college education for a state's most disadvantaged residents is a critical tool for reducing social disparity within a state's borders.

C. States may take steps to reduce the effects of racial isolation by addressing the social conditions of their most disadvantaged residents.

Given the large and persistent educational, health, and economic disparities between White and African Americans, providing access to college can be a transformative step to change the life trajectories of Black youth who pursue higher education. Perhaps because they must overcome some of the greatest employment impediments, the economic impact of a college degree for Black males is substantial. An analysis of the earnings for Black male college graduates by the Center for Labor Market Studies at Northeastern University, found that earnings for young Black men with a bachelor's degree are 250% higher than earnings for Black males with only a high school education. In fact, among all racial groups, Black males experience the largest increase in earnings from a college degree: college completion is projected to double the total income a Black male will earn over the course of his life. *See* Sum et al., *supra*, at 8. States are rightly interested in such an outsized return on investment.

Leading institutions of higher education may constitutionally respond to the realities of disadvantaged neighborhoods and unequal K-12 school experiences in the United States – realities that disproportionately disadvantage underrepresented minorities – by looking for more than just test scores and GPAs. In addition to these traditional indicia, admissions officers may look for the myriad qualities that can signal an applicant's potential to perform college level and add value to a class. Included among these is the resilience needed to persist through hardship in the pursuit of a "degree unseen." Through these admission decisions, states may also constitutionally seek to reduce the social conditions and levels of racial isolation that give life to the academic achievement gaps that their youth continue to experience.

In 2003, this Court dared to imagine a time when the nation might no longer need race-conscious admissions to ensure sufficient racial and ethnic diversity on its college campuses, *Grutter*, 539 U.S. at 343 (opinion of O'Connor, J.), but it grounded its decision upholding race-conscious admissions practices in the actual world in which we live. *Id.* at 330-31 (noting that race-sensitive admissions in higher education kept pathways open for underrepresented minorities to move into the military, politics, business, medicine, the legal profession, and other callings); *see also* Jack Greenberg, *Diversity, the University, and the World Outside*, 103 Colum. L. Rev. 1610, 1619 (2003) (arguing that a university may constitutionally take steps needed to prepare the racially diverse future graduates that the nation and world will need).

The need for holistic race-conscious admissions in higher education will not vanish on its own in the absence of determined state action that addresses the social conditions from which academic achievement gaps spring. As expressed by Justices Ginsburg and Breyer: "[O]ne may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring). There can come a time when concerted state actions reduce the social conditions that today unequally prepare America's children to compete for college admission under traditional criteria of merit such as standardized tests. But until that day, states must be empowered to devise other ways to ensure that their public institutions of higher learning do not become racially isolated enclaves of the privileged.

Decades ago, Dr. Martin Luther King, Jr. had a dream for the nation. He envisioned the United States as an integrated society in which all of its members would be full participants aware of their deep human interdependency. To keep the nation moving toward that future, states must be permitted to keep the doors of their flagship universities open to meaningful numbers of youth of color who will then help the nation reduce existing impediments to opportunity. Without flexible race-conscious review of the qualities and strengths of applicants such as these, many capable youth will be excluded, and their numbers on college campuses and in medical, law, business and graduate schools will decline even further. The loss of the potential contributions these students might make to their families, communities and the nation is incalculable.

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CONCLUSION

The judgment of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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August 13, 2012

APPENDIX A

List and Identity of *Amici Curiae*

I. Signatories of the National 2025 Network for Black Men & Boys

Shawn Mooring, Network Manager/Member
2025 Network for Black Men and Boys

Susan Taylor Batten, President & CEO
Association of Black Foundation Executives
New York, NY

Trupania 'Trap' Bonner, Executive Director
Moving Forward Gulf Coast
Slidell, LA

Kelly Brown, Coalition Director
D5 Coalition
Chicago, IL

Alan W. Houseman, Executive Director
Center for Law and Social Policy
Washington, DC

Bryan Echols
Chicago, IL

George Garrow, President & CEO
Concerned Black Men, Inc.
Washington, DC

Gregory Hodge, Principal
KHEPERA Consulting
Oakland, CA

David Payne, Executive Director
Atlanta Community Action Team
Atlanta, GA

Jonathan Peck, President & CEO
Tucson Urban League
Tucson, AZ

Cheo Tyehimba Taylor, Principal
Forwardever Media, Inc.
Oakland, CA

Marcus Walton, Program Director
Association of Blacks in Philanthropy
New York, NY

Pete White, Executive Director
Los Angeles Community Action Network
Los Angeles, CA

Fraternities and Sororities/2025 Network BMB Membership:

Jomar Jenkins
Alpha Foundation Inc.
Huntsville, AL

Faith-Based Institutions/2025 Network BMB Membership:

Anita Smith Etheridge, Social Justice Director
Rev. Grady Scott, Pastor
Grace Temple Baptist Church
Tucson, AZ

Local Non Profit Organizations/2025 Network BMB Membership:

Ricardo Jasso, Executive Director
Amistades, Inc.

Cesar Lopez, Executive Director
Tierra Y Libertad Organizations

Academic-Based Member Organizations/2025 Network BMB Membership:

University/College:

Daisy Jenkins, Chairperson
Univ. of Arizona President's African American
Advisory Council

Maria Moore, Director
African American Student Affairs
University of Arizona

High School/Vocational:

Jimmy Hart
Tucson Unified School District
African American Studies Department

National and State-Based Organizing and Policy-Based Organizations/2025 Network BMB Membership:

James Bell, Executive Director
Tshaka Barrows, Deputy Director
Malachi Garza, Community Justice for Youth Network Director
The Burns Institute
San Francisco, CA

Jeremy Lahoud, Executive Director
Californians For Justice

Civil and Human Rights Organizations/2025 Network BMB Membership:

Diane Allen Phillips,
President and CEO
Urban League of Pikes Peak
Colorado Springs, CO

Landri Taylor, President and CEO
Urban League of Metropolitan Denver

Lavonne Lewis, Interim President and CEO
Las Vegas-Clark County Urban League

Donna Liggins, President
Tucson NAACP

Clarence Boykins, Executive Director
Tucson Southern Arizona Black Chamber of Commerce

II. BMI Signatories

Prof. Shaun R. Harper, Director
Center for the Study of Race & Equity in Education
University of Pennsylvania
Philadelphia, PA

Christopher P. Chatmon, Executive Director
African American Male Achievement
Oakland Unified School District
Oakland, California

III. Bar Association Signatories

Jennifer Anne Adair, President
John Mercer Langston Bar Association
Affiliate Chapter of the National Bar Association
Columbus, Ohio
(signing for Board of 15 members)

IV. Individual Signatories

a. Elliott Dawes
University Director
The City University of New York Black Male Initiative (CUNY BMI)
(CUNY affiliation listed for identification purposes only)

b. Dr. James L. Moore III (signing as a private citizen and a nationally- and internationally-recognized researcher on black male achievement in elementary, secondary, and postsecondary education)

c. Arlethia Perry-Johnson (signing as private citizen with 25 years of experience in the field of higher education, and 10 years of experience in the Black male educational achievement field)

d. Robert L. Solomon, President Emeritus
100 Black Men of Central Ohio

e. Floyd Weatherspoon
Professor of Law, Capital University Law School
Columbus, Ohio
(Capital University affiliation listed for identification purposes only)

APPENDIX B

Data from the Integrated Postsecondary Education Data System (IPEDS) Prepared by Cheryl Staats, Research Associate, Kirwan Institute

Figure 1: Number of Black non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, 1994-2009

Figure 2: Number of White non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, Fall 1994-2009

Figure 3: Total number of Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, Fall 1994-2010

Figure 4: Percentage of all Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin that were Black Male Freshmen, Fall 1994-2009

Figure 5: Number of Black non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, 1994-2009

Figure 6: Number of White non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, 1994-2009

Figure 7: Total number of Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, Fall 1994-2010

Figure 8: Percentage of all Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus that were Black Male Freshmen, Fall 1994-2009

Figure 1: Number of Black non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, 1994-2009

Year (Fall)	Men	Women	Total
1994	125	198	323
1995	125	184	309
1996	108	158	266
1997	73	117	190
1998	81	118	199
1999	114	172	286
2000	121	175	296
2001	93	149	242
2002	106	166	272
2003	109	158	267
2004	114	195	309
2005	122	225	347
2006	144	243	387
2007	164	267	431
2008	121	255	376
2009	129	225	354

Figure 2: Number of White non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, Fall 1994-2009

Year (Fall)	Men	Women	Total
1994	1980	1913	3893
1995	2031	2050	4081
1996	2103	2056	4159
1997	2281	2449	4730
1998	2139	2260	4399
1999	2176	2271	4447
2000	2304	2497	4801
2001	2124	2323	4447
2002	2288	2594	4882
2003	1762	2104	3866
2004	1758	2143	3901
2005	1758	2032	3790
2006	1816	2212	4028
2007	1777	2062	3839
2008	1597	1918	3515
2009	1736	1964	3700

Figure 3: Total number of Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, Fall 1994-2010

Year (Fall)	Men	Women	Total
1994	3008	2951	5959
1995	3073	3139	6212
1996	3194	3087	6281
1997	3377	3568	6945
1998	3210	3388	6598
1999	3417	3508	6925
2000	3701	3859	7560
2001	3462	3746	7208
2002	3733	4112	7845
2003	2943	3542	6485
2004	3055	3695	6750
2005	3158	3633	6791
2006	3361	4008	7369
2007	3447	3973	7420
2008	3000	3679	6679
2009	3346	3853	7199
2010	3363	3870	7233

Figure 4: Percentage of all Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin that were Black Male Freshmen, Fall 1994-2009

Year (Fall)	Percentage of Undergraduate Student Body that were Black Male Freshmen
1994	2.10
1995	2.01
1996	1.72
1997	1.05
1998	1.23
1999	1.65
2000	1.60
2001	1.29
2002	1.35
2003	1.68
2004	1.69
2005	1.80
2006	1.95
2007	2.21
2008	1.81
2009	1.79

Figure 5: Number of Black non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, Fall 1994-2009

Year (Fall)	Men	Women	Total
1994	181	314	495
1995	176	315	491
1996	192	322	514
1997	211	367	578
1998	206	354	560
1999	219	371	590
2000	220	339	559
2001	231	365	596
2002	212	367	579
2003	213	350	563
2004	160	244	404
2005	163	267	430
2006	141	259	400
2007	154	267	421
2008	137	227	364
2009	159	220	379

Figure 6: Number of White non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, Fall 1994-2009

Year (Fall)	Men	Women	Total
1994	2496	2415	4911
1995	2365	2354	4719
1996	2479	2412	4891
1997	2312	2411	4723
1998	2478	2526	5004
1999	2476	2364	4840
2000	2268	2340	4608
2001	2389	2204	4593
2002	2382	2258	4640
2003	2610	2491	5101
2004	2614	2323	4937
2005	2426	2372	4798
2006	2608	2468	5076
2007	2570	2415	4985
2008	2488	2433	4921
2009	2796	2509	5305

Figure 7: Total number of Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, Fall 1994-2010

Year (Fall)	Men	Women	Total
1994	2930	2912	5742
1995	2796	2920	5716
1996	2947	2970	5917
1997	2816	3081	5897
1998	2991	3180	6171
1999	3043	3033	6076
2000	2827	3010	5837
2001	3029	2935	5964
2002	2994	2946	5940
2003	3150	3204	6354
2004	3144	2893	6037
2005	2933	3007	5940
2006	3161	3105	6266
2007	3119	3041	6160
2008	3084	3069	6153
2009	3488	3239	6727
2010	3335	3319	6654

Figure 8: Percentage of all Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus that were Black Male Freshmen, Fall 1994-2009*

Year (Fall)	Percentage of Undergraduate Student Body that were Black Male Freshmen
1994	3.10
1995	3.08
1996	3.24
1997	3.58
1998	3.34
1999	3.60
2000	3.77
2001	3.87
2002	3.57
2003	3.35
2004	2.65
2005	2.74
2006	2.25
2007	2.50
2008	2.23
2009	2.63

*After *Gratz v. Bollinger* struck down the University of Michigan's undergraduate admissions system for relying too heavily on point indices, Ohio State revised its undergraduate admissions criteria to align with those approved in *Grutter v. Bollinger*.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

Supreme Court U.S.
FILED
AUG 13 2012
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In the Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* ON BEHALF OF THE COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) AND UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND (UEAALDF) IN SUPPORT OF THE RESPONDENTS URGING AFFIRMANCE

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INTEREST OF THE *AMICI CURIAE*

The Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) initiated, organized and led the demonstration of 50,000 persons, mostly young black and Latina/o students, outside this Court on the day that Grutter was argued.[1]

BAMN was founded in 1995 in the fight to defeat California's Proposition 209 and to defend affirmative action at the University of California in particular. BAMN's members are mostly black or Latina/o young people. For almost twenty years, BAMN has organized and led young people in defending affirmative action.

BAMN is now involved in campaigns to defend affirmative action and to increase the admissions of black and Latino students at the campuses of the University of California, at the University of Michigan, and at many other campuses and high schools in those and other regions of the country.

BAMN has always asserted that legal challenges have historically been and are today a crucial means for winning racial equality. BAMN and its legal arm, United for Equality and Affirmative Action Legal

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6 of this Court, *amici curiae* certifies that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, and its counsel made such a monetary contribution to its preparation or submission.

Defense Fund (UEAALDF), organized the student intervenors in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and presented much of the evidence that formed the record for this Court's decision in that case.

BAMN is now the lead plaintiff in the case challenging Michigan's version of Proposition 209 which is now pending before the en banc panel of the United States Court of Appeals for the Sixth Circuit. See *Coal. to Defend Aff. Action v. Regents of the Univ. of Michigan*, 652 F.3d 207 (6th Cir. 2011), en banc review granted. BAMN has also been a leading plaintiff in legal challenges to laws or proposed laws banning affirmative action in California, Arizona, Oklahoma, and Michigan.

SUMMARY OF ARGUMENT

The Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) and United for Equality and Affirmative Action Legal Defense Fund (UEAALDF) defend, without reservations, the entire current University of Texas at Austin (UT Austin) admissions plan. Austin is the flagship campus of the University of Texas, which includes several other satellite campuses which do not utilize the same admissions system as the far more selective Austin campus.

UT Austin's admissions plan has two separate but complementary tracks. The first is essentially a race-neutral voluntary desegregation plan for higher education for Texas residents, known as the Ten Percent Plan. The vast majority of freshmen admitted enter through the Ten Percent Plan. The second admissions track is modeled on the holistic admission system upheld by this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). This second, special admissions system includes the affirmative action plan at issue in this case and is utilized primarily for the admission of out-of-state students, international students, and more privileged and wealthy Texas students who do not qualify for admission under the Ten Percent Plan. The two plans work in tandem and constitute a single overall admissions system which has made UT Austin the most integrated, diverse and dynamic flagship public university in the country.

From its inception, public education in Texas has been defined by the struggle to create a unified educational system that could move the state forward while accommodating what seemed like the insuperable, often counterposed interests of its white population on one side and its oppressed and discriminated-against Latina/o, black and Native American populations on the other. The struggles of its oppressed communities have always provided the motor force to the people of Texas to meld into a unified whole and have moved the state towards more equality and away from the segregation by race and class that the backlash against civil rights and basic democracy have always tried to reinstitute. None of the past experiments, from Jim Crow educational segregation, to halting initial forays into timid and partial affirmative action measures, to the more extensive affirmative action policies struck down in *Hopwood v. Texas,* 78 F.3d 932 (5th Cir. 1996), ever succeeded in desegregating UT. After one hundred years of failed experiments, UT Austin has finally found an admissions system that is making real gains in transforming the University into a diverse and racially and socio-economically diverse campus and is wildly popular with the great majority of Texans.

The petitioners are asking the Court to derail this process and eviscerate all the gains towards integration, equality and academic greatness UT Austin has made in the last fifteen years. BAMN and UEAALDF ask the Court to stand with the progress and unity that have been achieved, instead of being the force that halts it and restores vestiges of the old Jim Crow. We ask the Court to resist the petitioner's invitation to follow the lead of the Court that issued *Plessy v. Ferguson,* 163 U.S. 537 (1896), and plunged this nation into the old Jim Crow and instead to restore *Brown v. Board of Education,* 347 U.S. 483 (1954), to the commanding role it must play again to halt the decline of America into the abyss of the new Jim Crow.

The issue here is that, as Texas becomes an increasingly majority-minority state, whether (1) Texas may continue the kind of experimentation this Court urged in *Grutter* and provide a model for the nation of how to foster diversity and integration through a university admissions system that combines a race-neutral desegregation plan and a modest, constitutional affirmative action plan, contained in a holistic admissions system, or whether (2) Texas will restore a separate and unequal education system, wherein white privilege is the highest priority and the Fourteenth Amendment once again becomes the opposite of what it was intended to be.

ARGUMENT

I. The Current UT Austin Admissions System

Currently, the vast majority of students at UT Austin are admitted under the Ten Percent Plan. This plan guarantees a seat at UT's flagship university to every Texas high school graduate who graduates in the top ten percent of their high school class. The Ten Percent Plan is by far and away the most democratic, equal, fair and transparent admissions system of any elite university in the country. Factors considered in every holistic plan, factors over which the students themselves have no control, factors which capture institutionalized racial and class inequities in educational opportunities, do not enter into consideration in the Ten Percent Plan. These factors, most importantly heavy reliance on standardized test scores,[2] always give applicants who attend privileged

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[2] In 2011 on the SAT, white college-bound seniors scored an average of 1579, black college-bound seniors scored an average of 1272 , and Mexican American college-bound seniors scored an average of 1362. Data from College Board, *2011 College-Bound Seniors Total Group Profile Report*.

A university study of student college performance observed: "Compared to high-school grade-point average (HSGPA), scores on standardized admissions tests such as the SAT I are much more closely correlated with students' socioeconomic status… Rank-ordering students by test scores produces much sharper racial/ethnic stratification than when the same students are ranked by HSGPA." University of California, Berkeley's Center for Studies in Higher Education, *Validity of High-School Grades in Predicting Student Success Beyond the Freshman Year: High-School Record vs. Standardized Tests as Indicators of Four-Year College Outcomes,* p. 2. http://cshe.berkeley.edu/publications/docs/ROPS.GEISER_SAT_6.12.07.pdf majority-white high schools a huge unearned advantage in a competitive admissions system. (Other factors that are taken into consideration in the special holistic admissions system include alumnae preference, access to advanced placement courses, state-wide ranking of applicants' high schools, and extra-curricular activities offered and taken advantage of by these applicants.)

Large numbers of gifted and hard-working students from not only poor and Latina/o, black, Native American and immigrant communities, but also from poor white communities,[3] who never even would have applied, let alone gained admission to UT Austin under a conventional admissions system, even one with affirmative action, have been able to utilize the educational opportunities UT Austin provides, to develop themselves, to let their talents shine and to uplift the dignity and pride of their embattled and struggling communities.

The second admissions pipeline, which currently accounts for about twenty-five percent of the student body, is a special holistic system which takes into account a variety of factors, including those listed above which disadvantage poor students of all races, especially Latina/o, black and Native American students. The Ten Percent Plan was created by the Texas legislature in 1997 and took effect in 1998. In 2009 the Legislature capped the number of students who could be admitted through the Ten Percent Plan at 75%. The cap took effect in 2011. The extremely modest affirmative action plan being challenged here is incorporated within this special smaller admissions track. This plan has allowed highly-qualified Latina/o, black, Native American, and some immigrant students to attain some opportunity to gain admission to UT Austin. These minority students attend majority-white Texas high schools where almost no underrepresented minority students are placed in upper-echelon college track or Advanced Placement classes. This affirmative action plan provides a small number of out-of-state, non-athlete, underrepresented minority students access to UT Austin. Specific undergraduate colleges at UT Austin, especially those that require students to enter the University with a great deal of proficiency in math and science, and which currently have only tiny numbers of underrepresented students, would be completely resegregated, if the affirmative action component of the special admissions system is struck down.

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[3] Between 1996 and 2004 (the Ten Percent Plan began in 1998), the number of high schools represented in UT Austin's freshman class increased from 616 to 815. The number of urban schools increased from 77 to 115 and rural schools increased from 26 to 47. University of Texas at Austin Office of Admissions, *An Investigation into Rural High School Representation in Entering Freshman Classes at the University of Texas at Austin – Summer/Fall Classes of 1996-2007.* http://www.utexas.edu/student/admissions/research/RuralSchoolStudy-96-07.pdf

An important gain for diversity and integration achieved through the special admissions track is the increase in the number of Asian-American students who attend UT Austin. It has also provided a pathway for international students and out-of-state students of all races to attend the University.

Working in tandem, the two complementary admission tracks have made the undergraduate student body at UT Austin a majority-minority campus. And while the two admissions systems have not yet made the UT student body representative of the racial composition of Texas,[4] they have gone farther in admitting, retaining and graduating more underrepresented minority students than many other flagship public universities.

Under its current admissions system, UT Austin has raised the academic quality of the University and created a learning environment that provides minority students with the critical mass needed to flourish academically and to lift their confidence and self-worth. It has, by example challenged and proven wrong all the degrading and false stereotypes of black and brown inferiority still far too prevalent in this society. The pervasive wrong and false assumption that students who attend more academically rigorous or better-resourced schools are *a priori* more gifted, talented or meritorious than the top-performing students who go to poor, overcrowded, and dangerous segregated inner-city high schools in Dallas-Fort Worth, Houston or San Antonio or their largely white rural equivalents is being stripped of legitimacy every day in a multitude of classrooms at UT Austin.

Unlike any other elite public university in America, UT Austin is acting on the principle that it is the responsibility of the University, not of each individual student, to overcome and correct the gaping inequalities in educational opportunity that are created by racial segregation and the vast differences in family income and social status which exist in every state in the nation. By treating as peers and equals students of every race and socio-economic background, UT Austin is actually breaking down the pervasive prejudices against and stereotyping of under-represented minority students and fostering the kind of diversity and integration that every elite university seeks, but cannot accomplish because they lack the courage to institute the kind of admissions system UT utilizes.

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[4] The Fifth Circuit observed: "The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas's African-American population, while Asian-American enrollment is more than five times the percentage of Texan Asian-Americans." *Fisher v. Univ. of Texas*, 631 F.3d 213, 235 (5th Cir. 2011).

II. The History of Racial Segregation in Higher Education in Texas

In 1946, black World War II veteran Herman Marion Sweatt was rejected from admission to the UT Austin School of Law because he was black. After a four-year legal struggle, *Sweatt v. Painter*, 339 U.S. 629 (1950), was decided by this Court, which forced UT Austin to admit black students for the first time since it was founded in 1883.

Sweatt did not, however, open the gates of equal educational opportunity to black and Latina/o Texas students. Even though *Brown v Board of Education*, perhaps the greatest decision in this Court's history, held in 1954 that separate never could be equal, in practice, UT Austin maintained *de facto* segregation for the next twenty years. From 1950 to 1956, UT Austin continued to reject black students from its undergraduate programs, stating that those programs were also offered at segregated black universities. Black students only could enter UT Austin's law school. In 1956, just months before Autherine Lucy enrolled at the University of Alabama and the US Supreme Court voided portions of the Texas constitution outlining segregation, UT Austin decided to integrate.

But southern universities used standardized tests as proxies for white-only segregation. In the wake of *Sweatt,* UT Austin began requiring "aptitude tests" in 1951, and after *Brown* it incorporated the SAT into its admissions system in 1956,[5] the year it formally desegregated its undergraduate admissions.[6] Even after the end of legal segregation, standardized tests acted as gatekeepers to keep out Latina/o and black students until affirmative action programs were finally instituted in the 1970s: in 1971, UT Austin's law school had zero entering black students.[7]

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[5] Julian Vasquez Heilig & Laurel Dietz & Michael Volonnino, *From Jim Crow to the Top 10% Plan: A Historical Analysis of Latina/o Access to a Selective Flagship University,* Enrollment Management Journal: Student Access, Finance, and Success in Higher Education, 5(3), 83-109.

[6] Julian Vasquez Heilig & Richard J. Reddick & Choquette Hamilton & Laurel Dietz , *Actuating Equity?: Historical and Contemporary Analyses of African American Access to Selective Higher Education from* Sweatt *to the Top 10 Percent Law,* Harvard Journal of African American Public Policy, 27(1), 11-27.

[7] William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter: *A History of African American, Latino, and American Indian Law School Admissions, 1950-2000,* 19 Harvard BlackLetter Law Journal 1-42, 1-3 (Spring, 2003).

Under pressure from the Civil Rights movement, UT Austin instituted a Provisional Admissions Program in 1962, which allowed students to enroll in a summer session, and prove their ability to perform well by taking twelve college credits of classes and earning good grades. This program actually helped wealthier students who could not qualify for admission but who could afford to take college classes without financial aid, which was not offered, and without working, which was discouraged because of the heavy course load for a summer session.[8]

In 1968 UT Austin offered a Program for Equal Opportunity which offered admission to twelve black students and thirteen Latina/o students who were chosen based on recommendations and interviews, as "educationally, culturally and financially disadvantaged" students who could succeed at UT Austin but who had not done well on the standardized tests. Twelve students successfully returned for their sophomore year, but the program was defunded by 1969.

In the 1970s, UT Austin implemented effective affirmative action programs for the first time, which admitted Latina/o and black students with lower standardized test scores, thereby overcoming the race and class bias inherent in those tests. But in 1996, *Hopwood* outlawed the consideration of race, and Latina/o and black attendance plunged: between 1995 and 1997, the number of enrolled black freshmen fell from 309 (5%) to 190 (3%), and enrolled Hispanic freshmen fell from 935 (15%) to 892 (13%).

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[8] *Supra* at note 5.

In response to the specter of resegregation posed by *Hopwood,* the Texas legislature adopted the Ten Percent Law in 1997, granting automatic admission to UT Austin and other Texas public universities to Texas students who finished in the top ten percent of their high-school graduating class, according to grade-point average and without regard to standardized test scores. This new admissions system existed side by side with the old admissions system which now had no affirmative action component. Initially the Texas state legislature and the UT administration set as a goal to create incoming freshman classes fifty percent of which were admitted through the Ten Percent Plan and fifty percent of which were admitted through the conventional admissions system. No one was certain about how the students admitted through the Ten Percent Plan would perform academically and what the impact of the whole new admissions system would have on the life of the campus and the relationship of the people of Texas to UT.

This new admissions plan broadened access and opportunity throughout Texas, both to majority-minority student populations in Texas' under-funded urban districts and also to students in Texas' rural, majority-white and poor districts. The Ten Percent Plan took effect in 1998, and by 2004, two conclusions about the new admissions system were drawn. First, that the students admitted under the Ten Percent Plan were performing as well as students who had test scores which were 200 to 300 points higher.[9] In fact, since the inception of the new admissions plan, UT rankings as an academic institution have been on the rise.

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[9] "[A]t the mid-ranges [of SAT scores] where most students are located, top 10% students performed as well as non-top 10% students scoring 200-300 points higher on the SAT scale." This

Second, the Ten Percent Plan led to an increase in Latina/o and black student enrollment: by 2004, black freshman enrollment had increased to 309 (5%) and Hispanic freshman enrollment had increased to 1,149 (17%).[10] It also meant that schools that had sent no students to UT Austin before could be represented: between 1996 and 2004, the number of high schools represented in UT Austin's freshman class increased from 616 to 815, the number of urban districts increasing from 77 to 115 and rural districts increased from 26 to 47.[11]

An unforeseen gain of the new admissions system is that for the first time in the history of Texas, East Texas, infamous for its Ku Klux Klan activities into the 1980s, formed an alliance with the black and Latina/o communities of Texas to defend the continued use and expansion of the Ten Percent Plan.

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study was in 2003, when the SAT was on a 1600 scale and not today's 2400 scale. University of Texas at Austin Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588 – Report 6, part 1*, p. 9. http://www.utexas.edu/student/admissions/research/HB588-Report6-part1.pdf

[10] University of Texas at Austin Office of Admissions, "*Implementation and Results of the Texas Automatic Admissions Law (HB 588) – Volume I, part 1*. p. 4. http://www.utexas.edu/student/admissions/research/HB588-Report-VolumeI.pdf

[11] *Supra* at note 3.

When this Court upheld affirmative action in *Grutter v. Bollinger* in 2003, UT Austin reevaluated its admissions policies and instituted an affirmative action plan in 2005 that was based on the constitutionally-approved *Grutter* plan. This affirmative action plan applied to applications of students who were not automatically admitted under the Ten Percent Plan. The enrollment of underrepresented minority students increased significantly: between 2004 and 2006, the number of black enrolled freshmen increased from 309 (5%) to 387 (5%) and the number of Hispanic enrolled freshmen increased from 1,149 (17%) to 1,389 (19%).[12]

Although the Ten Percent Plan was capped to account for a maximum of 75 percent of UT Austin's admissions, it, together with UT Austin's *Grutter*-style affirmative action plan, remains an effective and popular desegregation plan that diminishes the role of privilege in UT admissions and expands educational opportunity for the vast majority of Texans.

III. Striking down UT Austin's affirmative action plan would convert its holistic admissions track into a blatant separate, unequal, and discriminatory white-privilege track for Texas' wealthy, white students

The Ten Percent Plan is UT Austin's primary admissions system, accounting for 75 percent of its admissions. For its remaining admits, UT Austin employs a holistic admissions system encompassing a variety of criteria. On the one hand, this special admissions track has the benefit of providing a means to admit out-of-state, non-athlete underrepresented minority students and international students to UT Austin who cannot benefit from the Ten Percent Plan (which only benefits Texas residents). As part of the Big Twelve, UT Austin also offers in-state tuition to residents of other states that are part of the Big Twelve system. This holistic special-admissions track has also increased the number of Asian-American students. BAMN and UEAALDF favor giving the greatest possible number of students access to the selection of high-quality public universities.

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[12] *Supra* at note 10.

But at the same time, this special admissions track, in the context of UT Austin's *primary* admissions system (the Ten Percent Plan), sets aside twenty-five percent of UT Austin's seats to students who come from Texas' privileged majority-white schools. It incorporates factors—such as standardized test scores, alumni preference, access to Advanced Placement courses, high school rank, and extracurricular activities—that give a huge unearned advantage to wealthy, white students and those from privileged schools. In this context, the affirmative-action plan challenged by the petitioner is the only measure barring this special-admissions track from becoming a blatant white-privilege track for those wealthy, white Texas students who expressly do not qualify under UT Austin's predominant admissions system.

The holistic system ratified by this Court in *Grutter* provides a small but important number of underrepresented minority students with access to UT Austin, many of whom attend majority-white Texas schools where almost no underrepresented minority students are placed in college-track or Advanced Placement classes and given an equal opportunity to compete to be in their school's top ten percent.

Even as the affirmative-action plan currently stands, UT Austin, in conjunction with the Ten Percent Plan, has not yet attained a student body representative of the racial composition of Texas.[13] Still, UT Austin has gone farther in admitting, retaining and graduating more underrepresented minority students than many other flagship public universities.

IV. The Benefits of the *Grutter*-Like Admissions Plan

This admissions system is a holistic full-file review, which is based on an Academic Index, which includes standardized test scores as well as high school rank, and on a Personal Achievement Index, which includes the mean score of two essays, and an array of personal experiences and special circumstances, which also includes race. This system has facilitated growth in admission of Asian American students, which BAMN and UEAALDF support.

The *Grutter*-like plan has also established a standardized method for out-of-state applicants to gain admission to UT Austin. In the Big Twelve, any student who lives in a state that is part of the Big Twelve system is entitled to pay in-state tuition at any Big Twelve university, including those not in the student's state of residence. No other Big Twelve university has a Ten Percent program, and by law the Ten Percent admissions guarantee only applies to Texas residents. The *Grutter*-like admissions plan creates a uniform system of consideration for out-of-state students that is consistent. BAMN and UEAALDF favor giving the greatest possible number of students access to the selection of high-quality public universities.

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[13] The Fifth Circuit observed: "The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas' African-American population, while Asian-American enrollment enrollment is more than five times the percentage of Texan Asian-Americans." *Fisher v. Univ. of Texas*, 631 F.3d 213, 235 (5th Cir. 2011).

Ending the affirmative action component in the context of the UT Austin admissions system would set aside a portion of the twenty-five percent of UT Austin seats to students from Texas and other states who come from privileged majority-white schools. By incorporating factors such as standardized test scores, alumni preference, access to advanced placement courses, high school rank and extra-curricular activities—that give a huge unearned advantage to wealthy white students and those from privileged schools. In this context the affirmative action plan challenged by the petitioner is the only measure barring this special admissions track from becoming a blatant white-privilege track for those wealthy, white Texas and out-of-state students who expressly do not qualify under UT Austin's predominant Ten Percent admissions track.

Even under the current admissions system, which includes the affirmative action plan within the special admissions track, UT Austin has not yet attained a student body representative of the racial composition of Texas. This challenge is the challenge for the future. Nonetheless, dismantling the current admissions system only makes the possibility of success more remote.

CONCLUSION

For the reasons stated above, this Court should affirm the Fifth Circuit's decision to uphold UT's *Grutter*-like admissions plan as constitutional.

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ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR AMICI CURIAE THE COLLEGE BOARD AND THE NATIONAL SCHOOL BOARDS ASSOCIATION ET AL. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici represent elementary, secondary, and postsecondary education organizations committed to the success of all students, upon which their futures in the workplace and as citizens will be shaped. With a recognition of the vital role of diversity in the lives of students, these organizations address the goals to which they and their members aspire, and their reliance on long-standing principles of this Court that have informed their diversity-related efforts to foster success for the benefit of all students.

Founded in 1900, the **College Board** is a mission-driven not-for-profit organization that connects students to college success and opportunity. Today, its membership includes more than 6,000 of the world's leading educational institutions dedicated to promoting excellence and equity in education. Each year, the College Board helps more than seven million students prepare for a successful transition to college through programs and services in college readiness and college success — including the SAT® and the Advanced Placement Program®. The organization also serves the education community through research and advocacy on behalf of students, educators, and schools.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The **National School Boards Association** ("NSBA") is a nonprofit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in many school diversity cases.

The College Board and NSBA are joined in this brief by eleven organizations whose members include educational leaders, schools, colleges, universities, and other institutions dedicated to improving education in America: **American Association of College Registrars and Admissions Officers, American Association of Colleges for Teacher Education, American Association of School Administrators, Association of Teacher Educators, Council of Chief State School Officers, Horace Mann League, National Association for College Admission Counseling, National Association of Independent Schools, National Association of Secondary School Principals, Public Education Network,** and **Texas Association of School Boards Legal Assistance Fund.**

SUMMARY OF THE ARGUMENT

The ability of America's educators to help students achieve excellence by providing the kinds of opportunities and experiences students will need as they prepare for careers and citizenship in the 21st Century is dependent upon many factors, including the diversity among peers with whom they interact. From the elementary to the postsecondary context, where the establishment of a sufficiently diverse learning environment is often essential to educational success, race and ethnicity still matter.

The American workplace is diverse and global, and becomes more so each year. Success is dependent upon an individual's ability to engage with diversity of all kinds, be it diversity of ideas or cultures or diversity of race and ethnicity. Indeed, the nation's future depends on ensuring that pathways exist that exhibit such diversity, with education settings being among the most critical. Accounting for the reality of the current and evolving American workforce necessarily includes providing the learning experiences that will facilitate student success in a diverse world, which in turn necessitates considerations of achieving diversity within educational institutions—including, but not limited to, racial and ethnic diversity.

Decisions regarding who to admit to postsecondary institutions have historically been judged to be among the cornerstones of academic freedom, meriting deference in the establishment of mission-oriented goals and objectives that are both grounded in evidence and central to institutional success. It is therefore essential that this Court preserve the ability of higher education admissions officers to render mission-informed holistic judgments based upon the background qualities, characteristics, and experiences of applicants—consistent with the current, rigorous federal nondiscrimination standards and framework that have guided such efforts for decades.

Academic judgments inherent in higher education admissions involve considerations of numerous factors regarding student applicants, which, in combination, are essential in the formation of classes in which students will expand their horizons, have their world views sharpened and challenged by exposure to other viewpoints and experiences, and prepare for productive and engaging lives. Race and ethnicity often constitute a small but vital part of that overall mix of factors. To eliminate or materially alter the current legal framework that preserves the foundation for holistic judgments informed by these factors (that may or may not include race and ethnicity) would undermine the investment that thousands of institutions have made in defining themselves and aligning policies and practices to concrete inquiries derived from this Court's teachings. Under current law, educators continue to adhere to a workable legal framework that has guided diversity efforts for decades—as a foundation for achieving success for students, as well as for the institutions these students attend and the society in which they will enter as productive workers and engaged citizens.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THAT 21ST CENTURY EDUCATION GOALS ALIGNED WITH EFFORTS TO ADVANCE ECONOMIC SUCCESS AND PROMOTE THE CONTINUED VITALITY OF OUR DEMOCRACY ARE FURTHERED BY DIVERSITY.

This Court has consistently recognized that in educational settings, the benefits of diversity are compelling. Throughout the education spectrum, this Court has recognized the relationship of diversity (including racial and ethnic diversity) to enhanced teaching and learning, as well as its role in preparing students for productive lives in the workforce and in society.[2] In the postsecondary context, in particular, the benefits associated with diversity include improved teaching and learning through which critical and complex thinking and problem solving abilities are enhanced;[3] in addition, such diversity advances the development of skills associated with communication, collaboration, and teamwork—which, in turn, promote creativity and innovation.[4] In the elementary and secondary setting, as well, diversity not only contributes to the achievement of students, it also contributes positively to the development of citizenship traits, transmission of cultural norms, and growth of interpersonal and social skills that students will need to be productive and thriving citizens of a democratic nation. In this setting, diversity plays "an important role in transmitting society's culture and values to its young, as well as giving them the appropriate knowledge and skills for leading productive and fulfilling adult lives."[5]

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[2] *See Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003) (recognizing the compelling interest associated with the educational benefits of diversity, including those of improved teaching and learning, preparation for the workforce in a global economy, and more—with emphasis on developing skills that enhance communication and that mitigate stereotypes); *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population."); *id.* at 865 (Breyer, J., dissenting) (agreeing, on behalf of four Members of the Court, that "'avoiding racial

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isolation' and 'achiev[ing] a diverse student population' [are] compelling interests").

[3] *See generally* ANTHONY LISING ANTONIO ET AL., EFFECTS OF RACIAL DIVERSITY ON COMPLEX THINKING IN COLLEGE STUDENTS (2003), *available at* http://www.stanford.edu/~aantonio/psychsci.pdf; T.K. BIKSON & S. A. LAW, RAND REPORT ON GLOBAL PREPAREDNESS AND HUMAN RESOURCES: COLLEGE AND CORPORATE PERSPECTIVES 15-19 (1994); *see also* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. 330, 330-36 (2002).

[4] *See* Neal Lane, *Increasing Diversity in Engineering Workforce,* 29 THE BRIDGE, No. 2, 15-19 (Summer 1999); Charlan J. Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCH. REV. 23, 23-32 (1986).

[5] Jomills Henry Braddock II, *Looking Back: The Effects of Court-Ordered Desegregation, in* FROM THE COURTROOM TO THE

These educational interests today are, if anything, more clearly compelling than in decades past.[6] Long identified as essential to the missions of many postsecondary institutions and school districts in the United States, diversity has emerged as central to our nation's overarching goals associated with educational excellence and the preparation of individuals to contribute meaningfully to our rapidly changing global workforce and to the communities in which they will live.

Indeed, a growing consensus regarding "'[m]ust [h]ave' skills," ELENA SILVA, EDUC. SECTOR, MEASURING SKILLS FOR THE 21ST CENTURY 2 (2008), reflects that students must know and be able to "master core academic content; *think critically and solve complex problems*; *work collaboratively*; *communicate effectively*; and be self-directed and able to incorporate feedback." ALLIANCE FOR EXCELLENT EDUC., A TIME FOR DEEPER LEARNING:

CLASSROOM: THE SHIFTING LANDSCAPE OF SCHOOL DESEGREGATION 3, 7 (Claire E. Smrekar & Ellen B. Goldring eds., 2009). Studies have shown that "children exposed to racially diverse peers in the classroom exhibit reduced adherence to racial stereotypes and reduced racial prejudice, and they are more willing to engage in voluntary interactions with peers of a different race." *Id* at 11.

[6] *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (citations omitted) (maintaining that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples" and that "our tradition and experience lend support to the view that the contribution of diversity is substantial"); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (similar); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result).

PREPARING STUDENTS FOR A CHANGING WORLD 2 (2011) (emphasis added). These expectations, along with the emerging consensus state standards that are defining what students should know and be able to do as they graduate from high school, are fully aligned with the aims of postsecondary education.[7]

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[7] Support for more demanding and relevant educational standards has led 45 states and the District of Columbia to adopt the "Common Core State Standards," which establish evidence-based English/language arts and mathematics standards aligned to college and work expectations. *See About the Standards*, COMMON CORE STATE STANDARDS INITIATIVE, http://www.corestandards.org/about-the-standards (last visited July 30, 2012). Adoption of the Common Core signifies recognition among the vast majority of states that "the competition for jobs is now an international one [and]... that we needed a new body of standards that truly prepared kids for the 21st century and to compete in an international environment," *David Coleman*, YOUTUBE (Oct. 26, 2011), http://www.youtube.com/ watch?v=EBjIC-g5Psk; and that the goals of "teaching students to think critically, giving them the skills they will need in college and careers, and preparing them to succeed in a global economy" is essential. Gene Wilhoit, *States Raise the Bar with Standards Implementation*, EDUC. WK.,http://www.edweek.org/ew/articles/2012/06/22/36wilhoit.h31.html (last visited July 29, 2012); *see also* LINDA DARLING-HAMMOND & FRANK ADAMSON, STANFORD CTR. FOR OPPORTUNITY IN POLICY EDUC., BEYOND BASIC SKILLS: THE ROLE OF PERFORMANCE ASSESSMENT IN ACHIEVING 21ST CENTURY STANDARDS OF LEARNING 1 (2010) ("Genuine readiness for college and 21st century careers, as well as participation in today's democratic society, requires...much more than 'bubbling in' on a test. Students need to be able to find, evaluate, synthesize, and use knowledge in new contexts, frame and solve non-routine problems, and produce research findings and solutions. It also requires students to acquire well-developed thinking, program solving, design, and communication skills."); P'SHIP FOR 21ST CENTURY SKILLS, 21ST CENTURY SKILLS, EDUCATION, AND COMPETITIVENESS 6 (2008).

Indeed, the vital interest in equipping tomorrow's workforce and citizens with the experiences and skills they will need to succeed is manifested in higher education's obligation to the students it educates *and* to the society that it serves. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 280-86 (1998). Thus, to meet the challenges of the day, educators throughout the secondary and postsecondary spectrum have embraced a commitment to ensuring that America's students are globally competitive, just as they remain focused on the corresponding core interests that have defined education's mission for generations.

To fulfill these aims effectively, the continuing importance of considerations of race and ethnicity—including within the institutions that are charged with preparing students for life as productive workers and contributing citizens—remains central. *See Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003) (finding that benefits associated with higher education's diversity goals are "substantial," "important," "laudable," "real," and "pivotal").[8] These national interests are widely reflected within a varied array of postsecondary institutions in their articulation of institution-specific core principles, many of which have been developed in the context of this Court's longstanding guidance. In a 2003 survey, almost three-quarters of colleges and universities indicated that they included a commitment to diversity in their institutional mission statements, with over two-thirds of responding institutions reporting an express commitment to racial and ethnic diversity as part of that commitment. *See* NAT'L ASSOC. FOR COLL. ADMISSION COUNSELING, DIVERSITY AND COLLEGE ADMISSION IN 2003: A SURVEY REPORT x (2003).[9]

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[8] Indeed, this Court has recognized that goals of diversity and academic excellence are complementary, not competing goals. *See Grutter,* 539 U.S. at 331 (concluding that "our country's...most selective institutions must remain both diverse *and* selective"); *id.* at 339 (stating that narrow tailoring does not "require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups").

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[9] *See also* GRETCHEN W. RIGOL, COLL. BD., ADMISSIONS DECISION-MAKING MODELS: HOW U.S. INSTITUTIONS OF HIGHER EDUCATION SELECT UNDERGRADUATE STUDENTS app. A (2003) [hereinafter RIGOL, ADMISSIONS MODELS] (listing illustrative institutional policy statements regarding admissions policies and enrollment goals reflecting institutional commitments to, e.g., enrolling a "diverse student body, full of talented and interesting individuals"; achieving a "rich learning environment ...with students whose life experiences and world views differ significantly from their own"; and enrolling students "who bring a diversity of talents, skills, viewpoints, and experiences to the University"). A decade later, that landscape has not changed. Illustrative mission-based statements included in Appendix B to this brief reflect a common focus on student diversity as integral to institutional missions and success. *See also infra* Part III.

As these forward-looking, mission-oriented statements reflect, diversity-related education goals and the race-conscious strategies that may be associated with them are not coextensive with policies associated with remedial aims. *See Grutter,* 539 U.S. at 328 (holding that race-conscious policies associated with diversity goals are legally distinguishable from "affirmative action" policies designed to remedy past discrimination); *PICS,* 551 U.S. at 791 (Kennedy, J., concurring in part and concurring in the judgment).

Diversity as an institutional priority and point of focus comes as no surprise, given that many of our nation's fastest-growing economic sectors require that workers have higher levels of reasoning, problem-solving, and interpersonal skills[10]—skills enhanced by experiences among diverse peers.[11] To the degree, then, that our nation's education system is able to serve students in diverse learning environments, we will better prepare our citizenry for a global economy that demands professionals who can work together effectively and productively, where differences of backgrounds and experience are foundations for—not obstacles to—success.

Consistent with the views expressed by Members of this Court, educators throughout our nation recognize that there is still work to be done: "Our highest aspirations are yet unfulfilled." *Parents Involved in Cmty. Sch. v Seattle Sch. Dist. No. 1*

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[10] *See* ANTHONY P. CARNEVALE & DONNA M. DESROCHERS, U.S. DEP'T OF EDUC., OFFICE OF VOCATIONAL AND ADULT EDUC., THE MISSING MIDDLE: ALIGNING EDUCATION AND THE KNOWLEDGE ECONOMY 15-19 (2002).

[11] *See* ASS'N OF AM. COLL. AND UNIV. AND HART RESEARCH ASSOCIATES, RAISING THE BAR: EMPLOYERS' VIEWS ON COLLEGE LEARNING IN THE WAKE OF THE ECONOMIC DOWNTURN 1-2 (2010) (explaining that more than 70 percent of employers "believe that colleges should place greater emphasis on a variety of learning outcomes . . .which include. . . [t]eamwork skills and the ability to collaborate with others in diverse group settings"); CONFERENCE BD. ET AL, ARE THEY REALLY READY TO WORK? EMPLOYERS' PERSPECTIVES ON THE BASIC KNOWLEDGE AND APPLIED SKILLS OF NEW ENTRANTS TO THE 21ST CENTURY U.S. WORKFORCE 49 (2006) (placing ability to handle diversity and to participate in teamwork and collaboration as two of the top five work-related skills expected to increase in importance over next five years).

(*PICS*), 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment). And, in fact, while we aspire to a society in which race should not matter, "all too often it does." *Id.* at 787; *see also* ANNIE E. CASEY FOUND., RACE MATTERS: UNEQUAL OPPORTUNITIES IN EDUCATION (2006); ANNE HABASH ROWAN ET AL., EDUC. TRUST, GAUGING THE GAPS: A DEEPER LOOK AT STUDENT ACHIEVEMENT (2010). Thus, educators must continue to be able to make fundamental judgments regarding higher education admissions that will serve the many interests of their institutions, the students they enroll, and the nation.[12] To maintain the vital, visible pathways toward that success, educators must also retain the discretion to consider *all* factors associated with student qualifications, characteristics, and experiences, consistent with this Court's established precedent.

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[12] "Perhaps, in the end, this is the point: [college and university] presidents and admissions officers share obligations that involve futures—students' futures, their institutions' futures, and society's future . . . . Both have opportunities to enable or empower people, especially students . . . [with] the goal of free[ing] women and men of the costs of ignorance and exclusion." John Casteen, *Perspectives on Admissions, in* HANDBOOK FOR THE COLLEGE ADMISSIONS PROFESSION 7, 10 (Claire C. Swann & Stanley E. Henderson eds., 1998).

II. EDUCATIONAL JUDGMENTS IN THE ADMISSIONS PROCESS THAT INVOLVE MANY STUDENT QUALITIES AND CHARACTERISTICS (INCLUDING RACE AND ETHNICITY) SHOULD BE RECOGNIZED AS ESSENTIAL FOUNDATIONS FOR ATTAINING MISSION-DRIVEN EDUCATIONAL EXCELLENCE.

A. This Court Should Reaffirm That The Admissions Process Is An Institution-Specific, Mission-Oriented Process Grounded In Academic Judgments Regarding How To Best Achieve Institutional Goals.

The work of personnel in the admissions field—from high school counselors who help guide and prepare students for their futures in postsecondary education, to admissions officers who make the judgments regarding the optimal composition of their incoming classes—centers on dual aims. One aim is helping students identify the institution(s) where they are most likely to thrive. The other complementary aim is helping students identify the institution(s) where they can materially contribute to the educational experience of their peers. The ultimate goal associated with these aims is preparation for fulfilling and productive lives in which they, and the society in which they live, will benefit.[13]

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[13] The importance of student expectations regarding their post-secondary pursuits—and the way in which they can "see" pathways to success—is an integral factor in promoting opportunity and expanding access for all students. *See, e.g.*,

In fact, within postsecondary institutions, themselves, the admissions process is not about merely admitting freshmen to a class. To the contrary, the admissions process is one of fully evaluating and making decisions about prospective graduates, who will in the course of their higher education experience, explore, and expand their potential and horizons, just as they challenge their peers to do the same for the benefit of *all* students who attend their institution. In sum, the admissions process reflects a blend of both art and science—grounded in standards, data, and evidence; and involving the careful application of human judgment and intuition. It is a humanistic endeavor, involving many factors shaped by the qualifications, backgrounds, and experiences of prospective students *in light of* the character and mission of the institution to which they apply. *E.g.*, Michele

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PATRICIA M. MCDONOUGH, COUNSELING AND COLLEGE COUNSELING IN AMERICA'S HIGH SCHOOLS 7 (2005) (documenting several research studies demonstrating that college counseling has significant impact on postsecondary aspirations of students of color); PATRICIA M. MCDONOUGH, AM. COUNCIL ON EDUC., THE SCHOOL-TO-COLLEGE TRANSITION: CHALLENGES AND PROSPECTS 9 (2004) ("Creating an environment in which students are expected to achieve academically, and are encouraged and supported to do so, is an essential precondition for college attendance."); *see also* MONICA MARTINEZ & SHAYNA KLOPOTT, PATHWAYS TO COLL. NETWORK, IMPROVING COLLEGE ACCESS FOR MINORITY, LOW-INCOME, AND FIRST-GENERATION STUDENTS 6 (2003) (synthesizing research on elements necessary to increase college access for minority, low-income, and first-generation students and recognizing that the creation of "high expectations and clear pathways to postsecondary education" is essential to encouraging college attendance).

Sandlin, *The "Insight Resume:" Oregon State University's Approach to Holistic Assessment*, *in* THE COLLEGE ADMISSIONS OFFICER'S GUIDE 99 (Barbara Lauren ed., 2008); *see generally* GRETCHEN W. RIGOL, COLL. BD. ADMISSIONS DECISION-MAKING MODELS: HOW U.S. INSTITUTIONS OF HIGHER EDUCATION SELECT UNDERGRADUATE STUDENTS, 7 (2003) [hereinafter RIGOL, ADMISSIONS MODELS]; GRETCHEN W. RIGOL, COLL. BD., SELECTION THROUGH INDIVIDUALIZED REVIEW: A REPORT ON PHASE IV OF THE ADMISSIONS MODEL PROJECT 3-7 (2004).[14]

B. This Court Should Reaffirm That Decisions Regarding Student Merit In The Admissions Process Are Grounded In Educational Judgments Associated With A Wide Range Of Factors That May Include Consideration Of A Student's Race Or Ethnicity.

Higher education institutions in the United States differ widely—from public to private; from large to small; from community college to major research institution; and more. There is remarkable diversity both among the types of institutions, as well as *within* each of these sectors—where service areas, academic strengths and pursuits, and other core mission elements vary greatly. *See* NAT'L RESEARCH COUNCIL, MYTHS AND TRADEOFFS: THE ROLE OF TESTS IN UNDERGRADUATE ADMISSIONS 10 (1999) ("U.S. colleges and universities could hardly be less uniform."). Institution-specific admissions determinations are correspondingly varied:

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[14] Educational judgments associated with the establishment of institutional missions, including the judgment that "diversity is essential" to those missions and the admissions processes that help fulfill those missions, merit deference in accordance with long-standing academic freedom principles. *See Grutter*, 539 U.S. at 329; *Bakke*, 438 U.S. at 312-13; *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (opinion of Powell, J.).

> Despite what the popular press and various guidebooks would suggest, gaining admissions to college is not equivalent to finding your place on the food chain. If one must use a biological metaphor, a more appropriate analogy would be finding your niche in an ecosystem. Different institutions aspire to serve different educational needs, and different students will have their educational needs served by different kinds and types of colleges. A particular institution's decision of whom and how to admit...must be related to the societal role that it elects to play.

GRETCHEN W. RIGOL, COLL. BD., TOWARD A TAXONOMY OF THE ADMISSIONS DECISION-MAKING PROCESS 5 (1999) [hereinafter RIGOL, TOWARD A TAXONOMY]; *see also* RIGOL, ADMISSIONS MODELS, *supra*, at 1 ("The primary conclusion this report reaches is that there are almost as many different approaches to selection as there are institutions."); ARTHUR L. COLEMAN ET AL., COLL. BD., A DIVERSITY ACTION BLUEPRINT: POLICY PARAMETERS AND MODEL PRACTICES FOR HIGHER EDUCATION INSTITUTIONS iii (2010) [hereinafter COLEMAN, DIVERSITY ACTION BLUEPRINT] ("As with the diversity interests themselves, which are inherently institution-specific, institutional policies should reflect the particular values, aims and histories of the institutions with which they are associated.").

This variety of institutional type has significant implications regarding how race and ethnicity may be and should be considered to advance particular institutional goals. Specifically, the differences that define higher education institutions correspond to the variety of ways in which institutions reach conclusions about the merit of student applicants in light of admissions aims. This includes whether—and if so, how—they integrate considerations of race and ethnicity in the admissions decision to achieve their diversity goals.[15] Regardless of type, however, those judgments rest upon three universal principles associated with the admissions process: A determination of merit (1) is aligned with mission;

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[15] At the same time, differences *within* institutions—between undergraduate and graduate/professional programs; and among schools within undergraduate institutions—also reflect mission orientations that are distinct, and that can generate differing admissions criteria.

These institution-by-institution and within-institution differences also correspond to the highly contextualized inquiry associated with strict scrutiny legal principles regarding race-conscious admissions. *See Grutter*, 539 U.S. at 327 (recognizing that "[c]ontext matters" regarding race-conscious action under federal law, and noting, as a consequence, that "generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). Such differences defy simplistic, cookie-cutter policy solutions: What works for one institution (or school within an institution) in light of its mission and processes will not necessarily work for another.

(2) embodies judgments regarding multiple factors that reflect who, in the first instance, is qualified; *and* who, then, should be admitted; and (3) can depend on limited but important considerations of race and ethnicity, among many other diversity-related factors. *See generally* RIGOL, ADMISSIONS MODELS, *supra;* RIGOL, TOWARD A TAXONOMY, *supra;* COLEMAN, DIVERSITY ACTION BLUEPRINT, *supra.*

1. A Determination Of Merit Is Aligned With Mission.

Admissions decisions are not made in a vacuum; they are, instead, driven by the missions of the institutions at which they are made. They are reflective of admissions officials' well-developed understanding of institutional missions and goals, and they are shaped by many factors, including the perspectives of faculty and leaders within the institution and feedback from employers who seek to hire from the pool of students admitted. *See* RIGOL, ADMISSIONS MODELS, *supra*, at 9, 19-36 (describing the complexity of the admissions process and the factors that affect those judgments). In this context, institution-specific academic standards, expectations, and aims established for graduates are important guideposts for the admissions judgments that are made, to which appropriate legal deference should be afforded.[16] There is, as a consequence, no single definition of merit—and, more to the point, there *cannot be* a single definition of merit that would effectively satisfy all institutional goals, nationwide. *See id.* at 13-18, 39-46, app. D (describing numerous admissions models and processes pursued among various institutional types and listing over one hundred academic and non-academic factors possibly relevant to admissions decisions).

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[16] *See supra* note 14. Deference toward and respect for institutional autonomy, in fact, is an "important reason why American higher education has become pre-eminent in the world." WILLIAM G. BOWEN & BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 298 (1998); *see generally* ROSS

2. A Determination Of Merit Is Based On A Wide Range Of Factors Considered In An Institutional Context.

The determination of merit in any individual instance—a judgment that is inextricably "defined in light of what educational institutions are trying to accomplish," BOWEN & BOK, *supra*, at 278, is not a self-defining concept. To the contrary, it reflects an institutional judgment, in the first instance, about who is qualified and, therefore, likely to succeed; and in the second (within that pool of students deemed qualified), who should be admitted based upon their likely contributions to the university community. Said differently, admissions officers examine students' potential to succeed *and, as importantly*, they assess the characteristics of a prospective class of qualified students in light of what students collectively can bring to each other and to their institution. "For many institutions, finding the best balance of students with different academic interests, different talents and skills, and different background characteristics is the ultimate aim of the admissions process." RIGOL, ADMISSIONS MODELS, *supra* at 7. In

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WILLIAMS ET AL., UNIVERSITAS 21, U21 RANKING OF NATIONAL HIGHER EDUCATION SYSTEMS 2012 (2012).

sum, the admissions process aptly illustrates the value of assembling a class where the whole is greater than the sum of its parts.

The mix of criteria considered by admissions officials reflective of their mission focus is vast, and multiple factors inform judgments about the academic qualifications of students and their potential to succeed at a given institution. These include grades, test scores, Advanced Placement performance, and rank in class. Those data points are but a baseline, however. More qualitative academic criteria tend to round out the picture of a student's readiness—including strength of the curriculum to which the student has been exposed, particular accomplishments, and evidence of drive and initiative.[17] Even in the limited context regarding these kinds of academic qualifications, therefore, it is abundantly clear that the *amici* who would press for a simplistic judgment regarding a student's qualifications based merely on SAT or similar scores miss the mark—by a mile. There is, to the contrary, universal recognition among educators that while admissions tests in higher education can provide important information upon which admissions judgments are appropriately grounded, they should never serve as a single basis for making admissions decisions—or, in other words, be the sole embodiment of "merit."[18]

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[17] *See* WARREN W. WILLINGHAM & HUNTER M. BRELAND, PERSONAL QUALITIES AND COLLEGE ADMISSIONS 12-17 (1982) [hereinafter WILLINGHAM & BRELAND, PERSONAL QUALITIES]; *see also* Angela L. Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY AND SOC. PSYCHOL. 1087, 1087 (2007) (finding grit, as a qualitative personal quality, "demonstrated incremental predictive validity of success measures over and beyond" traditional factors such as "IQ and conscientiousness"); Paul Tough, *The Character Test*, N.Y. TIMES SUNDAY MAGAZINE, Sept. 14, 2011, at MM38 (discussing "performance character" as a success predictor by measuring seven characteristics: "zest, grit, self-control, social intelligence, gratitude, optimism and curiosity").

This conclusion is not only consistent with the decades of experience reflected among higher education admissions experts, it also squarely aligns with core, long-standing principles regarding appropriate and psychometrically sound test use practices. Those time-tested principles are reflected, in fact, in the parameters established regarding the use of SAT scores. The predictive value of the SAT for admissions purposes does not lead to the conclusion that SAT scores should be the sole (or even the principal) factor in judging a student's ability to succeed at a particular institution. SAT scores are, in the first instance, "contemporary and approximate indicators"—not "fixed and exact measures of a student's preparation for college-level work." COLL. BD., GUIDELINES ON THE USES OF COLLEGE BOARD TEST SCORES AND RELATED DATA 9 (2011) (emphasizing that responsible officials should "[u]se SAT scores in conjunction with other indicators, such as the secondary school record[s] (grades and courses), interviews, personal statements, writing samples, portfolios, recommendations, etc., in evaluating [an] applicant's admissibility at a particular institution"); *see also* AM. EDUC. RESEARCH ASS'N, AM. PSYCHOLOGICAL ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 146-47 (1999) ("In educational settings, a decision or characterization that will have a major impact on a student should not be made on the basis of a single test score. Other relevant information should be taken into account if it will enhance the overall validity of the decision."); *id.* at 141.[19]

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[18] *See, e.g.*, NAT'L RESEARCH COUNCIL, MYTHS AND TRADEOFFS: THE ROLE OF TESTS IN UNDERGRADUATE ADMISSIONS 25 (1999) (asserting that to conclude "admissions tests measure ...a compelling distillation of academic merit that should have dominant influence on admissions decisions" is a "myth"); *id.* at 22 ("Both the SAT and ACT cover relatively broad domains... relevant to the ability to do college work. Neither, however, measures the full range of abilities that are needed to succeed in college; important attributes not measured include, for example, persistence [and] intellectual curiosity....").

Correspondingly, the admissions process is not, as some contend, a mechanical calculation of numbers. Were that the case, the judgment of admissions officers would be unnecessary. Pursuant to that view of reality, there would be no need for personnel to conduct the outreach to high school counselors and teachers working with students who are trying to determine the institutions that will be a "fit" for them, just as there would be no need for personnel to labor for months over the details of admissions applications as they work to understand their schools' applicants' profiles and potential for success within, and contributions to, their institutions.

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[19] Differences in test performance may be manifested due to differences in preparation, illustrated by different opportunities associated with family income and school quality, which to this day still correspond along race/ethnicity lines. *See generally* BRENT BRIDGEMAN & CATHY WENDLER, EDUC. TESTING SERV., CHARACTERISTICS OF MINORITY STUDENTS WHO EXCEL ON THE SAT AND IN THE CLASSROOM (2004) (analyzing background and behaviors of high-scoring minority students and concluding rigorous high school coursework better prepares students for the SAT); WAYNE J. CAMARA & AMY ELIZABETH SCHMIDT, GROUP DIFFERENCES IN STANDARDIZED TESTING AND SOCIAL STRATIFICATION (1999) (analyzing racial gaps on high-stakes

Beyond the question of who is qualified (and, therefore, likely to succeed), the focus on who should be admitted implicates a significantly expanded examination of background qualities, characteristics, and experiences that can and do inform judgments about what a student may be able to bring to an institution to enrich the learning and growth of peers. Among them are: life experiences including overcoming adversity or hardships, military experience, community service-related experiences, and the like; family backgrounds including first-generation college-going experience, family economic circumstances, and unique family profiles; particular skills and interests including artistic talents, interests in science, etc.; and characteristics emblematic of other diversity factors, including race, ethnicity, geographic origin, socio-economic status, and life experiences in different cultural settings or in diverse learning environments.[20]

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admissions tests, standardized assessments, and other indicators of educational attainment and finding that consistency of achievement gaps indicates inequitable access to high quality education).

[20] *See* RIGOL, ADMISSIONS MODELS, *supra* note 9, at app. D (listing "Factors That May Be Used in Making Admissions Decisions Based on Internal Evaluation Guidelines," including those illustrative of: Academic Achievement, Quality and Potential; and Nonacademic Characteristics and Attributes (Geographic, Personal Background, Extracurricular Activities, Service and Leadership, Personal Attributes, Extenuating Circumstances, and Other)); *id.* at app. E (listing over 100 academic and non-academic factors reflected in "What Colleges Tell Students About What They Are Looking For"); Michele Sandlin, *The "Insight Resume": Oregon State University's Approach to Holistic Assessment, in* THE COLLEGE ADMISSIONS OFFICERS GUIDE 99 (Barbara Lauren ed., 2008).

Importantly, as well, these factors are judged through multiple avenues embedded in the holistic review process (where, for instance, race is not merely a designation on an application, but is reflected in discussions of backgrounds, life experiences and the like). For instance, essays designed to elicit how the student sees himself or herself in light of contributions that can be expected from an applicant often trigger discussion of racial and ethnic background, among other factors that may not otherwise surface in the admissions process.[21]

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[21] Questions posed by higher education institutions elicit such information about a student's background and experience in various ways. Illustrative application questions include:

From Harvey Mudd College: "Scientific research is a human endeavor. The choices of topics that we research are based on our biases, our beliefs, and what we bring: our cultures and our families. The kinds of problems that people put their talents to solving depends on their values." – Dr. Clifton Poodry
How has your own background influenced the types of problems you want to solve? *available at* http://www.hmc.edu/admission1/applyingforadmission.html (link to application).

From Rice University: The quality of Rice's academic life and the Residential College System are heavily influenced by the unique life experiences and cultural traditions each student brings. What perspective do you feel that you will contribute to life at Rice? *available at* http://futureowls.rice.edu/uploadedFiles/Future_Owls/FreshmanSupplement.pdf (link to application).

From The University of Maryland: "The whole is greater than the sum of its parts."- Aristotle
The intellectual, social and cultural differences embraced by the University of Maryland are integral to the fabric of our community. The strength of the University is realized through

In the end, the admissions reality today is as it has been for decades: with "much emphasis on academic performance...[as well as] consider[ation of] other personal qualities" that include a focus on students who will "make a contribution to the institution, bring unique skills and interests, add cultural diversity and different points of view, help maintain important institutional ties and continuity, and also fit reasonably well the particular types of programs that the college offers."[22]

3. A Determination Of Merit May Include The Consideration Of An Applicant's Racial/Ethnic Diversity As Part Of Individualized, Holistic Review.

Among the array of factors considered by admissions officers to meet institutional goals, the consideration of race and/or ethnicity is often essential, given the long-established compelling educational benefits associated with racial and ethnic diversity, among other kinds of diversity. As described *supra* Part I, the realities associated with workforce preparation and 21st Century citizenship make this even more of a vital focus for many institutions today.

The practical reality is that in a number of institutional contexts, race-neutral means are simply

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the contributions of every member of our campus. We understand each individual is a result of his/her personal background and experiences. Describe the parts that add up to the sum of you. *available at* https://app.applyyourself.com/ ?id=umd (link to application).

[22] WILLINGHAM & BRELAND, PERSONAL QUALITIES, *supra* note 17, *at* 2-3.

insufficient, standing alone, to generate the kind of racial/ethnic diversity institutions seek in order to achieve their mission–related goals. While institutions pursue many race-neutral means to achieve their diversity goals, these measures often are not sufficient to yield the kind of significant presence on campus that is essential to ensure sufficient compositional diversity or critical mass, which is a critical foundation for improved teaching and learning and other benefits of diversity. *Cf. PICS,* 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment) ("In the real world,...[color-blindness] cannot be a universal constitutional principle.").[23] Indeed, race-conscious measures that do not treat individual students "in different fashion solely on the basis of a systematic, individual typing by race," *id.* at 789, but rather that embody a holistic process of individualized review inclusive of the kinds of factors described above are the constitutionally permissible norm, *see Grutter*, 539 U.S. at 337 (finding constitutional an admissions policy based on "a highly individualized, holistic review of each applicant's file" and aimed at achieving the educational benefits of diversity).

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[23] Inextricably linked to the benefits of diversity, critical mass can serve as a contextual foundation for decisions about ways to enhance learning experiences for all students. Judgments about critical mass are highly contextualized—dependent upon the relevant institution, the field of study within an institution, or the size of the setting of relevance. It is, in fact, "reasonable to conclude that a decision as to what size would entail a critical mass in relation to an admissions policy can only be determined case by case by those who have access to the profile of the student body admitted and the structure of the system of interaction in which these students are to relate to one another." Adeno Addis, *The Concept of Critical Mass in Legal Discourse,* 29 CARDOZO L. REV. 97, 133-34 (2007). *See also* ARTHUR L. COLEMAN & SCOTT PALMER, COLL. BD., ADMISSIONS AND DIVERSITY AFTER MICHIGAN: THE NEXT GENERATION OF LEGAL AND POLICY ISSUES 33-41 (2006) [hereinafter COLEMAN & PALMER, ADMISSIONS AFTER MICHIGAN] (describing institution-/context-specific nature of the inquiry in light of social science principles and Court's *Grutter* decision).

The breadth and depth of factors affecting judgments by admissions officials in selective institutions—some going directly to academic preparation, some to qualities and characteristics that an individual may bring that will enhance the learning experience of all—also demonstrate in compelling terms why percentage plans are not the silver bullet that some may assert.[24] Rather, admissions processes that are aligned with institutional missions and goals, grounded in educational judgment, and include a practiced deliberation of a wide range of applicant factors (including, where appropriate, race and ethnicity) accord with more than three decades of this Court's jurisprudence and elucidate, in part, the international preeminence of our nation's schools of higher education.

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[24] Although appropriately designed plans in limited contexts and for certain institutions may have some benefits, *see e.g.*, Mark C. Long & Marta Tienda, *Changes in Texas Universities' Applicant Pools after the Hopwood Decision*, 39 SOC. SCI. RES. 48, 53 (2010), they do not provide a viable, comprehensive alternative to holistic, individualized review. In fact, mechanical and formulaic processes that do not fully incorporate human judgment as part of the selective admissions process are destined to undermine the very principles that for decades have guided individualized, holistic review by higher education admissions officers. Thus, even in instances in which percentage plans might be considered authentically neutral so as not to trigger strict scrutiny review, they would pose a significant threat to the integrity of academic judgments that have been and are the foundations for institutional selectivity and excellence, consistent with this Court's decisions in *Bakke*, *Grutter*, and *Gratz*.

III. THE BALANCED AND WORKABLE *GRUTTER* FRAMEWORK SHOULD BE PRESERVED AS IT HAS BEEN EFFECTIVELY IMPLEMENTED BY EDUCATION INSTITUTIONS TO GUIDE THEIR POLICY DEVELOPMENT AND ENSURE THE ATTAINMENT OF COMPELLING EDUCATIONAL GOALS ASSOCIATED WITH DIVERSITY.

Education leaders, including admissions officials, have endeavored to fulfill their institutional goals associated with student diversity over the course of decades by adherence to the principles first articulated by Justice Powell in *Bakke*, which then were amplified and settled by this Court in *Grutter* and *Gratz*.[25] The strict scrutiny framework articulated by this Court that is associated with admissions has become an industry standard—to which educators nationwide consistently have turned in the development, articulation, and execution of such policies. Abundant evidence documents the reliance on and institutional investment based upon the Court's guidance, and illustrates the ways in which strict scrutiny principles have been (and are being) practically and faithfully applied.[26] Given the

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[25] For decades, higher education institutions relied on the principles articulated by Justice Powell in his 1978 *Bakke* opinion as a foundation for their diversity-related policy development. *Grutter*, 539 U.S. at 323 (observing that Justice Powell's opinion served as the "touchstone for constitutional analysis" during this period, on which institutions of higher education "modeled their own admissions programs"). In 1996, that reliance was called into question with a panel opinion in *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996). Although other federal circuits refused to adopt the Fifth Circuit's *Hopwood* conclusion that diversity was not a compelling interest, confusion ensued. This Court's subsequent resolution in *Grutter* and *Gratz* reaffirmed key principles regarding diversity

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as a compelling interest and narrow tailoring upon which educators had relied—and would continue to rely.

This reliance by education policymakers has been informed and guided by U.S. Department of Education [Department] regulations and policies, which have consistently cited to this Court's authorities in establishing rules regarding enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (2012), which prohibits discrimination on the basis of race and national origin in a manner coextensive with the Fourteenth Amendment to the U.S. Constitution. *See, e.g.*, U.S. Dep't of Educ., Policy Interpretation on Use of Race in Postsecondary Admissions, Analyzing the *Bakke* Decision, 44 Fed. Reg. 58,509 (Oct. 10, 1979); Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (Feb. 23, 1994) (citing to *Bakke* as foundation for permissible institutional policy development); Magnet Schools Assistance Program, Notice Inviting Applications for New Awards for Fiscal 2001, 65 Fed. Reg. 46,698-706 (July 31, 2000); DEAR COLLEAGUE LETTER AND GUIDANCE (Dec. 2, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague201111.html (addressing voluntary policies to achieve diversity or avoid racial isolation pursuant to Title VI of the Civil Rights Act of 1964 and Equal Protection Clause of the Fourteenth Amendment to U.S. Constitution, in light of *Grutter* and *Gratz*).

[26] In the immediate wake of this Court's *Grutter* and *Gratz* decisions, for example, the College Board established the Access and Diversity Collaborative ("the Collaborative"),

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http:/advocacy.collegeboard.org/admission-completion/access diversity-collaborative, to provide assistance to college admissions officers and others regarding application of *Bakke*, *Grutter* and *Gratz* decisions. That national effort resulted in ten publications (manuals, policy papers, and toolkits); well over a dozen national seminars where over a thousand attendees focused on legal parameters; blueprints for action; institutional team trainings; and other outreach. *See* COLL. BD., THE ACCESS AND DIVERSITY COLLABORATIVE: A SIX-YEAR RETROSPECTIVE (Oct. 27, 2010) http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/adc-2004-2010-overview.pdf. More recently, an on-line professional development video series building on this effort, has been produced. *See Access and Diversity and the Law: Understanding the Legal and Policy Fundamentals*, COLL. BD., http://diversitycollaborative.collegeboard.org/video-library (last visited July 19, 2012); *From Law to Policy Development: Setting the Stage for Action*, COLL. BD., http://diversitycollaborative.collegeboard.org/video-library (last visited July 19, 2012).

Illustrative of the postsecondary effort is the publication of institutional policy models identified by the Collaborative, reflective of efforts to conform policy development with the teachings of this Court regarding mission-driven diversity goals and means. *See* ARTHUR L. COLEMAN ET AL., COLL. BD., A DIVERSITY ACTION BLUEPRINT: POLICY PARAMETERS AND MODEL PRACTICES FOR HIGHER EDUCATION INSTITUTIONS, 8-10, 35-38 (2010) (citing to and analyzing institutional policies identified to reflect efforts to align institutional goals and practices with federal legal principles).

Correspondingly, after this Court's decision in *PICS*, the National School Boards Association, working with the Collaborative and more broadly, provided legal and policy guidance to the elementary and secondary field regarding key principles from the Court's decision. These efforts were directed at many different groups within the K-12 community, including school board members, state school boards association leaders, and attorneys. Guidance was delivered through various means, including presentations, technical legal articles, community engagement guides, sharing of effective diversity policies and practices, ongoing reporting of litigation, and video messaging. *See, e.g.*, JOHN BORKOWSKI & MAREE SNEED, STUDENT evidence of reliance, investment, and practical application, there is no reason for this Court to

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ASSIGNMENT AFTER THE SUPREME COURT'S DECISION IN THE SEATTLE AND LOUISVILLE CASES (2007); ARTHUR COLEMAN ET AL., NAT'L SCH. BOARDS ASS'N, COLL. BD., & EDUCATIONCOUNSEL, LLC, ACHIEVING EDUCATIONAL EXCELLENCE FOR ALL: A GUIDE TO DIVERSITY-RELATED POLICY STRATEGIES FOR SCHOOL DISTRICTS (2011); ARTHUR L. COLEMAN ET AL., NAT'L SCH. BOARDS ASS'N & COLL. BD., NOT BLACK AND WHITE: MAKING SENSE OF THE UNITED STATES SUPREME COURT DECISIONS REGARDING RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS (2007), *available at* http://www.nsba.org/Services/CUBE/Publications/CUBEResearchReports/NotBlackandWhite/NotBlackandWhite.pdf; ARTHUR L. COLEMAN ET AL., RACE-CONSCIOUS STUDENT ASSIGNMENT PRACTICES IN ELEMENTARY AND SECONDARY EDUCATION: KEY ISSUES FOR BOARDS TO CONSIDER IN THE 2006-07 SUPREME COURT TERM (2007), *available at* http://www.nsba.org/Services/CUBE/ConferencesMeetings/CUBEMeetingsHeldin2007/CUBEIssuesForumCongressionalLuncheon/RaceConsciousStudentAssignmentPracticesinElementaryandSecondaryEducation.pdf; Jollee Patterson & Michael Porter, *Closing the Achievement Gap with a Race-Neutral Framework, in* SCHOOL LAW IN REVIEW 2012 (2012); Celia Ruiz, *The Use of Race in Public Primary and Secondary School Assignment Programs: Where Do We Draw the Line? in* SCHOOL LAW IN REVIEW 2007 (2007); Francisco Negrón & Jay Worona, Presentation at NSBA Council of Urban Boards of Education Annual Conference: Diversity: Dead or Different? Guidance on Implementing Diversity in Student Assignment after *PICS v. Seattle* (Sept. 30, 2010).

Similar efforts have been undertaken by other organizations, as well. *See, e.g.*, ROBERT BURGOYNE ET AL., AM. ASS'N FOR THE ADVANCEMENT OF SCI. & ASS'N OF AM. UNIV., HANDBOOK ON DIVERSITY AND THE LAW: NAVIGATING A COMPLEX LANDSCAPE TO FOSTER GREATER FACULTY AND STUDENT DIVERSITY IN HIGHER EDUCATION (2010); *see also* AMY N. ADDAMS ET AL., ASS'N OF AM. MED. COLL., ROADMAP TO DIVERSITY: INTEGRATING HOLISTIC REVIEW PRACTICES INTO MEDICAL SCHOOL ADMISSIONS PROCESSES (2010).

depart from the parameters and principles on which admissions officials have in good faith relied and on which they continue to rely. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992) (ruling that a "series of prudential and pragmatic considerations designed to [among other things] . . . gauge the respective costs of reaffirming and overruling a prior case" should be evaluated when questions about the legitimacy of prior authority have been raised—including whether precedent "def[ies] practical workability," "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation" and whether it is still timely and viable).

Indeed, *Grutter* reflected agreement of at least six Justices on the lawfulness of diversity as a compelling interest among higher education institutions, as well as the legitimacy of a limited and nuanced consideration of race to achieve those goals. *See Grutter*, 539 U.S. at 325-26, 334, 337; *id.* at 387-88 (Kennedy, J., dissenting) (agreeing with the Majority that "[o]ur precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence;" but disagreeing as to the way in which that standard was applied by the Majority on the *Grutter* facts).

Moreover, a mere four years later, *all nine* Justices agreed that *Grutter* had established the operative legal framework that permitted postsecondary institutions to pursue diversity-related goals that could justify race-conscious admissions practices. *See PICS,* 551 U.S. at 722; *id.* at 837 (Breyer, J., dissenting).

Absent clear and compelling evidence that the principles articulated in *Bakke,* as affirmed and expanded upon in *Grutter* and *Gratz,* have been routinely ignored or misapplied, or have had unintended and unconstitutional systemic consequences in their implementation—and such evidence does not exist—any dilution of this Court's precedent is simply not justified. In fact, such action likely would have significant adverse consequences—affecting education institutions, the students they serve, and the goals they seek to achieve for the benefit of all in society.

The time, effort, and fiscal cost to higher education institutions of all kinds to understand the Court's guidance and then faithfully to apply it in multiple settings, are simply incalculable. *See supra* note 26 and accompanying text. Given the significant investment in the development of policies and practices that conform to the *Grutter* and *Gratz* framework and principles, the disruption and cost to higher education institutions resulting from a material change in that framework would be immense. Indeed, such a change in legal standards affecting colleges and universities would have an impact well beyond the words in discrete policies affecting enrollment practices. The impact would be felt in an overhaul of staff development and training materials; materials developed for the education of students, parents, and the public to describe those policies and practices (including, as necessary, governing board deliberations and approval of key changes); a reorientation of other related policies and practices connected to, but distinct from, admissions policies and practices; and more. In short, among institutions where diversity goals are mission-central and where discrete race-conscious practices support those goals, the very fabric of institutional action on many campuses likely will be undone if a core thread affecting institutional priorities is removed or significantly cut.

This kind of impact also likely would occur beyond the walls of postsecondary institutions. *See PICS,* 551 U.S. at 791 (Kennedy, J., concurring in part and concurring in the judgment) (explaining that the compelling interest in diversity in higher education "help[ed] inform the...inquiry" regarding elementary and secondary diversity goals). Among elementary and secondary educators, the principles of *Bakke, Grutter,* and *Gratz* have established important foundations for action, amplified by this Court's 2007 decision in *PICS.* *See* sources cited *supra* notes 25 and 26.

Second, and importantly, such action likely would chill the environment in which so many institutions are working to explore and innovate within the current parameters of federal law. In the postsecondary context, colleges and universities are different. Missions and policies are different. Personnel responsible for executing and implementing policies are different. Thus, even within a common framework and set of standards, the ability to find the best ways to adapt policies to practice to achieve success is varied; and the need to preserve institutional and individual creativity and innovation within a rigorous but context-sensitive framework is essential if higher education institutions are to achieve their potential—and more importantly, help the students they serve realize theirs.

Correspondingly in the elementary and secondary setting, a re-reading of *Grutter* that eliminates its fundamental support for the rule that race may be utilized within certain strictures to achieve a school's interest in diversity could adversely affect the implementation of voluntary diversity programs in public school districts. Without *Grutte*r to buttress the current understanding of *PICS* that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue," *PICS*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in the judgment), public schools could feel compelled to abandon their good faith efforts to afford the educational benefits of diversity to their students. In other words, without the protective umbrella that *Grutter* provides to color the understanding of an elementary or secondary school's compelling interest in the wake of *PICS*, schools may be unwilling to voluntarily explore avenues for diversity in their classrooms that could both diminish the harms of racial isolation and enhance the benefits of diversity for all students. *Id.* at 788. To limit *Grutter* would be to ignore this reality and needlessly restrict the prospects for schools to address the educational needs of their students.

This Court has for decades recognized and valued the special role that education in America serves, including its connection to helping future generations find their paths, achieve their potential, and succeed in their contributions to the communities in which they live. *Grutter*, 539 U.S. at 331; *Brown v. Bd. of Educ.* 347 U.S. 483, 493 (1954). As this Court recognized, "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. This is but one part of a broader quest by educators throughout our nation—all of whom should have at their disposal every legitimate strategy and tool to achieve their goals. The limited consideration of race and ethnicity in admissions—consistent with the principles of *Bakke, Grutter*, and *Gratz*—is among those strategies and tools, and should be preserved in line with this Court's well-established, long-standing precedents.

CONCLUSION

For the foregoing reasons, and those in Respondents' brief, the judgment below should be affirmed.

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APPENDIX A

AMICI CURIAE

American Association of College Registrars and Admissions Officers—a professional association of more than 11,000 higher education admissions and registrations professionals who represent more than 2,600 institutions and agencies in over 40 countries.

American Association of Colleges for Teacher Education—membership of 800 public and private colleges and universities in every state, the District of Columbia, the Virgin Islands, Puerto Rico, and Guam.

American Association of School Administrators—membership of more than 13,000 educational leaders, including chief executive officers, superintendents, and senior level school administrators, in the United States and throughout the world.

Association of Teacher Educators—individual membership organization devoted solely to the improvement of teacher education both for school-based and postsecondary teacher educators, with members representing over 700 colleges and universities, over 500 major school systems, and the majority of state departments of education.

Council of Chief State School Officers—a nonpartisan, nationwide, nonprofit organization of public officials who head departments of elementary and secondary education in the states, the District of Columbia, the Department of Defense Education Activity, and five U.S. extra-state jurisdictions. CCSSO provides leadership, advocacy, and technical assistance on major education issues. The Council seeks member consensus on key educational issues and expresses their view to civic and professional organizations, federal agencies, Congress, and the public.

Horace Mann League—perpetuates the ideals of Horace Mann, the founder of American public school systems, to strengthen the public school system of the United States.

National Association for College Admission Counseling— a non-profit education association of more than 12,000 secondary school counselors, independent counselors, college admissions and financial aid officers, enrollment managers, and organizations that work with students as they make the transition from high school to postsecondary education.

National Association of Independent Schools—represents over 1,400 independent elementary and secondary schools in the United States. NAIS member schools are implicated by the present case to the extent the schools receive federal funds.

National Association of Secondary School Principals—represents more than 25,000 members, including principals, assistant principals, and aspiring school leaders from across the United States and more than 45 countries around the world.

Public Education Network—network of community based organizations in high poverty school districts across the country devoted to increasing quality of public education and engaging the public in their communities.

Texas Association of School Boards Legal Assistance Fund—advocates the interest of nearly 800 public school districts in Texas in litigation with potential statewide impact.

APPENDIX B

MISSION STATEMENTS

Austin College[27]

Austin College is a private, residential, co-educational college dedicated to educating undergraduate students in the liberal arts and sciences while also offering select pre-professional programs and a graduate teacher education program. Founded by the Presbyterian Church in 1849, Austin College continues its relationship with the church and its commitment to a heritage that values personal growth, justice, community, and service. An Austin College education emphasizes academic excellence, intellectual and personal integrity, and participation in community life. Thus Austin College affirms the importance of:

- A community that through its size, diversity, and programs fosters lively intellectual and social interaction among persons of different origins, experiences, beliefs, accomplishments, and goals.
- A program that does not discriminate with regard to religion or creed, gender, gender identity, sexual orientation, national or ethnic origin, physical disability, age, or economic status.
- A faculty that acknowledges teaching, sustained by active commitment to

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[27] ***Mission***, AUSTIN COLLEGE, http://www.austincollege.edu/about/mission (last visited July 27, 2012).

professional growth and development, as its primary responsibility.

- A student body of committed learners, actively involved in the programs of the college and in service to the greater community.
- A climate of civility and respect that encourages free inquiry and the open expression of ideas.
- A non-sectarian education that fosters the exploration and development of values through an awareness of the world's religious, philosophical, and cultural traditions.

The mission of Austin College is to educate students in the liberal arts and sciences in order to prepare them for rewarding careers and for full, engaged, and meaningful lives.

Dartmouth University[28]

OUR CORE VALUES

Dartmouth expects academic excellence and encourages independence of thought within a culture of collaboration.

Dartmouth faculty are passionate about teaching our students and are at the forefront of their scholarly or creative work.

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[28] *Mission Statement*, DARTMOUTH UNIVERSITY, http://www.dartmouth.edu/~jameswright/archive/mission/index.html (last visited July 27, 2012).

Dartmouth embraces diversity with the knowledge that it significantly enhances the quality of a Dartmouth education.

Dartmouth recruits and admits outstanding students from all backgrounds, regardless of their financial means.

Dartmouth fosters lasting bonds among faculty, staff, and students, which encourage a culture of integrity, self-reliance, and collegiality and instill a sense of responsibility for each other and for the broader world.

Dartmouth supports the vigorous and open debate of ideas within a community marked by mutual respect.

Texas Tech University[29]

As a public research university, Texas Tech advances knowledge through innovative and creative teaching, research, and scholarship. The university is dedicated to student success by preparing learners to be ethical leaders for a diverse and globally competitive workforce. The university is committed to enhancing the cultural and economic development of the state, nation, and world.

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[29] *Mission Statement*, TEXAS TECH UNIVERSITY, http://www.ttu.edu/about/mission.php (last visited July 27, 2012).

The University of Maryland[30]

Vision Statement

During the next decade, the University of Maryland will enhance its standing as a world-class, preeminent institution of higher education. The University will achieve this goal through an unwavering commitment to excellence in all that it undertakes. The University will attract a diverse student body that possesses the ability and passion for learning. Innovative and relevant programs, whether within or built upon traditional disciplines in the arts and sciences, will prepare students to be engaged and self-realized citizens and leaders in a complex, democratic society. The University will foster research, scholarship, and arts programs noted for their quality, creativity, and impact, and provide affordable access. As befits its proximity to the nation's capital, the University will expand its international influence and address great and challenging problems of our time. Taking maximum advantage of its special location, the University will be a world center for creation and refinement of knowledge; advancement in science and technology, humanities, and social sciences; global leadership; and innovative production in the creative and performing arts.

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[30] *Vision Statement*, THE UNIVERSITY OF MARYLAND, http://www.provost.umd.edu/vision_statement.cfm (last visited July 27, 2012).

The University of North Carolina at Chapel Hill[31]

The University of North Carolina at Chapel Hill, the nation's first public university, serves North Carolina, the United States, and the world through teaching, research, and public service. We embrace an unwavering commitment to excellence as one of the world's great research universities.

Our mission is to serve as a center for research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders. Through the efforts of our exceptional faculty and staff, and with generous support from North Carolina's citizens, we invest our knowledge and resources to enhance access to learning and to foster the success and prosperity of each rising generation. We also extend knowledge-based services and other resources of the University to the citizens of North Carolina and their institutions to enhance the quality of life for all people in the State.

With *lux, libertas*—light and liberty—as its founding principles, the University has charted a bold course of leading change to improve society and to help solve the world's greatest problems.

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[31] *Mission Statement of the University*, THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, http://oira.unc.edu/facts-and-figures/general-information-about-the-university/mission-statement-of-the-university.html (last visited July 27, 2012).

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF *AMICI CURIAE* OF CONSTITUTIONAL LAW SCHOLARS AND CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

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Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998) 9, 14, 15

INTEREST OF *AMICI CURIAE*

The following scholars are experts in the field of constitutional law, each of whom has published a book or law review article on the Fourteenth Amendment. *Amici* law professors teach courses in constitutional law and have devoted significant attention – in some cases, for several decades – to studying the Fourteenth Amendment:

Bruce Ackerman, Sterling Professor of Law and Political Science, Yale Law School.

Vikram Amar, Associate Dean for Academic Affairs and Professor of Law, University of California at Davis School of Law.

Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment.

Burt Neuborne, Inez Milholland Professor of Civil Liberties, New York University School of Law.

James E. Ryan, William L. Matheson & Robert M. Morgenthau Distinguished Professor of Law, University of Virginia School of Law.

Adam Winkler, Professor of Law, UCLA School of Law.

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the Fourteenth Amendment's protections. CAC has filed *amicus curiae* briefs in the U.S. Supreme Court in cases raising significant issues regarding the text and history of the Fourteenth Amendment, including *Northwest Austin Municipal Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Fisher contends that the University of Texas at Austin's use of race as one factor in its holistic admissions policy runs afoul of the "'central mandate' of equal protection: 'racial neutrality in governmental decisionmaking.'" Pet. Br. at 24 (quoting *Miller v. Johnson*, 515 U.S. 900, 904 (1995)). Fisher's claim that the Constitution requires UT-Austin to employ a color-blind admissions procedure cannot be squared with the text and history of the Fourteenth Amendment or this Court's cases.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

Far from establishing a constitutional ban on the use of race by the government, the Framers of the Fourteenth Amendment rejected proposals to prohibit all racial classifications by the government. Indeed, the Reconstruction Congress enacted a long list of race-conscious legislation to ensure equality of opportunity to all persons regardless of race. These acts were not limited to the former slaves or the goal of redressing badges of slavery or other race-based government action; rather, like UT-Austin's use of race under review here, the race-conscious measures enacted by the Framers of the Fourteenth Amendment were forward-looking in design, seeking to ensure equality of opportunity for African Americans and fulfill the promise of equality contained in the Fourteenth Amendment.

At the heart of these race-conscious government measures were federal efforts to ensure equality of educational opportunity for African Americans. Recognizing the importance of providing pathways to leadership and professional life for African Americans, the federal government established schools and colleges throughout the South, making it possible for African Americans to realize the full potential of the freedom secured by the Civil War Amendments. The Framers also provided chaplains to assist in the education of African American soldiers. The Reconstruction Framers thus recognized that in certain contexts it was permissible to use race – indeed, to classify on account of race – to help ensure that educational opportunities were available to all regardless of race. Fisher's contrary view – that UT-Austin may take into account every sort of diversity except for racial diversity – would turn the Fourteenth Amendment on its head.

In line with the Fourteenth Amendment's text and history, this Court's cases have consistently held that the government may use race as a factor in selecting a student body with a critical mass of diverse, academically accomplished students to admit to its public colleges and universities, so long as the university ensures individualized consideration to the diverse background and qualification of all persons regardless of race. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *see also Parents Involved In Community Schools v. Seattle School Dist., No. 1*, 551 U.S. 701, 787-89 (2007) (Kennedy, J., concurring). Applying strict scrutiny, *Bakke* and *Grutter* establish that use of race as a factor in selecting a student body with a critical mass of diverse students can withstand the rigorous judicial review that this Court has applied to judge the constitutionality of governmental racial classifications. As UT-Austin demonstrates, see UT Br. at 23-28, the University's holistic admissions policy comports in all respects with *Bakke* and *Grutter*.

Fisher's brief in this case argues that the Fifth Circuit failed to heed basic constitutional first principles concerning the meaning of the Fourteenth Amendment's guarantee of equal protection of the laws to all persons. But it is Fisher who has lost sight of our Constitution's text, history, and original meaning. Fisher's plea to rewrite the text and history of the Fourteenth Amendment and cast aside decades of settled Supreme Court precedent upholding the sensitive use of race in university admissions should be rejected.

ARGUMENT

I. The Text and History of the Fourteenth Amendment Permit Governments To Enact Race-Conscious Measures To Ensure Equality of Opportunity To All Persons Regardless of Race.

The Fourteenth Amendment, in relevant part, provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, §1. Rejecting efforts to establish a constitutional proscription solely on racial discrimination, the Framers of the Fourteenth Amendment wrote a broad universal guarantee of equality that swept men and women of all races and groups into its coverage. As Justice Kennedy has explained, "[t]hough in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color, or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring). Rather than simply prohibiting discrimination on account of race or previous condition of servitude, "[t]he fourteenth amendment extends its protection to races and classes, and prohibits any state legislation, which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *Civil Rights Cases*, 109 U.S. 3, 24 (1883).

In choosing the broader language of equal protection, the Framers of the Fourteenth Amendment established an all-encompassing guarantee of equality under the law in order to protect, among other persons, newly freed slaves,[2] white Union sympathizers residing in the South,[3] and Chinese immigrants in the West[4] from state-sponsored discrimination. As the text of the Equal Protection Clause makes clear, every person in this country can invoke its universal guarantee of equality. In this respect, the Framers of the Fourteenth Amendment established that "in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). As its Framers explained, the Equal Protection Clause "abolishes all class legislation," "does away with the injustice of subjecting one caste of persons to a code not applicable to another," and "establishes equality before the law." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard). In their view, the "words caste, race, color," were "ever unknown to the Constitution." *Id.* at 630 (Rep. Hubbard).

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[2] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xiii (1866) (explaining that "[i]t was impossible to abandon [the newly freed slaves] without securing them their rights as free men and citizens").

[3] Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (Rep. Bingham) ("The adoption of this amendment is essential to the protection of Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been at arms against them"); *id.* at 1263 (Rep. Broomall) ("[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country").

[4] Cong. Globe, 39th Cong., 1st Sess. 1090 (Rep. Bingham) (arguing that "all persons, whether citizens or strangers within this land" should "have equal protection in every State in this Union in the rights of life and liberty and property"); Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870) (Sen. Stewart) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . .; let them be protected by all the laws and the same laws that other men are.").

At the same time, in writing the text, the Framers recognized that, after a century of racial slavery, the Constitution could not be simplistically color-blind. Faced with the task of fulfilling President Abraham Lincoln's promise of a "new birth of freedom," and integrating African Americans into the civic life of the nation, the Framers of the Fourteenth Amendment concluded that race-conscious efforts were appropriate to further "the legitimate interest government has in ensuring all people have equal opportunity regardless of their race." *Parents Involved In Community Schools v. Seattle School Dist., No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring). The Fourteenth Amendment's Framers time and again rejected proposed constitutional language that would have precluded race-conscious measures designed to assist African Americans in the transition to their new status as equal citizens.[5]

Not only did the Reconstruction Framers reject proposed constitutional language that would have prohibited race-conscious efforts to guarantee equality of opportunity, but, contemporaneous with the drafting and passage of the Fourteenth Amendment, they enacted a long list of race-conscious legislation to help ensure that the Amendment's promise of equality would be a reality for African Americans. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-84 (1985) (cataloguing race-conscious measures enacted by Framers of the Fourteenth Amendment); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 429-32 (1997) (same); JACK M. BALKIN, LIVING ORIGINALISM 223, 417 n.20 (2011) (same). The Framers of the Fourteenth Amendment recognized that forward-looking, race-conscious measures would help fulfill the promise of equality contained in the Fourteenth Amendment, "break down discrimination between whites and blacks," and "ameliorat[e] of the condition of the colored people." Cong. Globe, 39th Cong. 1st Sess. 632 (1866) (Rep. Moulton).

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[5] *See* Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (proposing that "[a]ll national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color"); JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865-1867, at 46 (Benjamin B. Kendrick ed. 1914) (proposing that "all laws, state or national, shall operate equally and impartially on all persons without regard to race or color"); *id.* at 83 (proposing that "[n]o discrimination shall be made . . . as to the civil rights of persons because of race, color, or previous condition of servitude").

In the debates over these legislative acts, the Reconstruction Framers repeatedly rejected their opponents' arguments that race-conscious legislation was inconsistent with the principle of equality under the law because it classified people on the basis of race. In the Framers' view, efforts to ensure equality of opportunity and assist African Americans in securing the full measure of freedom promised in the Civil War Amendments were consistent with, not contrary to, the new constitutional guarantee of equality.

The Reconstruction Framers' principal effort to assist the newly freed slaves in the transition from slavery to freedom was the creation of the Freedmen's Bureau. Enacted in 1865 and expanded in 1866 to ensure that "the gulf which separates servitude from freedom is bridged over," Cong. Globe, 39th Cong., 1st Sess. 2779 (1866) (Rep. Eliot), the Freedmen's Bureau "provided its charges with clothing, food, fuel, and medicine; it built, staffed, and operated their schools and hospitals; it wrote their leases and their labor contracts, [and] rented them land . . . ." Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 559 (1998). As the Framers explained, "[h]aving made the slave a freeman, the nation needs some instrumentality which shall reach every portion of the South and stand between the freedman and oppression," Cong. Globe, 39th Cong., 1st Sess. 585 (1866) (Rep. Donnelly), and "protect them in their new rights, to find employment for the able-bodied, and take care of the suffering . . . ." *Id.* at 937 (Sen. Trumbull); *see also id.* at 2779 ("[W]e have struck off their chains. Shall we not help them to find homes? . . . .We have not let them know the meaning of the sacred name of home.") (Rep. Eliot).

While the Act's provisions extended to freed slaves as well as refugees of any race, whose lives had been devastated during the war, the Act gave the two groups different benefits. The Act, as expanded in 1866, authorized the Bureau to "aid" the newly freed slaves in any manner "in making the freedom conferred by proclamation of the commander in chief, by emancipation under the laws of States, and by constitutional amendment," while providing support to "loyal refugees" only to the extent "the same shall be necessary to enable them . . . to become self-supporting citizens . . . ." Freedmen's Bureau Act, § 2, 14 Stat. 173, 174 (1866). Further, the Act's educational provisions permitted the Bureau's commissioners to use, sell, or lease certain property in the former Confederacy abandoned during the Civil War for "the education of the freed people." *Id.* at § 12, 14 Stat. at 176.

Congressional opponents of the Fourteenth Amendment and Reconstruction denounced the Act as discriminatory, arguing that it "make[s] a distinction on account of color between the two races," Cong. Globe, 39th Cong., 1st Sess. 397 (1866) (Sen. Willey). Using the same terminology the

Amendment's Framers had used in describing the Equal Protection Clause, Democrats in Congress denounced the Freedmen's Bureau Act as "class legislation," *id.* at 2780 (Rep. LeBlond); *see also id.* at 649 (Rep. Trimble); *id.* at app. 69-70 (Rep. Rousseau), that treats "freedmen" not "equal before the law, but superior" directly "in opposition to the plain spirit . . . of the Constitution that congressional legislation should in its operation affect all alike." *Id.* at 544 (Rep. Taylor). Likewise, President Andrew Johnson cited the "danger of class legislation" in twice vetoing the Act, 6 MESSAGES AND PAPERS OF THE PRESIDENTS 422, 425 (James D. Richardson ed. 1897) (veto message of July 16, 1866), arguing that there was no legitimate reason why the Freedmen's Bureau "should be founded for one class or color of our people more than one another." *Id.* at 401 (veto message of Feb. 19, 1866).

The Reconstruction Framers in Congress resoundingly rejected these arguments. They explained that "the very object of the bill is to break down discrimination between whites and blacks" and to make possible "the amelioration of the condition of the colored people," Cong. Globe, 39th Cong., 1st Sess. 632 (1866) (Rep. Moulton), and that race-conscious measures were appropriate "to make real to these freedmen the liberty you have vouchsafed to them," noting that "[w]e have done nothing to them, as a race, but injury." *Id.* at 2779 (Rep. Eliot). On July 16, 1866, barely a month after sending the Fourteenth Amendment to the States for ratification, Congress, by votes of 104-33 in the House and 33-12 in the Senate, overrode President Johnson's veto of the Act. *Id.* at 3842, 3850.

Particularly important here, in approving the Freedmen's Bureau, the Framers of the Fourteenth Amendment recognized that education is "the very foundation of good citizenship," *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and that race-conscious efforts to guarantee equal educational opportunity were necessary to integrate African Americans into the civic life of the nation. Providing an equal educational opportunity for the newly freed slaves was the signature achievement of the Freedmen's Bureau, "the foundation upon which all efforts to assist the freedmen rested . . . ." ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 144 (1988). By 1869, at a time when public education in the South was still in a skeletal state, *see Brown*, 347 U.S. at 489-90, "nearly 3,000 schools, serving over 150,000 pupils reported to the Bureau," helping to "lay the foundation for Southern public education." FONER, *supra*, at 144. Among African Americans, the conviction that "'knowledge is power'" drew "hundreds of thousands, adult and children alike to the freedmen's schools, from the moment they opened . . . ." LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 473, 474 (1979).

The Freedmen's Bureau also "provided funds, lands, and other assistance to help establish more than a dozen colleges and universities," Schnapper, *supra*, at 781, recognizing the importance of providing pathways to leadership and professional life for African Americans. *See id.* at 781-82 (discussing Bureau's assistance in establishing Howard University, which was open to students of all races but made special provisions for the education of freed slaves).

Championing these race-conscious efforts, the Framers explained that "th[e] Bureau, while it protects and directs the negro, may educate him, and fit him to protect and direct himself . . . ." Cong Globe, 39th Cong., 1st Sess. 585 (1866) (Rep. Donnelly); *see also id.* at 656 (observing that Freedmen's Bureau Act is designed to "lift them from slavery into the manhood of freedom, to clothe the nakedness of the slave, and to educate him into that manhood") (Rep. Eliot). Race-conscious education measures were meant to facilitate African Americans' transition to becoming self-sustaining citizens, while also enlightening young minds and breaking down prejudices. "Education has here fused all nations into one; it has obliterated prejudices; it has dissolved falsehoods; it has announced great truths; it has flung open all doors . . . ." *Id.* at 586 (Rep. Donnelly).

While the Freedmen's Bureau Act and its education-related provisions were at the heart of Reconstruction-Era efforts to assist African Americans in the transition from slavery to citizenship, Congress also enacted numerous race-conscious measures to ensure equality of opportunity to all persons regardless of race that were not limited to the newly freed slaves. The Reconstruction Framers designed these acts to be forward-looking in design, helping to fulfill the Fourteenth Amendment's promise of equality rather than remedying specific discriminatory practices.

For example, in 1866 and 1867, Congress enacted legislation designed to protect the rights of African American soldiers to receive bounties for enlisting in the Union Army. Concerned that African American soldiers who had served the Union in the Civil War were being cheated out of their bounties by the fraudulent acts of claims agents, Congress enacted race-conscious anti-fraud measures to ensure that African American soldiers, in fact, obtained the bounties to which they were entitled to for their military service. *See* Joint Resolution of July 26, 1866, No. 86, 14 Stat. 367, 368 (fixing the maximum fees chargeable by an agent to collect a bounty on behalf of "colored soldiers"); Resolution of Mar. 29, 1867, No. 25, 15 Stat. 26, 26-27 (providing for payment to agents of "colored soldiers, sailors, or marines" by the Freedmen's Bureau); *see also* Act of Mar. 3, 1869, ch. 122, 15 Stat. 301, 302 (appropriating money for "collection and payment of bounty, prize-money and other legitimate claims of colored soldiers and sailors"); Act of Mar. 3, 1873, ch. 127, 17 Stat. 510, 528 (same). *See also* Siegel, *supra*, at 561 (observing that these measures resulted in "the creation of special protections for black, but not white, soldiers").

Opponents of Reconstruction in Congress denounced these additional measures to protect the rights of African American soldiers as "class legislation" and argued that "there is no reason . . . why we should pass a law such as this applicable to colored people and not apply it to white people," Cong. Globe, 40th Cong., 1st Sess. 79 (Sen. Grimes) (1867). The Framers of the Fourteenth Amendment firmly rejected the argument that Congress could not adopt race-conscious measures to protect African American soldiers from fraud and ensure that "the balance of this little bounty shall get into the hands of the soldier himself, so that he shall have the money to spend either in the education of himself or of his children." *Id.* at 444 (Rep. Scofield). Emphasizing that "[w]e have passed laws that made it a crime for them to be taught," the Reconstruction Framers concluded that it was permissible to enact race-conscious measures "to protect colored soldiers against the fraudulent devices by which their small bounties are taken away from them." *Id.*

Further, the Reconstruction Congress also established a bank, the Freedman's Savings and Trust Company, for "persons heretofore held in slavery in the United States or their descendants," Act of March 3, 1865, § 5, 13 Stat. 510, 511; BALKIN, *supra*, at 417 n.20 (observing that "because of the addition of the words 'their descendants' . . . the bill was not restricted to assisting only former slaves"); provided for the appointment of one chaplain "for each regiment of colored troops, whose duty shall include the instruction of the enlisted men in the common English branches of education," Act of July 28, 1866, ch. 299, § 30, 14 Stat. 332, 337; Siegel, *supra*, at 560-61 (noting that "chaplains for white troops had no similar responsibilities, and education for white troops remained an unfunded 'optional service' during and after Reconstruction"); appropriated money "[f]or the 'National association for the relief of destitute colored women and children," Act of July 28, 1866, ch. 296, 14 Stat. 310, 317, a corporation created three years earlier by Congress "for the purpose of supporting . . . aged or indigent and destitute colored women and children," Act of Feb. 14, 1863, ch. 33, 12 Stat. 650, 650; and appropriated money "for the relief of freedmen or destitute colored people in the District of Columbia," Resolution of March 16, 1867, No. 4, 15 Stat. 20. Like other Reconstruction-era race-conscious legislation, these measures were not limited to assisting newly freed slaves and were not designed to remedy specific forms of racial discrimination; indeed, many "expressly refer[red] to color in the allotment of federal benefits," Rubenfeld, *supra*, at 431, in order to "ameliorat[e] the condition of the colored people." Cong Globe, 39th Cong., 1st Sess. 632 (1866) (Rep. Moulton). *See also* BALKIN, *supra*, at 223 (noting that the Reconstruction Framers provided federal benefits to African Americans "regardless of whether they were newly freed slaves").

In writing the text of the Fourteenth Amendment and in adopting race-conscious measures to fulfill the promise of that Amendment, the Framers rejected "an all-too-unyielding insistence that race cannot be a factor," *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring), concluding that government may properly take race into account to "ensur[e] all people have equal opportunity regardless of their race." *Id.* at 788 (Kennedy, J., concurring). While the Framers were intent on preventing state-sponsored racial discrimination and ensuring that the "words caste, race, [or] color," were "ever unknown to the Constitution," Cong. Globe, 39th Cong., 1st Sess. 630 (Rep. Hubbard), they concluded that race-conscious governmental measures were appropriate to ensure equal opportunities and remedy racial inequalities.

Thus, the text and history of the Fourteenth Amendment, including the efforts of the Framers to "expand the promise of liberty and equality" and to "confront the flaws and injustices that remain," *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring), establish that government may, consistent with the guarantee of equal protection, seek to use race-conscious measures in certain circumstances to ensure equality of opportunity for all persons regardless of race. The notion that, in *all* circumstances, the Constitution must be color-blind, prohibiting all race-conscious assistance, is inconsistent with "the history, meaning, and reach of the Equal Protection Clause." *Id.* at 782-83 (Kennedy, J., concurring).

II. This Court's Precedents Reflect the Reconstruction Framers' Judgment that Race-Conscious Measures Are Appropriate To Ensure Equal Educational Opportunity To All Persons Regardless of Race.

A. Case Law Establishes that Public Universities May Use Race as a Factor in Selecting a Diverse, Integrated Student Body.

This Court has interpreted the Equal Protection Clause to give effect both to the universal language of the Clause, protecting all persons from discrimination, as well as the Reconstruction Framers' recognition that certain circumstances warrant the use of race-conscious measures to ensure equality of opportunity to all persons regardless of race.

Emphasizing that the Fourteenth Amendment protects "*persons*, not *groups*," this Court held that "governmental action based on race – a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry to ensure that the *personal* right to the equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis in original). This Court has also made clear that "[s]trict scrutiny is not 'strict in theory, but fatal in fact'" and that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 237); *see also Adarand*, 515 U.S. at 228 ("[S]trict scrutiny *does* take 'relevant differences' into account – indeed that is its fundamental purpose. . . . The point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race.").

Accordingly, strict scrutiny cannot be applied to UT-Austin's admissions policy in a vacuum. Instead, strict scrutiny must be applied against the backdrop of constitutional text and history which endorses the use of race-conscious measures to ensure equality of opportunity for all persons regardless of race, as well as in keeping with "our tradition . . . to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring).

As this Court observed in *Adarand*, "[t]he unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups is an unfortunate reality, and the government is not disqualified in acting in response to it." *Adarand*, 515 U.S. at 237; *see also Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that it often does.").

Consistent with the text and history of the Fourteenth Amendment, this Court's cases applying strict scrutiny have recognized that "this Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). In nearly four decades of equal protection jurisprudence, the Court has never wavered from the principle that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples," *Regents of the University of California v. Bakke,* 438 U.S. 265, 313 (1978), and that universities may take race into account "so that all members of our heterogenous society may participate in the educational institutions that provide the training and education necessary to succeed in America." *Grutter*, 539 U.S. at 333.

Nearly thirty-five years ago, in *Bakke*, this Court held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and national origin." 438 U.S.

at 321. Recognizing a compelling state interest in ensuring student body diversity, Justice Powell's plurality opinion explained that an applicant's race or ethnic background may be treated as "simply one element – to be weighed fairly against other elements – in the selection progress," thus "treat[ing] each applicant as an individual in the admissions process." *Id.* at 318. In those circumstances, "[t]he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background . . . would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.* *See also* UT Br. at 23-24.

A quarter of century later, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court upheld the University of Michigan's Law School policy of using race as one factor in admitting a critical mass of diverse, academically accomplished students. Applying strict scrutiny, *Grutter* "endorsed Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in admissions," *id.* at 325, emphasizing that the policy "ensure[d] that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at 337; *see also id.* at 387 (Kennedy, J., dissenting) (agreeing that the "opinion by Justice Powell states the correct rule"). *See also* UT Br. at 24-25.

In line with the text and history of the Fourteenth Amendment described above, *Grutter* recognized that race-conscious measures can assist in achieving equal educational opportunity for all persons regardless of race and fulfilling the Fourteenth Amendment's promise of equality. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible is to be realized." *Id.* at 332. Noting the role of universities in serving as a "training ground for a large number of our Nation's leaders," *Grutter* recognized that it is constitutionally permissible to take race into account to ensure that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332, 333. Thus, consistent with Fourteenth Amendment history, *Grutter* held that the government may enact forward-looking measures that call for the sensitive use of race to foster equality in education.

In 2007, in *Parents Involved v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Court recognized that state and local governments have authority to employ race-conscious measures to combat racial isolation in schools. While no single opinion garnered a majority of the Court, five Justices agreed that school districts have a compelling state interest in using forward-looking, race-conscious measures to fulfill the Constitution's promise of "equal educational opportunity," firmly rejecting the notion that "the Constitution mandates that state and local authorities must accept the status quo of racial isolation in schools." *Id.* at 788 (Kennedy, J., concurring); *id.* at 803 (Breyer, J., dissenting). Importantly, while Justice Kennedy provided the fifth vote to strike down the specific policies under review for "reduc[ing] children to racial chits," *id.* at 798 (Kennedy, J., concurring), his concurring opinion recognized that "it is permissible to consider the racial makeup of schools" and to adopt "race-conscious measures to address the problem," including "general policies to encourage a diverse student body" as well as "more nuanced, individual evaluation of school needs and student characteristics that might include race as a component . . . informed by *Grutter.*" *Id.* at 788, 790 (Kennedy, J., concurring).

B. UT-Austin's Holistic Admissions Policy Is Constitutional Under *Bakke, Grutter,* and *Parents Involved.*

Under the doctrine of *stare decisis,* Fisher faces a heavy burden of explaining why this unbroken line of precedents stretching back more than three decades does not control this case. She cannot satisfy that burden. The University's policy of using race as a factor in admitting a critical mass of diverse, academically accomplished students for the state's flagship public university comports in all respects with the holdings and principles laid out *Bakke, Grutter,* and *Parents Involved.*

As in *Bakke* and *Grutter,* the University's use of race as part of a holistic review of the personal backgrounds and circumstances of applicants for admission satisfies the rigors of strict scrutiny. First, as the Fifth Circuit observed, App. 21a-24a, UT-Austin's holistic admission policy was adopted only after the University extensively studied racial diversity in classrooms and on campus and concluded that race-neutral alternatives alone had not been successful in preventing racial isolation on campus, respecting the principle of using race only "as a last resort to achieve a compelling state interest." *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring). *See also* UT Br. at 43 (noting that "there was jarring evidence of racial isolation at UT" before UT decided to use of race as one factor in UT's holistic admissions policy). As in *Grutter*, the University concluded that "individualized assessments," including consideration of race as one factor among many, were "necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the University." *Grutter*, 539 U.S. at 340.

Second, the University ensures that "each individual receives individual consideration and that race does not become predominant in the admissions decisionmaking." *Grutter,* 539 U.S. at 393 (Kennedy, J., dissenting). To ensure a truly diverse student body, UT-Austin assigns each applicant for admission a personal achievement score designed to recognize students whose accomplishments are not fully reflected in their academic record or test scores. As the Fifth Circuit observed, the University does not single out race for special treatment, but gives "applicants of every race" the opportunity to "highlight their potential diversity contributions, which allows students who are diverse in unconventional ways to describe their unique attributes." App. 46a, 46a-47a. For example, "a white student who has demonstrated a substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same school." App. 46a. Consistent with the Fourteenth Amendment's guarantee of equality for all persons, "all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." *Grutter*, 539 U.S. at 337. *See also* UT Br. at 12-15, 25-26.

Third, as the uncontested record demonstrates, "UT has never established a specific number, percentage or range of minority enrollment . . ., nor does it award any fixed number of points to minority students in a way that impermissibly values race for its own sake." App. 44a; *see also* J.A. 131 (conceding that "UT Austin has not established a goal, target, or other quantitative objective for the admission/enrollment of under-represented minority students"). Contrary to Fisher's unsupported charges, see Pet. Br. at 19, 27, "UT has not admitted students so that its undergraduate population mirrors the demographics of Texas. . . . The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas' African American population, while the Asian-American enrollment is more than five times the percentage of Texan Asian-Americans." App. 45a. In fact, "[t]he summary judgment record shows that demographics are not consulted as part of any admissions decision . . . ." App. 47a. Ensuring genuine diversity in the University's academic community, not racial balancing, drives the University's admissions process. *See also* UT Br. at 29-30.

Finally, the University has improved on the admissions policy upheld in *Grutter*, providing additional protections to ensure that "individual assessment is safeguarded through the entire process." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting). As the Fifth Circuit explained, "[a]dmissions officers reviewing each application are aware of the applicant's race, but UT does not monitor the aggregate racial composition of the admitted applicant pool during the process. The admissions decisions for any particular applicant are not affected . . . by the number of students in her racial group that have been admitted during that year." App. 32a-33a; *see also* UT Br. at 13-15, 26.

This is a stark difference from *Grutter*, where the dissenters pointed to the "consultation of daily reports during the last stages of the admissions process" to show that "there was no further attempt at individual review save for race itself." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting); *id.* at 385 (Rehnquist, C.J., dissenting) (arguing that facts established "careful race based planning"). Here, in sharp contrast, in order to narrowly tailor their admissions policy to the goal of ensuring a diverse student class and ensure that admissions officers "undertake their responsibilities in this most sensitive area with utmost fidelity to the mandate of the Constitution," *id.* at 393 (Kennedy, J., dissenting), the University has adopted procedures that ensure that "each applicant receives individualized consideration and that race does not become a predominant factor in the admissions decisionmaking." *Id.*

UT-Austin's admissions policy guarantees the equal protection of the laws to all of its students, ensuring a diverse and academically accomplished academic community capable of providing pathways to professional life and leadership for all of the state's residents regardless of race. As this Court's precedents in *Bakke*, *Grutter*, and *Parents Involved* establish, UT-Austin has a compelling interest in diversity that justifies its use of race as one factor among many in the University's holistic admissions process. The district court properly rejected Fisher's facial challenge to UT-Austin's policy, and the Fifth Circuit correctly affirmed that judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

NO. 11-345

IN THE
SUPREME COURT OF THE UNITED STATES

ABIGAIL NOEL FISHER,
Petitioner
v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR MINORITY AFFAIRS AT TEXAS A&M, HISPANIC BUSINESS STUDENTS ASSOCIATION AT THE UNIVERSITY OF HOUSTON, SOCIETY OF HISPANIC PROFESSIONAL ENGINEERS AT THE UNIVERSITY OF TEXAS-AUSTIN, UNIVERSITY LEADERSHIP INITIATIVE, AND TEXAS COLLEGE STUDENTS FOR DIVERSITY ALEJANDRA AGUILAR, *ET AL.*

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INTEREST OF AMICI CURIAE

The student *Amici* represented here are Latino and Latina students who have attended, are attending, or may attend colleges and universities in Texas and other Texas students who know that a critical mass of Latino students substantially enhances their educational experience. Each of the represented student organizations is an advocate for Texas students of color, and particularly Latino and Latina students, in colleges and universities around the state.

Amici have a strong interest in this dispute because their educational environment and the quality of their learning experiences are significantly affected by the diversity of the student body at the University. As students and student organizations in Texas, *Amici* know firsthand the benefits of diverse classrooms for the development of critical thinking and leadership skills. *Amici* students are a mix of Top Ten Percent admits and students admitted at the holistic evaluation stage of the admissions process. Regardless of the specific path that led each individual student to higher education, all *Amici* have benefited from the rich learning environment that diversity can provide and many have suffered the isolation that lack of diversity can bring.[1]

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[1] No counsel for a party authored this brief in whole or in part and none of the parties or their counsel, nor any other person or entity other than *amici*, their members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The blended admissions process used by the University of Texas was designed after careful study and analysis to admit a group of individual students who will ensure a rich and effective educational environment. Both the Top Ten Percent policy and the holistic, individualized review conducted to fill the remaining seats at the University serve essential educational goals. As students and former students at colleges and universities around Texas, *amici* have seen firsthand the potential successes of this blended admissions policy. Both parts of the University's blended approach to admissions are essential to its mission to serve the citizens and students of Texas as a flagship institution of higher education and to educate future leaders of this diverse state.

The inclusion of race as one factor in the holistic evaluation is not only legally permissible but also important for admitting a well-qualified student body that brings the broadest set of outlooks to the classroom. Considering race among many factors that may have shaped an individual applicant's perspective recognizes the social realities of the continuing impact of racial experiences in America today. Further, the inclusion of race as one of many factors to be considered in a holistic admissions process that gives each applicant individualized consideration has had a significant positive impact on the diversity of the University's entering classes.

Finally, this case is not an appropriate vehicle for the Court's reconsideration of a significant constitutional question. Petitioners have asked the Court to reverse a decision made less than a decade ago. This fact itself raises serious concerns, and those concerns are exacerbated by the fact that Abigail Fisher's lawsuit does not present the constitutionally required "case" or "controversy." Ms. Fisher, who pursued this case as an individual and not on behalf of a class, is now a college graduate, and therefore no longer able to seek admission to the University of Texas. Moreover, Ms. Fisher never demonstrated that she was in fact harmed by the University's admissions policies in any cognizable way.

ARGUMENT

I. THE UNIVERSITY OF TEXAS EMPLOYS A COMPREHENSIVE ADMISSIONS PROCESS THAT CONSIDERS A BROAD RANGE OF INDIVIDUAL APPLICANT QUALITIES ESSENTIAL TO THE SCHOOL'S EDUCATIONAL MISSION

The blended admissions process used by the University of Texas ("UT" or "the University"), which combines the "Top Ten Percent" ("TTP") component with the non-Top Ten Percent ("non-TTP") admit group, was designed after careful study and analysis to achieve a mix of students that ensures a rich and effective educational environment. This blended admissions approach is precisely the type of innovation that this Court urged schools to experiment with just a decade ago. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). It is, moreover, an example of successful innovation in admissions policies.

Both TTP and non-TTP components of the blended process serve essential educational goals, and the inclusion of race as one factor in the non-TTP evaluation is not only legally permissible but also important for admitting a well-qualified student body that brings the broadest set of experiences and perspectives to the classroom. Both elements of UT's blended approach to admissions – combining a TTP policy with holistic, individualized review – are essential to its mission to serve the citizens of Texas as a flagship institution of higher education.

As students and former students at colleges and universities around Texas, *amici* have seen firsthand the potential successes of this blended admissions policy. *Amici*'s experiences as college students in more and less diverse classrooms have taught them the significant benefits of a broadly diverse learning environment and the importance of seeking a critical mass of Latino students to give voice to the full range of experiences and perspectives that Texas's large Latino community brings to bear.

A. The Top Ten-Percent Policy Rewards Hard-Working Students from Communities Throughout Texas

UT's blended admissions process for in-state students starts with the admission of all applicants who graduated in the top ten percent of their class at a Texas high school. This step in the process has been required by state law since 1997, Tex. Educ. Code §51.803, and most UT students are admitted at this stage. Today state law caps the number of students UT is required to accept under the TTP policy at 75 percent of admits. In 2008, the year Abigail Fisher applied to the University, about 90 percent of the admitted in-state students were TTP admits. JA 414a.

The TTP admissions policy has significant benefits as one piece of an admissions process, particularly in a state as geographically, culturally, and economically diverse as Texas. Texas has historically had the largest rural population in the United States, and while urban communities are continuing to grow at a rate much faster than rural communities, rural Texas remains an important part of the state's culture. *See Texas in Focus: A Statewide View of Opportunities*, *available at* http://www.window.state.tx.us/specialrpt/tif/population.html. Rural communities in Texas are not evenly dispersed throughout the state. West Texas is predominantly rural, while East Texas is dominated by urban areas. *See Rural Texas in Transition*, *available at* http://www.window.state.tx.us/specialrpt/rural/summary.html. These geographic differences significantly impact educational opportunities. *See, e.g.*, Dennis L. Poole & Susannah More, *Participation of Rural Youth in Higher Education: Factors, Strategies, and Innovations*, *available at* http://www.texasrural.org/docs/rural_education_report.pdf.

The state's geographic diversity is matched by extraordinary ethnic and racial diversity. Hispanics are the fastest growing population in Texas, accounting for close to 40 percent of the state's population. *See Texas in Focus*, *supra*. By 2020, demographers estimate that the Hispanic population will outnumber the white population in the state. *Id.* And the growth in the number of Latinos in Texas is happening significantly in rural areas and border communities. *See, e.g.*, Rick Jervis, *Hispanics Guide Huge Growth in Texas, available at* http://www.usatoday.com/ news/nation/census/2011-02-17-texas-census_N.html. In a demographic context like this one, a plan that encourages students from high schools in every part of the state to apply to strong institutions of higher education is essential.

By admitting interested students from the top of every high school in the state, UT increases opportunity for students who might otherwise not have a chance to compete for admission. This is particularly true for students who grow up in rural and poor communities throughout the state because they lack access to many of the college preparatory activities, extracurricular opportunities, and networking contact available to other talented students. For Latinos, who comprise 48 percent of the students in K-12 schools in the state, Pew Hispanic Center, *Demographic Profile of Hispanics in Texas 2010, available at* www.pewhispanic.org/states/state/tx/, this increased opportunity is particularly important. The potential benefit of the TTP plan for Latino students is amplified by the fact that so many high schools are extremely segregated. In a high school that is predominantly Latino, the students in the top ten percent of the class are most likely going to be Latino themselves. *See* Rebecca Leung, *Is The "Top 10" Plan*

Unfair?, *available at* http:// www.cbsnews.com/2100-18560_162-649704.html.[2]

One of the primary benefits of the TTP policy is that it reduces UT's over-reliance on SAT scores in the admissions process. SAT scores may be reasonable predictors of a student's GPA in the first year of college. *See, e.g.*, John L. Hoffman and Katie E. Lowitzki, *Predicting College Success with High School Grades and Test Scores: Limitations for Minority Students*, 28 Rev. Higher Ed. 455, 456 (2005) (noting substantial literature suggesting that SAT scores are "general strong predictors" of academic achievement). *But see* Jesse M. Rothstein, *College Performance Predictions and the SAT*, 121 J. Econometrics 297, 316 (2004) (demonstrating that claims about the SAT's predictive power are backed by flawed validity studies). But a student's first-year GPA is an entirely separate matter from overall college contributions or success or, more broadly, contributions or success in a career or as a community leader. *Cf.* Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Soc. Inquiry 395 (2006) (study finding that LSAT scores may predict law school grades, but do not accurately predict career success or satisfaction).

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[2] It certainly bears mentioning that the TTP policy is only effective for those students who choose to apply to UT. The increased opportunity for Latino students graduating at the top of their classes would be greater if incentives to apply were more readily available. *See* Angel L. Harris and Marta Tienda, *Hispanics in Higher Education and the Texas Top 10% Law*, 4 Race & Social Problems 57 (2012).

Moreover, "[t]he SAT simply recapitulates . . .all of the class advantages, all of the access advantages . . .in the K-12 experiences of the student." Christopher Edley, quoted in Daren Bakst, ed., *Hopwood, Bakke, and Beyond: Diversity on Our Nation's Campuses* 81 (Washington, D.C.: American Association of Collegiate Registrars and Admissions Officers, 1998). For students in rural communities and in poorer urban neighborhoods, prep classes for the SAT and other standardized tests are not easily available. When universities put excessive weight on these test scores, students who lack access to preparatory resources are significantly disadvantaged. The TTP policy takes a step toward leveling the playing field for these top students. For many Latino students in Texas, the TTP plan has therefore increased educational opportunities. These successes, however, do not support the assertion that the TTP has accomplished UT's pursuit of diversity or of including a critical mass of Latino students. That this is a positive step does not mean that there is not important need for additional efforts.

The TTP policy also has the virtue of rewarding the hard work and focus it takes to graduate at the top of your high school class. Like over-reliance on the SAT, however, a narrow focus on the numbers reflected in a high school GPA misses fundamental aspects of the myriad forms of "merit" that make great college students and that together make a great college class. A TTP policy does not capture students who were leaders in their class or community, but may have been late bloomers academically. It does not capture the Latino student for whom English was a second language, and whose hard work mastering the language and other substantive classes make him well-qualified for a UT education even though he didn't make it into the top ten percent of his class. It may not capture the athletes, the musicians, the community activists, the artists, the poets, or the many other significant contributors to an intellectual community whose skills may not show up in a purely numerical analysis. And it does not cover those young students who have overcome remarkable barriers to reach a level of success that may be outside the 10 percent cutoff, but that speaks of potential well beyond those numbers. For these students, the more holistic approach, which recognizes merit beyond simple grades, is an essential component of the system.

B. The Holistic, Individualized Approach to Selecting the Remaining Admits is Essential to UT's Core Educational Mission and Values, Among Them the Goal of Including a Critical Mass of Latino Students

For the remaining available seats in UT's freshman class, students are selected through a "highly individualized, holistic review," *Grutter*, 539 U.S. at 334-37, which balances academic, leadership, and service potential with the individual qualities a student would bring to the University. At this stage of the admissions process, UT seeks students from different cultural, linguistic, geographic, educational, racial and socio-economic backgrounds. The school also looks at an individual applicant's diversity of experience with work, volunteerism, and internships.[3] The goals of this stage of the admissions process, together with the TTP cohort, are to matriculate qualified, diverse individuals; to enhance the educational experience of all students; and to identify and train leaders for the next generation.

The holistic, individualized evaluation at this stage of the admissions process, and its inclusion of race as one of the many factors to be considered in the individualized assessment process, is essential to the University's overarching educational goals. At this stage in the admissions process, the University can consider the elements of merit that may be excluded from the TTP admissions policy. It is at this stage that students who bring unique non-academic talents, who have conquered unique and challenging personal hardships, and who have demonstrated initiative and leadership in their communities, their families, and their avocations may be considered for admission. Without this step in the admissions process, UT would not be able to admit many students whose inclusion in a broadly diverse class maximizes critical thinking, civic participation, and training for leadership in our diverse workplaces and in our democratic society.

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[3] As explained in detail in Respondent's Brief, the holistic review undertaken at this second stage of UT's admissions process involves a weighing of an Academic Index ("AI") and a Personal Achievement Index ("PAI") for each applicant. The PAI ranks each applicant on a scale of 1-6 based on the applicant's average score on two required essays, together with the applicant's "personal achievement score"—which takes into account leadership, extracurricular activities, honors and awards, work experience, community service, and special circumstances. The "special circumstances" that UT considers include the applicant's socioeconomic background; whether the applicant is from a single-parent home; the socioeconomic status of the applicant's high school; the language primarily spoken in the applicant's home; any special family responsibilities the applicant may have had; the average SAT/ACT scores at the student's high school compared to the student's own score; and the applicant's race or ethnicity. Each component of the personal achievement score is considered in the context of the applicant's entire file. *See* Resp. Br. at 12-15.

As UT recognized in implementing its current admissions policy, "[a] comprehensive college education requires a robust exchange of ideas, exposure to different cultures, preparation for the challenges of an increasingly diverse workforce and acquisition of competencies required of future leaders." SJA 23a. Before implementing the policy, UT conducted a thorough evaluation of whether including race in its holistic admissions review was a necessary step toward the University's goal of "provid[ing] an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society." *Id.* at 25a.

What the University found in this evaluation was that its pre-2004 policy was not successful in promoting the kind of full, broad diversity needed to maximize educational benefits. "In short, from a racial, ethnic, and cultural standpoint, students at the University are currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow." *Id.* at 25a-26a.

This failure manifested itself both in a lack of overall diversity, reflected in student dissatisfaction with the level of diversity in their classrooms, and also in a sense of classroom isolation among UT's Latino students and other students of color. JA 432a. UT also undertook a classroom study in 2002 that showed that 90 percent of undergraduate classes of participatory size (defined as a class of 5-24 students) had only one or no African-American students, and 43 percent of these classes had one or no Hispanic students. SJA 26a, Table 8. Even in the larger lecture classes, the number of students of color was extremely low. Looking at all UT classes, the study found that 79 percent had one or no African-American and 30 percent one or no Hispanic students. *Id.*

As this Court has recognized, diversity in education is a compelling state interest for several distinct reasons, *Grutter,* 539 U.S. at 328-333, each of which was considered by the University in its decision to make race one of the many factors it included in its individualized, holistic review process. First, the University found that there were real consequences of the lack of diversity in classrooms for the college experience confronted by Latinos and other students of color at UT. SJA 25a-26a. Students of color consistently report "isolation, alienation, and stereotyping" on college campuses. Shaun R. Harper & Sylvia Hurtado, *Nine Themes in Campus Racial Climates and Implications for Institutional Transformation,* New Directions for Student Services, Winter 2007, at 7, 12. As one Latina student from UT recently explained, "[S]ometimes it's still hard for me to speak up in class when it's almost all white students around me." Tamar Lewin, *At University of Texas, Admissions as a Mystery,* April 1, 2012, *available at* http://www.nytimes.com/2012/04/02/education/university-of-texas-mysterious-admissions-process.html. This experience is not at all unique.[4] Diversity in the classroom is important to ensure that "underrepresented minority students do not feel isolated or like spokespersons for their race," *Grutter*, 539 U.S. at 319, and to break down "racial stereotypes," which "lose their force [when] nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students," *id.* at 320.

This lack of classroom diversity is harmful for students of color, but, as UT concluded in determining whether and how to implement its current policy, lack of diversity is also harmful for all students, as it diminishes the quality of the learning experience. SJA at 25a-26a. "Students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." Patricia Y. Gurin, *Expert Report of Patricia Gurin, in* The Compelling Need for Diversity in Higher Education (1999). As set out in greater detail in briefs filed in this case by the American Educational Research Association and the American Sociological Association, more recent studies have similarly found that diversity in the classroom has a positive influence on critical thinking skills. *See, e.g.*, Chad Loes, Ernest Pascarella & Paul Umbach, *Effects of Diversity Experiences on Critical Thinking Skills: Who Benefits?*, 83 J. Higher Ed. 1 (2012). And studies have found that the positive effects of exposure to a diverse peer group during college continue into adulthood. *See, e.g.*, Nicholas A. Bowman, Jay W. Brandenberger, Patrick L. Hill & Daniel K. Lapsley, *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J. College Student Development 729 (2011); Gurin Report, *supra*.

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[4] In affidavits filed in the district court in this case, for example, many Latino students expressed their feelings of isolation in the classroom. *See* Motion of Lawrence Longoria, Jr., Nathan Bunch, & Texas League of United Latin American Citizens (LULAC) for Leave to File *Amicus Curiae* Brief in Support of Defendants, *Fisher v. Univ. of Texas at Austin* (No. 1:08-cv-00263-SS), Exhibits A-C (Declaration of Erwin Cuellar ("I sometimes feel like I am the only Latino in my classes... [T]his does change the classroom dynamics because my opinions and method of thinking, which are tied to my Latino culture and experiences, might be ostracized. If there are no other Latinos in the room, then it seems my opinions will not be taken into as much consideration. As a result, I feel underrepresented and sometimes uncomfortable."); Declaration of Ashley Nicole Perez ("I very often found myself the only Latina. When there were other Latinos/as, it seemed like we were so few...In these circumstances, I feel like I should not express certain concerns or opinions because no one will understand where I am coming from."); Declaration of Alexis Fernandez ("I believe my education would benefit if UT were more diverse than it is now so minorities, including myself, would not feel as isolated in our classes. I feel this way in classes where I am often the only, or one of the few, Latino students.")).

Of course, the fact that diversity in an educational setting yields significant educational benefits does not mean that every approach to increasing diversity is constitutionally appropriate. As Justice Kennedy explained in his separate opinion in *Grutter*, "[t]o be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individualized assessment is safeguarded through the entire process." 539 U.S. at 392 (Kennedy, J., dissenting). UT's individualized, holistic review is just such a system. The University takes enormous care to ensure that each student admitted at this holistic review stage is considered through a thorough, individualized assessment. As the lower court explained, the UT system for holistic review is carefully monitored to ensure that every element of an individual applicant's file is being evaluated and that race, like any other factor, is considered only in the complete context of the individual file. *See Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 228 (5th Cir. 2011).

C. Racial Diversity and the Experiences of People of Color Have Independent Value that Increases the Effectiveness of an Educational Community

Race still matters in American society today. Individuals continue to be treated differently on the basis of their race in many contexts, and that reality shapes the experiences of many young people applying to and attending UT and other colleges and universities. As Justice Kennedy has observed, "[t]he enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring). Promoting a diverse educational environment by taking into account the many real differences among individuals is not discrimination and it has real educational benefits. In a holistic, individualized admissions process like that employed by UT, taking race into account as one of many factors that may have shaped the life experiences of applicants is acknowledging the fact that certain applicants will add to the classroom unique experiences and perspectives because of the basic reality that race is still relevant and racism still exists.

Ignoring this reality is itself part of the problem. As psychologist John Dovidio has explained, in order to address persistent race discrimination and stereotyping, "it is essential that race be recognized." Test. of John Francis Dovidio, *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328 (D. Mass. 2003) (No. 03-2415). Refusing to acknowledge race in admissions does not make race irrelevant in the educational experience. Instead, it makes it more difficult to address, in an educationally effective way, the very real individual experiences that people have as a result of their many individual characteristics, including their race. The denial that race matters "leads to distrust, [leads] to segregation, [leads] to inefficiencies, [leads] to stress." *Id.*

Amici for the Petitioner argue that racial classifications are largely meaningless and therefore UT's consideration of race in its holistic evaluation is inappropriate. These arguments try to shift focus from the experiences that people of color have because of the ways that race affects social, cultural, and economic interactions in today's America. They seek instead to focus attention on the lack of biological basis for racial classifications. *See, e.g.*, *Amicus* Brief of The American Center for Law and Justice in Support of Petitioner, *Fisher v. University* *of Texas at Austin, et al.* (No. 11-345), 3-4; Brief of *Amici Curiae* Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioner, *Fisher v. University of Texas at Austin, et al* (No. 11-345), 6-9. But the reason that diversity is so important in an educational environment is because education must confront not only biological fictions, but also sociopolitical realities. As this Court recognized less than a decade ago, "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333.

As Latino students who are attending or have attended institutions of higher education in Texas, *Amici* have direct experience with the continuing importance of race and ethnicity in today's America. Our experiences growing up as Latinos has not been uniform, nor are our opinions or perspectives uniform. But for each of us, being Latino is a relevant aspect of what she or he brings to the classroom and to the educational environment outside of the classroom. Similarly, each of us has learned from the perspectives offered by our African-American, Asian-American, American Indian and White classmates. Just as our perspectives have been shaped in some part by our racial and ethnic experiences, so have the views of those students. Our learning environment has been richer and our education more valuable when we have had the opportunity to learn in classrooms that include racial diversity.

II. THE TEXAS ADMISSIONS PROCESS HAS SERVED THE STATE'S COMPELLING INTEREST IN A MEANINGFULLY MORE DIVERSE AND THUS MORE EFFECTIVE LEARNING ENVIRONMENT

The inclusion of race as one of many factors to be considered in a holistic admissions process that gives each applicant individualized consideration has had a significant positive impact on the diversity of UT's entering classes. Petitioner asserts that considering race and ethnicity has led to minimal gain in UT's diversity, and therefore that the University cannot demonstrate that its admissions policies are narrowly tailored to meet its compelling interest in educational diversity. Pet. Br. at 38-43. This argument puts inappropriate emphasis on percentages and repeatedly mischaracterizes UT's admissions numbers.

Importantly, even a modest increase in class diversity can make a significant difference in the educational goals UT legitimately pursues through its admissions policies. The University's mission is to ensure a class of qualified individuals with a diverse range of backgrounds and experiences because learning in a diverse environment helps students develop critical thinking and the skills necessary to succeed in a diverse global workplace. An essential component of this educational interest is offering students the opportunity to interact with others of different backgrounds and experiences. The likelihood of cross-racial and other cross-cultural interactions is not a one-to-one correlation with the percentage of students of a particular race in a class. Instead, as a recent study of selective universities' admissions programs demonstrated, even "a one percentage point increase in the share of nonwhite students in the entering freshman cohort is associated with a 3 or 4 percent increase in the odds of interacting with students of different racial backgrounds." Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 199 (2009). Thus, Petitioner's focus solely on the percentage of students of color admitted to UT misses the mark.

Furthermore, Petitioner uses statistics in a highly misleading way to suggest that UT's policy has had a minimal impact. For example, petitioner compares percentages across inconsistent groups and admission years. *See, e.g.*, Pet. Br. at 39 (comparing non-TTP enrollees in 2004 with *all* enrollees in 2008). A more appropriate comparison would be the enrollment of African American and Hispanic students in 2004 – the last year that Texas excluded race entirely from consideration – with enrollment in the year Ms. Fisher applied for admission. Looking at those numbers, the increase in underrepresented enrollment was significant: the number of African American students enrolled increased from 275 to 335 and the number of Latino students from 1,024 to 1,228. *See Fisher*, 631 F.3d at 226. This is an increase of about 18 percent in both Latino and African-American student representation.

The significance of even a small increase in diversity for student experience can be seen by comparing UT with the state's other flagship institution, Texas A&M. Texas A&M does not consider race as a factor in any way in its admissions process. The class entering in the fall of 2008 at Texas A&M was 16 percent Latino. *See* Texas A&M, Enrollment Profile 2008, *available at* http://www.tamu.edu/customers/oisp/student-reports/enrollment-profile-fall-2008-certified.pdf. Meanwhile, at the much more selective UT, the class entering in the fall of 2008 was nearly 20 percent Latino. *See* University of Texas at Austin Office of Information Management, Undergraduate Profile Fall 2008, *available at* http://www.utexas.edu/academic/ima/sites/default/files/Fall%202008%20IMA-UT%20Undergrad%20Profile.pdf. The importance of those differences can be seen in a "campus climate" study recently conducted by Texas A&M. Of Latino students, 42 percent strongly agreed that discrimination is a problem at the school. More than one in four Latino respondents felt that they were not part of the "Aggie family." Texas A&M, *Campus Climate 2008, Texas A&M – How's it Working for You?*, at 3, *available at* http://studentlifestudies.tamu.edu/sites/studentlifestudies.tamu.edu/files/results/full/142-full.pdf.

The gains that have been made toward enrolling a critical mass of Latino students at UT through the blended admissions process are of fundamental importance to the learning experience and the campus environment. They are also essential for maintaining a visible pathway to leadership for Latino and other students of color. As this Court has recognized, that is a compelling state interest, and is especially so for Latinos in Texas, given the reality that a majority of Texas residents is likely to be

Latino by 2020. *See Texas in Focus, supra.* The University's interest in maintaining visible pathways to leadership is served each time even a single Latino student succeeds and can offer a model for those who follow.

III. ABIGAIL FISHER LACKS STANDING TO PURSUE THIS CLAIM

This case is not an appropriate vehicle for the Court's reconsideration of a significant constitutional question. Petitioners have asked the Court to reverse a decision made less than a decade ago. This raises serious concerns, and those concerns are exacerbated by the fact that Abigail Fisher's case does not present the constitutionally required "case" or "controversy." U.S. Const. Art. III. In addition to the fact that she is a college graduate, and therefore no longer able to seek the relief she requested in her complaint, Fisher never demonstrated that she was in fact harmed by UT's admissions policies in any cognizable way.

In order to pursue a case in federal court, a plaintiff must have standing and the case must not be moot. The constitutional requirements of standing and mootness derive from Article III's admonition that federal court jurisdiction is limited to "cases" or "controversies." U.S. Const., Art. III. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Simon v Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 27 (1976). The standing analysis assists courts in assuring that they are not issuing advisory opinions, but are instead addressing cognizable claims of injury. *See, e.g., St. Pierre v. United States*, 319 U.S. 41, 42 (1943). As this Court has observed:

> [t]he "personal stake" aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'

U.S. Parole Commission v. Geraghty, 445 U.S. 388, 397 (1980) (citing Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)).[5]

Fisher's case is moot because she has graduated from college. Unlike other challenges to school admissions policies, *see e.g. Grutter*, 539 U.S. at 317; *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003), this case was not pursued as a class action. Accordingly, the fact that Fisher can no longer be a freshman at UT renders this case moot, and the Court should dismiss it as improvidently granted for this reason.

---

[5] Because both standing and mootness are jurisdictional issues, this Court should consider them even when not raised by the parties. *See, e.g. St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978) (noting that mootness is jurisdictional); *Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996) (standing is jurisdictional).

Furthermore, Ms. Fisher has failed to demonstrate that she has standing to pursue this challenge to the Texas admissions policy. The record in this case contains next to no information about Abigail Fisher. Other than a few brief paragraphs in her Amended Complaint, Ms. Fisher herself is simply not part of this case. The statement of facts at summary judgment, for example, mentioned the plaintiff's name only as it related to identification of her as a plaintiff and of her attorneys as representing her. JA 103a-151a. This is surprising, unless one recognizes this case for what it is: not a true "case or controversy" but simply a vehicle for a political effort to get a recent decision of this Court overturned in light of changes in the Court's composition.

What limited information there is in the record about Ms. Fisher does not raise any inference that her race was the reason she was not admitted to UT. According to the Amended Complaint, Ms. Fisher was ranked 82/674 in her graduating class and had an SAT of 1180. JA 65a-66a. Based on these numerical qualifications, Ms. Fisher alleges that she would have gotten into UT were race not "a factor of a factor of a factor of a factor." ***Fisher v. University of Texas at Austin, et al.***, 645 F.Supp.2d 587, 608 (W.D. Tex. 2009). But the available information about how UT's admissions process actually works and how it worked the year she applied contradicts that assertion entirely.

Fisher was not among the 9253 students admitted to UT because they were in the top ten percent of their high school classes. As a result, she was one of 16,000 applicants competing for 1,216 remaining in-state spots. Of the 3590 non-TTP admits in 2008 (which included out-of-state applicants in addition to the 1,216 Texas residents), 60 percent were white, 16 percent Asian-American, 4 percent Black, 11 percent Hispanic, and 8 percent Foreign. Univ. of Texas at Austin Office of Admissions, *Student Profile Admitted Freshman Class of 2008, available at* http://www.utexas.edu/vp/irla/Documents/AdmittedFreshmenProfile-2008.pdf.

There is simply no way to determine that race played a role in the fact that Fisher was not among this selective group of admitted students. Fisher is not similarly situated to the plaintiff in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) because she was in fact permitted to compete for all available openings at UT. *See* 438 U.S. at 280, n. 14 (observing that Mr. Bakke had suffered a constitutional injury because of "the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race"). Under UT's holistic consideration of each individual applicant, race is one of many factors that can help *any* applicant, regardless of that student's particular race, when viewed in the full context of the application. *See supra,* note 3. The facts at UT are fundamentally different from other race-conscious admissions cases, in which there was a quota or minority applicants were given a certain number of points based on their race. *See, e.g., Bakke,* 438 U.S. at 274-75; *Gratz,* 539 U.S. at 244. Petitioner should not be held to a lesser standing requirement absent factors such as there.

The information in the record about Ms. Fisher does not create even a reasonable inference that she would have been in this small group of admits had race not been any factor in UT's holistic admissions process. Ms. Fisher's 1180 SAT score was well below the average SAT score for students admitted to UT through holistic review in 2008. Indeed only 7 non-TTP students admitted that year at SAT scores at or below 1190. *2008 Student Profile, supra,* at 3. In part because of this SAT score, Ms. Fisher's AI–the academic factor in the holistic analysis–was 3.1. The minimum AI needed for fall admission to the Liberal Arts, undeclared major (to which Ms. Fisher also applied) in 2008 was 3.5. JA 410a.

Given these facts, there is absolutely no evidence that Ms. Fisher's race played any role in her failure to gain admission to UT. Since Ms. Fisher has already graduated from another college, and has failed to demonstrate that she suffered any cognizable harm from any UT policy, this case presents a deeply flawed vehicle for resolution of the issues it raises.

CONCLUSION

For the foregoing reasons, this case should be dismissed as improvidently granted or, alternatively, the decision of the Fifth Circuit should be affirmed.

Dated: August 13, 2012

Respectfully Submitted,

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APPENDIX

APPENDIX
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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 29 2012
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No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* CURRENT AND FORMER FEDERAL CIVIL RIGHTS OFFICIALS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are present and former federal civil rights officials, including appointees and officials at the level of Senior Executive Service up to and including a former U.S. Attorney General, as well as present and former members of federal civil rights advisory committees. Collectively, for the past four decades, *amici* have served in the federal agencies charged with the primary responsibility for administering diversity policies in higher education, including the U.S. Civil Rights Commission, the U.S. Department of Education, and the U.S. Department of Justice. *Amici* support innovative and race-neutral approaches to achieving the educational benefits of diversity in higher education and believe that racial preferences are generally unnecessary in light of the race-neutral alternatives available. A complete list of *amici* can be found in the Appendix at page 1a.

SUMMARY OF ARGUMENT

The Court has consistently applied strict scrutiny when assessing whether governmental actors seriously considered race-neutral alternatives to race-conscious affirmative action programs. This requirement consists of both a procedural element and a substantive element. First, a governmental actor must establish, subject to strict scrutiny, that it seriously considered race-neutral alternatives before implementing a race-conscious program. Second, it must demonstrate, also subject to strict scrutiny, that there were no race-neutral alternatives that would have advanced the relevant compelling governmental interest about as well as the race-conscious program.

---

[1] No counsel for any party has authored this brief in whole or in part. No person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk of this Court.

The Court has repeatedly declined to differentiate between school admissions and other contexts in its jurisprudence on race-neutral alternatives. There is no basis to do so, and the Court has regularly relied on non-admissions precedents in admissions cases. In the school admissions context, the Court has recognized that there may be a compelling governmental interest in the educational benefits of diversity, but not in racial balancing for its own sake.[2] Consequently, an analysis of race-neutral alternatives must focus on educational benefits, rather than simple racial statistics, to measure correctly the efficacy of those alternatives.

Both schools and courts have well-developed tools at their disposal to conduct the constitutionally mandated analysis of race-neutral alternatives in university admissions. After *Grutter v. Bollinger*, 539 U.S. 306 (2003), both government agencies and non-governmental entities created an intellectual framework for evaluating race-neutral alternatives in an academic setting. This framework, which is regularly used by universities, was built upon the already-rich literature on measuring and evaluating academic programs. These resources obviate any need to rely on the crude proxy of racial enrollment statistics—or the even more attenuated proxy of classroom-level racial statistics—to evaluate race-neutral alternatives.

---

[2] This brief addresses the issues of narrow tailoring and the use of race-neutral alternatives. *Amici* do not address any other constitutional issues concerning the Ten Percent Plan or college admissions more generally, including whether the use of race in university admissions furthers a compelling governmental interest.

In *Grutter*, this Court accepted the University of Michigan Law School's representations that it had seriously considered race-neutral alternatives before implementing a race-conscious admissions policy. Based on their collective experiences and research relating to the use of race-conscious and race-neutral admissions programs in higher education, *amici* believe that the Court should not accept similar representations from the University of Texas (the "University") in this case.

It is apparent that the University did not fulfill its obligation to consider seriously race-neutral alternatives. There is no evidence that it conducted a proper analysis of such alternatives prior to its decision to use a race-conscious supplement to the Ten Percent Plan. Because the constitutionally compelling goal at issue is the educational benefit of diversity, rather than simple headcounts to achieve racial balancing, the University was obligated to consider race-neutral alternatives that could advance the educational benefits of diversity as effectively as taking account of race in admissions in order to add a relatively small number of African-American and Hispanic students. There is no indication that the University considered such alternatives, much less that it would have found them inadequate.

The University is already a remarkably racially diverse institution and has just enrolled its first majority-minority class, thanks almost entirely to the impact of its race-neutral Ten Percent Plan. It is precisely this type of institution that has benefitted from, and should continue to benefit the most from, implementing race-neutral alternatives.

ARGUMENT

I. The Court's Jurisprudence Requires States To Give Serious Consideration to Race-Neutral Alternatives, and that Requirement Is Subject to Strict Scrutiny.

The Court has consistently held that all racial classifications, including those used in higher education admissions programs, must be strictly scrutinized to determine whether a less intrusive, race-neutral alternative can advance the compelling governmental interest that a racial classification purports to serve. Because of the pernicious effects of racial classifications, the Court has required the use of such alternatives if they advance the compelling governmental interest as well as—or almost as well as—a race-conscious policy. A race-conscious policy can be either procedurally impermissible, if race-neutral alternatives have not been seriously considered, or substantively impermissible, if a race-neutral alternative would work about as well as the proposed race-conscious policy.

Narrow tailoring of racial classifications has long required serious consideration of race-neutral alternatives. In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), Justice Powell, in his plurality opinion, noted that "the classification at issue must 'fit' with greater precision than any alternative means" and that courts "should give *particularly intense scrutiny* to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest . . . ." *Id.* at 280 n.6 (emphasis added). Such an alternative need only serve the legislative purpose "about as well" as a racial classification, and at "tolerable administrative expense." *Id.*

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court confirmed that race-preferential affirmative action programs are subject to strict scrutiny. The Court stated that "'[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies.'" *Id.* at 507 (quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987)). Unlike in *Paradise*, however, the Court imposed the requirement of considering race-neutral alternatives on the government agency, rather than merely placing that burden on the courts. *Croson*, 488 U.S. at 507. In other words, an agency had a duty to consider race-neutral alternatives, and the failure to do so could be an independent basis for invalidating race-conscious governmental action.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court again examined whether the defendant had considered race-neutral policies as a key factor in the narrow tailoring test. The Court directed the district court on remand to "address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting." *Id.* at 237-38.

Grutter v. Bollinger, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), applied these principles to university admissions programs. Relying on *Wygant* and *Croson*, the Court once again articulated the requirement for considering race-neutral alternatives:

> Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to

> provide educational opportunities to members of all racial groups. . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.

Grutter, 539 U.S. at 339. Based on the handful of race-neutral alternatives presented to the Court and a perceived good faith by the University, the Court held that the University of Michigan Law School had satisfied its obligation to consider race-neutral alternatives.[3]

The Court again strictly scrutinized a school's consideration of race-neutral alternatives in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). Citing *Grutter*, the Court held that the narrow tailoring test had not been satisfied because "several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration." *Id.* at 735. In particular, the Court noted that "Jefferson County has failed to present any evidence that it considered alternatives, *even though the district already claims that its goals are achieved primarily through means other than the racial classifications.*" *Id.* (emphasis added).

Thus, the Court's jurisprudence is clear that strict scrutiny requires serious consideration of race-neutral alternatives. In light of the Court's reliance on *Wygant* and *Adarand* in evaluating universities' and school districts' consideration of race-neutral alternatives, it is clear that the Fifth Circuit erred in holding that these precedents "have little purchase" in evaluating what the University has done.

---

[3] In *Gratz*, the Court did not reach the question whether consideration had been given to race-neutral alternatives, but quoting *Wygant* and *Adarand*, it reaffirmed that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," and that the Court's "review of whether such requirements have been met must entail 'a most searching examination.'" 539 U.S. at 270.

It is equally clear that *Grutter* did not alter the requirement that the consideration of race-neutral alternatives be scrutinized, as the Fifth Circuit held. Rather, the Court's "satisfaction" with the University of Michigan Law School's consideration of race-neutral alternatives reflected an application of the principle under the circumstances of that case, where no party had articulated either a reasonable race-neutral alternative or even a method for testing such an alternative.

Since *Grutter*, the federal government has articulated standards for evaluating race-neutral alternatives. Universities have the administrative framework in place to utilize these standards, and courts are more than capable of scrutinizing their results. In addition, the Texas Legislature obviated the problem of identifying an effective race-neutral alternative for the Court. Had the University tested its admissions program under these standards, it surely would have concluded that the race-neutral Ten Percent Plan works, at a minimum, "about as well" as the race-conscious system that the University unnecessarily and unconstitutionally tacked on to the Legislature's Ten Percent Plan. Indeed, the race-neutral Ten Percent Plan alone made the University a leader among institutions of higher education in achieving diversity, not only in terms of race, but also socioeconomic status and geography, as well as diversity of skills, interests, and experiences, such as the demonstrated ability to overcome different types of disadvantages. *See* Pet. Br. at 3-4, 10; *Cf. Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011) ("Even if the sale of violent video games to minors could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.").

II. Courts Can and Should Assess Whether Universities Seriously Considered Race-Neutral Alternatives.

Both governmental agencies and non-governmental entities in the educational arena have issued reports and developed standards in response to the requirement that serious consideration be given to race-neutral alternatives. A review of some of this literature demonstrates that substantial guidance is already available to universities to assist in their consideration of race-neutral alternatives.

A. Guidance from Governmental Agencies

After *Adarand*, the Department of Justice published an affirmative action guidance memorandum to assist other government agencies, including those responsible for higher education policies. *See* U.S. Dep't of Justice, *Legal Guidance on the Implications of the Supreme Court's Decision in* Adarand Constructors, Inc. v. Pena, 19 Op. Off. Legal Counsel 171 (1995) ("DOJ Guidance Memo"). The memorandum explained the intricacies of the Court's affirmative action jurisprudence and provided lists of questions to ask when evaluating a program's compliance with constitutional requirements. With respect to race-neutral alternatives, the questions included:

> Did Congress or the agency consider race-neutral means to achieve the ends of the program at the time it was adopted? Race-neutral alternatives might include preferences based on wealth, income, education, family, geography. . . . Were any of these alternatives actually tried and exhausted? What was the nature and extent of the deliberation over any race-neutral alternatives—for example, congressional debate? agency rulemaking? Was there a judgment that race-neutral alternatives would not be as efficacious as race-conscious measures? Did Congress or the agency rely on previous consideration and rejection of race-neutral alternatives in connection with a prior, related race-conscious measure (or series of measures)?

DOJ Guidance Memo at 26.

Following *Grutter*, the Office for Civil Rights in the Department of Education also issued guidance regarding race-neutral approaches to achieving diversity in higher education. Two of these reports focused on race-neutral alternatives in undergraduate admissions in States where racial preferences are prohibited by State law. *See* Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004), *available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html ("Achieving Diversity"); Office for Civil Rights, U.S. Dep't of Educ., *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity* (2003), *available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutral report.html ("Innovative Approaches"). A third report focused on race-neutral programs for private colleges. *See* Office for Civil Rights, U.S. Dep't of Educ., *Inclusive Campuses: Diversity Strategies for Private Colleges,* Report No. 3, Race-Neutral Alternatives Series (2005) ("Inclusive Campuses").

This report is particularly significant because it established a clear framework for evaluating race-neutral alternatives. The report's findings were incorporated into and adopted by a report from the U.S. Civil Rights Commission. *See* U.S. Comm'n on Civil Rights, *Fed. Procurement After* Adarand (2005), *available at* http://www.usccr.gov/pubs/080505_fedprocadarand.pdf. Specifically, the Inclusive Campuses framework, as endorsed by the Commission, recommended:

> identifying and evaluating a wide range of policies; articulating underlying facts that will prove whether a race-neutral plan works; collecting empirical research to demonstrate success; ensuring such assessments are based on current, competent, and comprehensive data; reviewing race-conscious plans periodically to determine the need for continuing them; and analyzing data to establish causal relationships before concluding that a race-neutral plan is ineffective.

Id. at xi.

The Commission itself created a framework for evaluating race-neutral alternatives, which was similar to the Inclusive Campuses framework. Although it is targeted at governmental agencies, its standards are general enough to be useful in a higher education context:

> Element 1: Standards—Agencies must develop policy, procedures, and statistical standards for evaluating race-neutral alternatives. . . .
>
> Element 2: Implementation—Agencies must develop or identify a wide range of race-neutral approaches, rather than relying on only one or two generic governmentwide programs. . . .
>
> Element 3: Evaluation—Agencies must measure the effectiveness of their chosen procurement strategies based on established empirical standards and benchmarks. The end goal should be to eliminate reliance on race-conscious programs. . . .
>
> Element 4: Communication—Agencies should communicate and coordinate race-neutral practices to ensure maximum efficiency and consistency governmentwide.

Id. Each of these frameworks provides clear and practical guidance about what issues universities should consider when evaluating a race-conscious program.

There is little evidence, however, that governmental agencies have actually complied with these obligations. For example, the Commission on Civil Rights found that "[m]ost agencies could not demonstrate that they consider race-neutral alternatives before resorting to race-conscious programs" and that "agencies generally do not adhere to" the DOJ Guidance Memo. *Id.* at 71. These troubling findings confirm, on a practical level, the important role that courts play in applying strict scrutiny to both the substance and process of governmental entities' consideration of race-neutral alternatives.

B. Guidance from Non-Governmental Entities

Public universities also may rely on guidance from non-governmental sources. For example, after *Grutter*, the College Board published a series of reports regarding affirmative action in higher education written by Arthur L. Coleman and Scott R. Palmer—two former Clinton-administration officials from the Office of Civil Rights in the Department of Education—which relied and built upon the Office of Civil Rights practices described above.

The College Board concluded that universities must consider several factors to determine if a race-conscious program is narrowly tailored, including:

- Whether the use of race is necessary in light of the university's goals;
- Whether the use of race is sufficiently flexible in light the university's goals;
- Whether race becomes the driving force for admissions decisions under a race-conscious program; and
- Whether there is a limit on the duration of the race-conscious program and a process of periodic review.

See Arthur L. Coleman & Scott R. Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* 19, 24 (College Bd. 2006), *available at* http://www.collegeboard.com/prod_downloads/diversitycollaborative/acc-div_next-generation.pdf. The report goes on to provide "practice pointers" for implementing these factors:

> 1. A body with the responsibility and authority for examining and making policy recommendations regarding race-neutral

> alternatives should be charged with periodically researching and evaluating possible race-neutral alternatives in light of institution-specific, diversity-related goals.
>
> 2. A record of practices considered, along with the accompanying evaluations regarding their viability, should be maintained. In addition, evidence-based foundations for making judgments about which practices to try and which to reject should be documented. (Research studies that include projections about likely results over time may also be useful, especially where comprehensive historical foundations for those conclusions do not exist.)
>
> 3. The entire array of race-neutral practices pursued by the institution should be well documented, along with an ongoing record of research regarding the effectiveness of those practices in achieving institutional diversity goals.

Id. at 53.

The American Association for the Advancement of Science and National Action Counsel for Minorities in Engineering reached a similar conclusion, urging educators to adopt a systematic approach to designing race-neutral alternatives: "Program activities should be designed to address specific diversity needs, be justified with research into past and present practices, and take into account the positive and possible negative impacts on other students (minority and non-minority alike)." Shirley M. Malcom et al., Am. Ass'n for the Advancement of Sci. & Nat'l Action Counsel for Minorities in Eng'g, *Standing Our Ground: A Guide for STEM Educators in the Post-Michigan Era* 36 (2004), *available at* http://www.aaas.org/standingourground/PDFs/Standing_Our_Ground.pdf. In short, there is ample guidance within the educational community describing a wide array of practical steps universities can take to ensure that they give serious consideration to race-neutral alternatives to achieving diversity.

C. Both Universities and Courts Can Easily Implement a Systematic Approach to Consider Race-Neutral Alternatives

There is extensive literature on methods for evaluating the efficacy of academic programs, and this literature can easily be adapted to conduct the evaluations required by the courts. *See, e.g.*, George La Noue & Kenneth L. Marcus, *"Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 Cath. U. L. Rev. 991 (2008). For example, universities have become adept at self-evaluation for purposes of gaining accreditation from, or membership in, organizations ranging from the American Bar Association to the Association of American Universities to the National Collegiate Athletic Association.

The rich literature regarding program evaluation emphasizes clear, simple principles defining the question to be asked or problem to be solved; measuring the outcomes of, and attributing those outcomes to, a given program; determining the link between the program and the outcomes, and explaining that relationship. *See* Carol H. Weiss, *Evaluation: Methods for Studying Programs and Policies* 75-76 (2d ed. 1998). For example, the Joint Committee on Standards for Educational Evaluation (which is housed at the University of Iowa and includes a variety of professional associations as members) emphasizes standards relating to, among other things, the collection of reliable information, and the use of explicit reasoning, transparency, and disclosure. *See, e.g.*, Joint Comm. on Standards for Educ. Evaluation, *Program Evaluation Standards Statements*, *available at* http://www.jcsee.org/program-evaluation-standards/program-evaluation-standards-statements.

Courts could assess studies following these guidelines in the same way they evaluate the testimony or reports of expert witnesses, who are required to follow similar standards. *Cf.* Fed. R. Civ. P. 26(a)(2)(B) (requiring expert reports to include "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them"); *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-95 (1993) (requiring courts to assess the "scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission").

Because there are already tools available for universities (and thus courts) to test the efficacy of race-conscious programs as compared to race-neutral alternatives, it is essential that courts require universities to do so by applying strict scrutiny to universities' consideration of race-neutral alternatives. Some commentators have noted that "many of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds." Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 34 (2002). Similarly, University of Texas law professor Sanford Levinson colorfully observed the degree to which some schools give effect to the form, but not the substance, of the Court's jurisprudence:

> [B]ecause of Justice Powell's emphasis on the almost unique legitimacy of "diversity" as a constitutional value, it has become the favorite catchword . . . of those defending the use of racial or ethnic preferences. . . . Whatever the actual efficacy of the Supreme Court in changing the behavior of American institutions, it seems indisputable that the Court sometimes fulfills the function of the French Academy in establishing the conventions of "law talk," so that all properly socialized lawyers, and many non-lawyers as well, adopt certain conventions of argument because the Court leads the way. It is a version of the old children's game of "Simon Says."

Sanford Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 577-78 (2000). Although there undoubtedly are many universities that make genuine, good-faith efforts to comply with their constitutional obligations, these commentators' observations reveal the importance of applying strict scrutiny to universities' evaluation of race-neutral alternatives to determine whether they actually have given such alternatives serious consideration.

III. The Legislature's Ten Percent Plan Was an Effective Race-Neutral Alternative.

There is no evidence in the record, much less a strong showing of evidence, that the University applied the standards set forth above to evaluate its race-conscious admissions program. Even using the University's flawed metric of evaluating the Ten Percent

Plan's efficacy in increasing certain racial statistics, it is clear that the race-neutral Ten Percent Plan successfully enhanced student diversity and its associated educational benefits.

The compelling interest behind a race-conscious admissions program is "the educational benefits that flow from a diverse student body," *Grutter*, 539 U.S. at 343, not mere racial balance by headcount. In *Bakke*, Justice Powell framed the proper governmental interest as selecting a student body that would encourage "the robust exchange of ideas." *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 313 (1978). Similarly, in *Grutter*, the Court described the educational benefits of diversity that come from "exposure to widely diverse people, cultures, ideas, and viewpoints" and promote "cross-racial understanding." 539 U.S. at 330-31.

The University's goal of achieving a certain level of racial representation in even its smallest classes (and by extension in other micro-groups in the university community) is not a constitutionally compelling government interest. The racial composition of a group of students is a pedagogically unsound and constitutionally infirm proxy for measuring the achievement of these goals, particularly when applied on a class-by-class basis. For example, it is facially implausible, much less supported by any showing of evidence, that having a "critical mass" of black or Hispanic students in a calculus or chemistry class will expose students to diverse cultures and viewpoints, or promote cross-racial understanding. And even in classrooms where diverse viewpoints contribute to the educational experience, such as in certain social science classes, it would be entirely inappropriate for a professor to assume that a student of a given race would express a viewpoint any different from those of other students—even if he or she were among those students who elect to participate actively in classroom discussions. Asking a student of a particular race to represent that race in class discussions would be an objectionable invitation to stereotyping and very poor pedagogy. Moreover, through the Internet, professors and students can instantly access any diverse viewpoint relevant to any class, regardless of the racial or ethnic identifications of course classmates.

Even if it were theoretically sound for a university to measure the effects of admissions programs on individual small classrooms, universities still must consider whether race-neutral admissions programs would be about as effective at the classroom level as race-conscious programs, viewed in light of the constitutionally permissible interest in the educational benefits of diversity. For example, if a race-neutral admissions program creates socioeconomic or geographic diversity in a broad range of classrooms, it may advance the educational benefits of diversity as well as or better than a race-conscious program—particularly a race-conscious program that adds only a handful of racially diverse students per year.

Moreover, approximately 40 percent of Americans live in States that have banned the use of race-conscious admissions policies in higher education, and universities in these States have developed an array of innovative race-neutral alternatives to ensure diversity on their campuses. *See, e.g.*, Roger Clegg, *Take the Fisher Case*, Nat'l Rev. Online (Jan. 9, 2012), *available at* http://www.nationalreview.com/phi-beta-cons/287298/take-ifisheri-case-roger-clegg#. These alternatives range from pre-admission efforts by States, such as aligning K-12 education requirements with university admission standards and expanding utilization of the College Board's Advanced Placement testing program, to outreach efforts by universities to underserved communities, to enhanced programs for transfer students. *See* Achieving Diversity at 5; Innovative Approaches at 10-32.

Given the proper goals of a diversity program and the superficiality of relying solely on racial statistics for admitted or enrolled students as a proxy for achieving those goals, serious consideration of race-neutral alternatives should also include an analysis of post-enrollment race-neutral alternatives. Here too, a wide array of tools are available to universities to ensure that students gain the educational benefits of diversity. For example, universities can encourage the formation of campus organizations that promote the educational goals of diversity, such as cross-racial understandings. They can invite speakers or performers, organize symposia, or promote study abroad programs. Race-neutral alternatives like these can encourage students from across a wide range of areas of study to interact with and learn from each other, and such programs would be directly targeted at maximizing the educational benefits that flow from a diverse student body. As a practical matter, any program that encourages a broad range of students to interact with each other will indirectly promote the educational benefits of diversity. One could easily imagine students understanding and learning more about their peers from a season of flag football than from a semester of physics.

Even if race-conscious headcounts were a proper metric for seriously considering the availability of race-neutral alternatives, it is clear that the race-neutral Ten Percent Plan has been tremendously successful. As Petitioners set forth more fully in their brief, the

University of Texas is more racially diverse than it was before the Ten Percent Plan was instituted. *See* Pet. Br. at 10, 36. The University just enrolled its first majority-minority freshman class (mostly attributable to the impact of the Ten Percent Plan), and demographic trends in Texas are likely to increase racial diversity further in the future. *Id.* at 10. These trends were apparent at least five years before the University added a race-conscious component to the Ten Percent Plan. Dr. Larry Faulkner, who was President of the University of Texas when the racial component was subsequently added, succinctly summarized the success of the Ten Percent Plan in October 2000:

> [T]he Top 10 Percent Law has enabled us to diversify enrollment at UT Austin with talented students who succeed. Our 1999 enrollment levels for African American and Hispanic freshmen have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies. And minority students earned higher grade point averages last year than in 1996 and have higher retention rates. An impressive 94.9 percent of 1998 African American freshmen returned to enroll for their sophomore year in 1999. For Hispanics, 85.8 percent returned for their second year. So, the law is helping us to create a more representative student body and enroll students who perform well academically.

Larry Faulkner, *The "Top 10 Percent Law" Is Working for Texas* (Oct. 19, 2000), *available at* http://www.utexas.edu/student/admissions/research/faulknerstatement.html.

* * *

The University of Texas had a constitutional obligation to conduct an adequate evaluation of its new race-conscious admissions system, focusing directly on the educational benefits of diversity, rather than on the constitutionally suspect proxy of racially categorized enrollment statistics. The University's review should have considered race-neutral alternatives that could be used in combination with the Ten Percent Plan, such as post-enrollment programs that encourage the interaction of students from across a broad range of academic programs, and race-neutral admissions programs currently in use by other universities. The University has failed to produce any evidence demonstrating that it conducted such an analysis, which it was required to do before implementing its race-conscious admissions policy.

Even if the University had produced such evidence, its race-conscious policy would still be impermissible because the University also failed to produce a robust evidentiary record that justified the use of racial classifications—with all their pernicious effects and attendant dangers, *see Gratz*, 539 U.S. at 270—to achieve its educational goals. Thus, the Court should require the University to stop discriminating on the basis of race and allow it to continue doing what it already does so well: enrolling unprecedented numbers of racially diverse students through its race-neutral Ten Percent Plan.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

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AMICUS CURIAE BRIEF

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No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

BRIEF OF DISTINGUISHED ALUMNI OF THE UNIVERSITY OF TEXAS AT AUSTIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici consist of prominent leaders in business, industry, and government – all of whom graduated from the University of Texas at Austin ("UT-Austin") between 1948 and 1986. A short biography of each of the *Amici* is attached as an Appendix to this brief.

As distinguished UT-Austin alumni and recruiters of UT-Austin graduates, *Amici* have a vital interest in ensuring that UT-Austin continues to cultivate students who are fit to be future leaders of the community – both within and without the State of Texas. Based on their years of practical experience in their respective fields, *Amici* emphatically agree with this Court's statement that "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

Amici have experienced firsthand the critical importance of ensuring diversity in the path to leadership and appreciate the benefits of being part of a diverse educational setting and workplace. Moreover, *Amici* live or have lived in Texas. As current or former Texans, they have an interest in highlighting the need for UT-Austin to continue to produce both culturally competent leaders and minority leaders – especially in a State that faces unique leadership challenges as Texas' population becomes increasingly diverse.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Written consents of the parties to allow all interested *Amici* to file briefs in this case are on file with the Court.

SUMMARY OF ARGUMENT

UT-Austin is Texas' flagship university. It is highly selective and ranks among the Nation's top educational institutions, public or private. UT-Austin historically has played a vital role in developing Texas' leaders in business, education, government, the military, and the community at large. It is thus a critical institution on the pathway to leadership in Texas.

Texas faces unique challenges due to its demographic dynamics and its shared border with Mexico. As the enormous growth in the population of Latinos and other minorities in Texas continues, UT-Austin will play an even more important role – and bear an increasing responsibility – to bring about diversity in its student body and, in turn, to ensure that Texas' leaders reflect the State's unique racial and ethnic diversity.

The importance of diversity in the path to leadership, however, extends beyond simply developing minority leaders. As *Amici* have experienced first-hand, a diverse student body helps to create culturally competent leaders of all backgrounds, who are then able to facilitate unique and creative approaches to problem-solving through the integration of different perspectives and cultural mindsets. By ensuring diversity in its student body, UT-Austin provides an invaluable state resource that is critical to nurture future leaders in government, business, industry, public education, and other organizations that serve the State and its residents.

Amici respectfully submit that the Equal Protection Clause should not be interpreted to impede UT-Austin from adopting admissions policies that are necessary to realize its critical mission of ensuring diversity in its path to leadership. UT-Austin's current admissions policies are the product of careful consideration by educators closest to the needs of the University and the broader community, and they are carefully designed to ensure that the "path to leadership" in Texas is "visibly open to talented and qualified individuals of every race and ethnicity." *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003). Consistent with this Court's decision in *Grutter*, UT-Austin should be permitted to continue to pursue its critical mission of fostering future leaders that reflect the unique racial and ethnic diversity in the State of Texas.

ARGUMENT

I. UT-AUSTIN HAS A CRITICAL NEED TO ENSURE DIVERSITY AMONG TEXAS' FUTURE LEADERS

A. UT-Austin Is A Key Gateway To Leadership In Texas

As the State's flagship university, UT-Austin historically has been a gateway to positions of leadership within the State of Texas and beyond. *See* Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1608 (2003) (discussing UT-Austin's mission "to serve every geographic region of the state of Texas, along with every community, every school district, and every socioeconomic level"). As a selective institution, UT-Austin attracts many of the brightest students from across the State. UT-Austin's graduation efficiency is among the best at more than 80%.[2]

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[2] *See* Marc Musick, *Analysis of Efficiency and Graduation Rates at The University of Texas at Austin and Other Public Research Universities in the United States* 8 (Univ. of Texas at

Roughly 8,000 students graduate each year – including 6,000 undergraduates – and they leave well-equipped to become Texas' next generation of innovators, problem solvers, educators, and leaders in a variety of professions.

For instance, in 2012 more than 350 students graduated from the highly ranked College of Education, including nearly 70 new math and science secondary school teachers from the nationally recognized UTeach program. Similarly, more than 1,800 students graduated with bachelor's degrees in the sciences, technology, engineering, and mathematics – many of whom will go on to become leaders in these fields in Texas and the world. UT-Austin sends more students to Texas medical schools than any other undergraduate institution, and in 2012 more than 35 undergraduates earned highly competitive National Science Foundation Graduate Research Fellowships.[3]

UT-Austin alumni have gone on to become formidable leaders in almost every aspect of society. Fourteen graduates are serving in the U.S. Congress.[4] In the Texas State Legislature, there are 39 UT-Austin graduates, as well as two non-legislative but statewide elected officials – the attorney general and state

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Austin Sept. 2011), *available at* http://www.utexas.edu/news/attach/2011/campus/analysis_efficiency.pdf.

[3] *See* UT-Austin, What Starts Here Changes the World, http://www.utexas.edu/what-starts-here/preparing-leaders/8000-reasons-world-changing-better (last visited Aug. 9, 2012); National Science Found., Award Offers and Honorable Mentions List, https://www.fastlane.nsf.gov/grfp/AwardeeList.do?method=loadAwardeeList (last visited Aug. 9, 2012).

[4] *See* CRiSP360, Where Did Congress Go To College?, http://www.crisp360.com/hosted-infographic/where-did-congress-go-college-full (last visited Aug. 9, 2012).

comptroller. Additionally, more than 195 alumni presently serve on city councils in Texas. UT-Austin alumni also hold leadership positions throughout the country. For example, UT-Austin alumni serve in the legislatures of 13 States.

UT-Austin alumni serve in leadership positions in a wide range of fields. To take but a few examples, UT-Austin alumni have co-founded and serve as CEOs in renowned, innovative companies such as ExxonMobil, National Instruments, Clear Channel Communications, Barnes & Noble, and Southwest Airlines.[5] UT-Austin graduates include 19 Pulitzer Prize winners,[6] and winners of the Nobel Prize, the National Medal of Science, and the Wolf Prize – among others.

This is not mere coincidence. UT-Austin's core mission is to train future leaders, with a specific emphasis on the State of which it serves as the flagship university. In addition to extracurricular activities and informal leadership training, leadership courses can be found throughout the various departments, schools, and research centers on campus. And it has been a central curricular focus of the administration. For instance, UT-Austin assembled the Commission of 125 in the early 2000s, which consisted of a group of more than 200 citizens chosen for occupational, ethnic, and geographic diversity. The Commission did a comprehensive review of UT-

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[5] *See, e.g.*, National Instruments, Community, https://decibel.ni.com/content/docs/DOC-5130 (last visited Aug. 9, 2012); UT-Austin, TxTell UT Stories, http://txtell.lib.utexas.edu/stories/m0001-full.html (last visited Aug. 9, 2012).

[6] *See* College of Communication, UT-Austin, Pulitzer Prize Winners, http://communication.utexas.edu/alumni/pulitzers/ (last visited Aug. 9, 2012).

Austin to provide recommendations to the University on how UT-Austin could best serve Texas and society for the next 25 years. The Commission delivered its report to the University in 2004, and one of the two strategic initiatives recommended was to establish a more demanding standard for leadership of academic departments and research centers. Since the report issued, the Commission and the University administration have worked tirelessly to develop further the path to leadership for its students.[7]

In sum, UT-Austin has served as the training ground for thousands of graduates who have gone on to leadership positions at the global, national, state-wide, and local levels. *Amici* proudly consider themselves among these graduates. UT-Austin has been and continues to be a critical part of the infrastructure for developing Texas' future leaders in government, industry, business, and public education – among other fields.

B. A Diverse Student Body Is Necessary For UT-Austin To Develop Effective Leaders For The State

As the Court has noted, because "universities . . . represent the training ground for a large number of our Nation's leaders," "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003). *Grutter*'s holding is especially salient for Texas and UT-Austin. In the professional experience of *Amici*, the dramatic increase of racial and ethnic diversity, and the rise of globalization in the economy and society more generally, require the talent and creativity of a workforce that is as diverse as the world around it. Simply put, our increasingly diverse and cross-cultural society needs more racially and culturally diverse leaders, as well as leaders who have been exposed to a diverse community. Justice Powell's statement more than 34 years ago in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), is all the more true today: "[T]he 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313 (opinion of Powell, J.) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

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[7] *See* UT-Austin, The Commission of 125, http://www.utexas.edu/com125/ (last visited Aug. 10, 2012) (including various reports and other information on leadership initiative).

Racial and ethnic diversity at UT-Austin does not just benefit Texas and society more generally; it also benefits its students. In *Grutter*, the Court correctly underscored the educational benefits of student body diversity, noting that "numerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." 539 U.S. at 330 (internal quotation marks omitted). "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.*; *see also* Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1769-76 (2004) (explaining how *Grutter* extended the importance of diversity in education to the development of leaders).

The Court's findings in *Bakke* and *Grutter* are confirmed by the practical experience of *Amici* – both while leaders-in-training at UT-Austin and now as leaders of their respective organizations. In the experience of *Amici*, individuals educated in a racially and ethnically heterogeneous university setting are better equipped to become future leaders. *Amici* have experienced this to be true in a number of concrete ways.

First, leaders educated in cross-cultural environments have a better ability to facilitate unique and creative approaches to problem-solving and to integrate different approaches. As scholars have noted, "much of the point of education is to teach students how others think and to help them understand different points of view – to teach students how to be sovereign, responsible, and informed citizens in a heterogeneous democracy." Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1774 (1996); *see also* Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 PEPP. L. REV. 663, 667-72 (2008) (discussing various benefits of diversity in the educational context).

Second, in the experience of *Amici*, leaders educated in a racially and ethnically heterogeneous environment are more likely to contribute to a positive environment for the organizations they lead, by decreasing incidents of discrimination and stereotyping. In so doing, not only do they recognize and integrate distinct approaches to solving problems, but they also create a safe environment for others to express ideas and offer unique solutions. Learning in a diverse environment helps leaders develop greater self-awareness and facilitates cooperation and communication. *See, e.g.*, Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?*, 25 CHANGE 44, 44-49 (Mar./Apr. 1993); Walter G. Stephan & Cookie White Stephan, *The Role of Ignorance in Intergroup Relations*, *in* GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 229, 243-49 (Norman N. Miller & Marilynn B. Brewer eds., 1984).

Third, leaders trained in a diverse educational setting are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers. This ability is directly related to their exposure to diverse needs, preferences, and perspectives on their path to leadership. For this reason, among others, leaders trained in a diverse university environment contribute to more productive organizations. *See, e.g.*, Jean-Marie Martino, *Diversity: An Imperative For Business Success* (The Conference Board 1999); TREVOR WILSON, DIVERSITY AT WORK: THE BUSINESS CASE FOR EQUITY (1996); Quentin Reade, *Diversity Helps To Deliver Better Business Benefits*, PERSONNEL TODAY, June 18, 2002 (reporting that 80% of organizations surveyed "believe there is a direct link between diversity and improved business performance"); *Research Makes a Business Case for Diversity*, FED. HUM. RESOURCES WEEK, Sept. 24, 2001 ("[r]esearch by the National Academy of Public Administration shows that diverse workforces are more productive").

Fourth, because our economy is becoming more diverse and global, exposure to diverse people, cultures, ideas, and viewpoints is imperative. In the experience of *Amici*, leaders trained in a diverse educational context are better able to manage and work with employees, business partners, and clientele in the United States and around the world.

Fifth, academic excellence as a secondary student, or even a university student, does not always translate into an effective and successful leadership quality. As *Amici* can attest, dynamic leaders in business, law, and government have emerged from UT-Austin even when they have not necessarily excelled as students. But their exposure to a first-class learning environment, and to each other as students, can have a profound effect on their future leadership potential.

Finally, diversity in the leadership ranks profoundly improves overall diversity within an organization. *See, e.g.*, Rebecca K. Lee, *Implementing Grutter's Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE J. GENDER L. & POL'Y 133, 134 (2011) ("Leadership is key to promoting meaningful diversity, as well as full equality, raising questions about which groups tend to occupy leadership positions and how the work of leading might be done differently to create the type of institutional cultures needed to support a deeper understanding of diversity."). Such increased diversity, in turn, creates a more fertile ground for training future leaders – thus reinforcing the leadership benefits discussed above.

In sum, as *Amici* have observed through their own experiences, both as students and now as leaders, an educational environment that ensures participation by diverse people, viewpoints, and ideas helps to produce more effective leaders in government, business, public education, and society at large. UT-Austin's current admissions policies ensure that such diversity is present in the educational opportunities afforded to the State's future leaders.

II. TEXAS FACES UNIQUE LEADERSHIP CHALLENGES DUE TO GEOGRAPHY AND SHIFTING DEMOGRAPHICS

In the experience of *Amici*, the need for culturally competent leaders (as well as more minority leaders) is particularly acute in Texas. That is due both to the State's shifting demographics and to its shared border with Mexico.

A. It Is Critical That Texas' Educational Infrastructure Support Texas' Minority Population, Especially Its Rapidly Expanding Latino Population

Texas is the second largest State in the United States, in terms of both population and size. According to U.S. Census data, the 2011 population of Texas was estimated at about 25.7 million.[8] Texas had the highest growth rate of any State, expanding by 529,000 people in 2011.[9] By comparison, the entire United States grew by only 2.8 million over the same period.

Texas' population is extraordinarily diverse. According to U.S. Census data, as of 2011 approximately 9.8 million Latinos, 3.1 million African-Americans, and 1 million Asian-Americans resided in Texas.[10] In May 2012, the U.S. Census reported that Texas is one of only five majority-minority States with 55.2% of its population not being single-race non-Latino white.[11] Indeed, by as early as 2000, minorities had already outnumbered the majority in Texas' college-age population. *See* Laycock, 78 TUL. L. REV. at 1800-01.

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[8] *See* U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/states/48000.html (last visited Aug. 9, 2012).

[9] *See* Press Release, U.S. Census Bureau, *Texas Gains the Most in Population Since the Census* (Dec. 21, 2011), *available at* http://www.census.gov/newsroom/releases/archives/population/cb11-215.html.

[10] *See* U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/states/48000.html (last visited Aug. 9, 2012).

Moreover, Texas' minority population is growing rapidly. In 2000, 43% of Texans younger than 18 were non-Latino white. In 2010, that number dropped to 34%. The data for 2011 show that percentage continuing to drop, as only 30% of Texas children under age five are non-Latino white.[12] One Texas demographer estimates that, between 2000 and 2040, the State's public school enrollment will see a 213% increase in Latino children.[13] The rapid increase in the Latino population will have a profound effect on the demographic makeup of the State's future labor force. In 2000, Latinos made up 27.5% of the State's labor force. But, in 2040, Latinos are projected to compose 58.7% of the State's labor force.[14]

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[11] *See* Press Release, U.S. Census Bureau, *Most Children Younger Than Age 1 are Minorities, Census Bureau Reports* (May 17, 2012), *available at* http://www.census.gov/newsroom/releases/archives/population/cb12-90.html.

[12] *See* Becca Aaronson, *On the Records: Texas 1 of 5 "Minority-Majority" States*, TEXAS TRIB., May 17, 2012, *available at* http://www.texastribune.org/texas-counties-and-demographics/census/on-the-records-majority-texas-minority-races/print/.

[13] *See* Gary Scharrer, *Texas Demographer: "It's Basically over for Anglos"*, chron.com, Feb. 24, 2011, *available at* http://blog.chron.com/texaspolitics/2011/02/texas-demographer-its-basically-over-for-anglos/.

[14] *See* Texas Comptroller of Public Accounts, *Texas Works: Training and Education for All Texans* 14 (Dec. 2008), *available*

Because the importance of higher education to economic success is now well-established,[15] the State has a compelling interest in ensuring that its educational infrastructure keeps pace with these seismic demographic shifts. In this respect, Texas has a long way to go. Texas has the lowest percentage of Latinos with high school degrees or higher among the States with the largest Latino populations.[16] As of March 2006, no more than 56% of the State's Latino population aged 21 or higher had attained an educational certification or degree more advanced than a high school degree.[17]

The State thus has an urgent need to take special care to see that talented and qualified Latino students are given an opportunity to succeed. As a 2004 Governor's Business Council report stated, "[t]oo few of [Texas'] students, particularly among

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at http://www.window.state.tx.us/specialrpt/workforce/PDF/WorkForceFullReport.pdf.

[15] *See* Lisa R. Barrow & Cecilia Elena Rouse, *Does College Still Pay?*, THE ECONOMISTS' VOICE, Vol. 2, Issue 4, Art. 3 (2005), *available at* http://www.transad.pop.upenn.edu/downloads/barrow-rouse.pdf; Eric L. Dey et al., *Long-Term Effect of College Quality on the Occupational Status of Students* (Nat'l Ctr. for Postsecondary Improvement 1999), *available at* http://www.stanford.edu/group/ncpi/documents/pdfs/5-06_collegequality.pdf; ERNEST T. PASCARELLA & PATRICK T. TERENZINI, HOW COLLEGE AFFECTS STUDENTS: A THIRD DECADE OF RESEARCH (2005).

[16] *See* Lina M. Rombalsky, *Leadership and Diversity: A Snapshot of Hispanic Representation in State Government throughout the United States* at 10, Presented at Workshop 2: Diverse Leaders and Leading a Diverse Workforce (Leading the Future of the Public Sector: The Third Transatlantic Dialogue, University of Delaware, Newark, Delaware, USA, May 31 – June 2, 2007), *available at* http://www.ipa.udel.edu/3tad/papers/workshop2/Rombalsky.pdf.

[17] *See id.*

[its] minority populations, are graduating from high school and college. Texas is a rapidly growing, diverse state with unique demographic challenges and we must close the gap with other competitor states in college participation and success."[18]

B. Texas Has A Unique Need For Culturally Competent Leaders In Light Of Its Shared Border With Mexico

Texas faces an additional unique leadership challenge due to its shared border with Mexico. As a border State, Texas plays an important role in shaping and protecting America's foreign policy and economic interests with respect to Mexico. The United States-Mexico border is the most frequently crossed international border in the world and provides a critical trade route between the countries.[19] In 2010, Texas was the first State with more than $100 billion in surface trade with Mexico in a calendar year.[20]

Trans-border concerns run the gamut of important issues for U.S.-Mexican relations. As the State with the largest border with Mexico, governmental and business leaders in Texas border communities play a critical role in the ongoing struggles to ensure proper adherence to the Nation's immigration policies. Their actions, in turn, have foreign policy effects with Mexico. Such leaders also perform a profound role in the inculcation of critical democratic values, from adherence to the rule of law to the protection of life, liberty, and property.

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[18] Governor's Business Council, *From Good to Great: The Next Phase in Improving Texas Public Schools* 1, 3 (Nov. 2004), *available at* http://texasgbc.org/GBC__From%20Good%20to%20Great.pdf.

[19] *See* Edwin Mora, *Senate Democratic Whip Compares Sealing the Mexican Border to Trying to Keep Drugs Off of I-95*, CNSNews.com, May 19, 2010, *available at* http://www.cnsnews.com/node/66271.

[20] *See* David Hendricks, *Volume of Texas-Mexico Freight Presses Higher: Texas in Driver's Seat as Border Trade Soars*, chron.com, June 1, 2011, *available at* http://www.chron.com/business/article/Volume-of-Texas-Mexico-freight-presses-higher-1688787.php.

Members of Texas law enforcement serve courageously on the frontline of America's war on drugs. Law enforcement agencies such as the U.S. Border Patrol are responsible for employing leaders who will need to deal with the fast evolving and socially complex environment in which they find themselves. To lead effectively in such circumstances requires education, judgment, and cultural sensitivity. Many of those leaders have been and will be educated at UT-Austin, as well as other state institutions in Texas.

The border town of El Paso serves as an example of how community leadership and education can effectively prevent the spread of crime and improve social cohesion. Despite its proximity to one of the most dangerous cities in Mexico, and perhaps the world, El Paso has maintained its reputation as one of the safest cities in America.[21] El Paso's officials credit active citizenry and community leadership for the city's low crime statistics.[22] Also relevant is the student makeup of the University of Texas, El Paso ("UTEP"), which mirrors the broader ethnic makeup of El Paso.[23] UTEP has 21,000 students, of which the large majority is Mexican American.[24] Additionally, roughly 1,400 students travel from Mexico every day to attend classes.[25] This diversity and inclusiveness in education have helped to develop leaders who are able to tackle the most problematic social issues in one of the most diverse cities in the State.

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[21] *See* Duncan Currie, *The War Next Door*, NAT'L REVIEW, July 19, 2010, at 25.

[22] *See id.* at 26.

[23] *See id.*

Given the intensity of the myriad relationships necessary to sustain productive dealings with Mexico, it is important not only to the State but to the Nation that Texas develops culturally competent leaders, including those with fluency in Spanish and knowledge of Mexican culture. UT-Austin's admissions policies are aimed at addressing this critical leadership need.

So is its curriculum. For instance, UT-Austin's McCombs School of Business hosts an annual Hispanic Leadership Summit at which leaders from all over the United States gather to collaborate and discuss important issues in Texas and across the Nation, and the key role Latino-Americans share in addressing these issues.[26] Such efforts illustrate UT-Austin's commitment to use creative educational methods to solve leadership issues that are critical to the State of Texas, as well as the Nation as a whole.

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[24] *See id.*

[25] *See id.*

[26] *See* McCombs School of Business, UT-Austin, Hispanic Leadership Summit, http://www.mccombs.utexas.edu/HLI/summit.aspx (last visited Aug. 9, 2012).

III. THE EQUAL PROTECTION CLAUSE SHOULD NOT BE INTERPRETED TO PROHIBIT UT-AUSTIN'S ADMISSIONS POLICIES, WHICH ARE NECESSARY TO ITS CRITICAL MISSION

In interpreting the Equal Protection Clause to permit UT-Austin to include racial considerations as part of its admissions process, the Fifth Circuit applied this Court's holding in *Grutter* that enrolling a critical mass of minority students achieves the compelling public interest "in obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. *Grutter* also recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332.

For the reasons set forth in Respondents' brief on the merits, the Fifth Circuit's decision should be affirmed. Based on their personal and professional experience, *Amici* would add two additional reasons for upholding UT-Austin's admissions policies.

A. The Constitution Should Not Be Interpreted To Prohibit A Public University From Ensuring Diversity In Its Path To State Leadership

UT-Austin's admissions policies are necessary for the realization of the University's critical mission of providing a path to state leadership and training culturally competent leaders. As discussed above, Texas has a compelling need to ensure diversity in this essential leadership training ground, and UT-Austin's carefully designed admissions policies implement that critical educational mission.

This Court has long recognized the wisdom of deferring to the informed and independent decisions of educators. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy"); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment."). The Court should adhere to that principle here.

B. The Court Should Be Reluctant To Interpret The Equal Protection Clause So As To Impair A State's Ability To Address Critical, State-Specific Challenges

The demographic trends discussed above underscore Texas' unique need to educate a greater number of minority leaders and culturally competent leaders so that they may go on to serve in roles of leadership throughout the State. Texas has never had a greater need for diversity in leadership than it does today. That need will increase as population growth and demographic trends continue as projected. The Equal Protection Clause does not bar UT-Austin from adopting admissions policies that serve the critical and evolving needs of the State and its residents.

To be sure, considering demographics in determining whether the "path to leadership" is visibly open at a flagship university like UT-Austin is a great deal different than "racial balancing." A flagship university cannot pick a demographic target and work towards it in its admissions process. That is not what UT-Austin does. But such a university can consider the racial and ethnic diversity of its student body, identify blatant racial disparities (like there are for Latinos at UT-Austin), and adopt limited measures to address such disparities – and open the path to leadership. These policies, which allow UT-Austin to assemble a diverse student body that is reflective of the surrounding community, utilize modest and individualized considerations of race that are consistent with the policies permitted under *Grutter* and *Bakke*.

That UT-Austin's admissions policies have been designed to address state-specific leadership needs is important for an additional reason. Just as the Court has long recognized the wisdom of deferring to educators' professional judgment, the Court traditionally has also shown great respect to States' right to address state-specific challenges. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 581 (1995) ("If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures.") (Kennedy, J., concurring); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) ("States cannot serve as laboratories for social and economic experiment if they must pay an added price when they meet the changing needs of their citizenry") (citation omitted). Respect for federalism in this case militates strongly in favor of deference to the State's carefully considered effort to address a critical state need.[27]

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[27] It must also be noted that UT-Austin has a long history of exclusion that continues to cast a shadow over the recruitment of African-Americans. *See, e.g.*, *Sweatt v. Painter*, 339 U.S. 629, 633 (1950) (striking down UT-Austin's policy of excluding African-Americans from its law school). In addition to advancing its

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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critical leadership objectives, UT-Austin's current admissions policies are a subtle, constitutionally permissible way for UT-Austin to show that it now regards a student's background as a potential asset, rather than a quality once treated as a disqualifying deficiency.

APPENDIX

List of Amici – Distinguished Alumni (titles and institutional affiliations are provided for identification purposes only)

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Member , The University of Texas System Board of Regents, 2003-2009
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Mezzo-Soprano, New York Metropolitan Opera, 1982-1989
When I Rise Documentary Film – http://www.whenirisefilm.com/
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President, The University of Texas at Austin, 1998-2006
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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE EMORY OUTLAW AND EMORY LATIN AMERICAN LAW STUDENTS ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Does the use of race in admissions at a public university further a compelling governmental interest in obtaining the educational benefits that flow from a diverse student body?

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INTEREST OF *AMICI CURIAE*[1]

Emory University School of Law OUTLaw is an organization for lesbian, gay, bisexual, transgender, and queer (LGBTQ) Emory Law students and their supporters. OUTLaw endeavors to combat and oppose discrimination on the basis of race, color, religion, ethnic or national origin, gender, age, disability, sexual orientation, gender identity, gender expression, veteran's status, or any factor that is a prohibited consideration under applicable law.

The Latin American Law Students Association (LALSA) is a student organization at Emory University School of Law dedicated to promoting the exchange of ideas and information on Hispanic culture and raising awareness of social and legal issues affecting the Hispanic community and the legal profession. To these ends, LALSA hosts various cultural and networking events, community service opportunities, and academic tutoring programs designed to help law students of diverse backgrounds integrate to their school and succeed in their careers.

This case is of great importance to *amici* because it concerns issues that lie at the core of their mission: the great and positive impact of diversity within legal education and the legal profession. *Amici* are aware of the educational benefits that diverse backgrounds bring to student bodies in every field of education. A decision in this case will affect the mission and members of *amici* and law students at schools across the nation.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have submitted to the Clerk blanket consents to the filing of all amicus briefs. Pursuant to this Court's Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part, and no such counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Diversity in the classroom is a compelling government interest because it is essential to good pedagogy. Diversity increases the number of perspectives available to students by bringing together students with very different life experiences. It prepares students to effectively contribute to an increasingly diverse and globalized workforce by helping them to overcome widespread prejudices. It fosters civic engagement by encouraging minority students who are most likely to contribute their services to marginalized communities.

These benefits are of great importance to the legal profession given its unique role in helping people navigate the complex framework of laws that undergirds our society, its particularly global character, and its centrality to movements for civil rights over the past century. The examples of African-American attorneys and law students, which have been the subjects of a significant number of scholarly works, illustrate this point as it applies to underrepresented minority populations in general.

ARGUMENT

I. DIVERSITY IN THE CLASSROOM IS A COMPELLING GOVERNMENTAL INTEREST.

Diversity in the law school classroom is essential to the functioning of the modern legal profession. This Court in *Grutter v. Bollinger*, 539 U.S. 306, 314–32 (2003) identified three aspects of diversity in the classroom that make it worthy of constitutional protection as a compelling governmental interest. Diversity in the classroom increases the number of perspectives available to students. *Id.* at 314. It prepares students to effectively contribute to an increasingly diverse and globalized workforce. *Id.* at 330. It fosters civic engagement. *Id.* at 331-332. This brief considers the ways in which the three aspects of diversity recognized in *Grutter* enhance the legal profession, and it urges this Court to affirm the decision of the court below.

A. Diversity in the Classroom Increases the Number of Perspectives Available to Students.

A legal education is incomplete without exposure to a diverse set of legal, cultural, and political viewpoints. *Grutter*, 539 U.S. at 314. Learning about law in a diverse classroom setting is necessary to understanding that law does not operate in a vacuum. Diversity in the legal classroom ensures that graduating lawyers are cognizant of inequalities within the profession, and of potential client needs to which they would not be exposed in more homogenous settings.

The American Bar Association acknowledges the necessity of heterogeneous student bodies with its Standard 212, which requires law schools to "demonstrate by concrete action a commitment" to supporting "members of underrepresented groups, particular racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity." American Bar Association Standards for Approval of Law Schools (2011-2012), Ch. 2, Stand. 212(A). Research shows that racial diversity brings students into contact with perspectives they would not otherwise encounter:

> Even among the most privileged minority students—those attending an elite university practicing affirmative action—half grew up in segregated or racially mixed neighborhoods . . . [L]argely middle-class black students, along with their similarly segregated Latino peers, are vastly more likely to have witnessed gunshots, muggings, and other social disorders, and to have known homeless people, prostitutes, and gang members than their white peers.

Elizabeth Anderson, *Affirmative Action is About Helping All of Us*, 57 Chron. Higher Educ. Rev. B11, B13 (June 3, 2011). Students who already have experience interacting with the people most likely to come into contact with, and to need the protection of, the justice system are an asset in the classroom. Minority students are equipped with "firsthand knowledge of racial conditions that is essential for elites to know if they are to be able to competently serve disadvantaged, racially segregated sectors of society." *Id.* at B13. Their knowledge enables minority students to "bring practical competence in establishing rapport and respectful interaction with the less privileged" into the classroom. *Id.* These are precisely the skills that lawyers, who will work with criminal defendants, at-risk property owners, and victims of injuries on a daily basis, need to have long before they conduct their first client interview.

The benefits of learning in a diverse classroom environment go beyond practical knowledge in dealing with marginalized people, known as members of "outgroups" in sociology. One review of over 500 studies undertaken between 1940 and 2000 showed that encountering people from different groups leads to more favorable attitudes "toward the entire outgroup, outgroup members in other situations, and even outgroups not involved" in the initial encounters. Thomas Pettigrew and Linda Tropp, *A Meta-Analytic Test of Intergroup Contacts Theory*, 90 J. Personality & Soc. Psych. 5, 751, 766 (2006). This is as true in law as it is in other sectors of society: "More racial diversity in the [county-level] bar results in less racial disparity in criminal sentencing." Ryan D. King, Kecia R. Johnson, and Kelly McGeever, *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 L. & Soc. Rev. 1, 1, 26 (2010). Diversity in the classroom is the surest way to inculcate respect for people of diverse backgrounds, which is indispensable to the pursuit of justice.

This diversity only came about recently, as a result of policies such as the University of Texas plan at issue in the present litigation. The history of minority lawyers in the southeastern United States illustrates the benefits to the legal profession of diversity policies in education.

Charles H. Houston, the first black student on the Harvard Law Review, later vice-dean of the Howard Law School and a champion of desegregation efforts in the courts, was acutely aware of the challenges communities of color faced in the South as African-Americans attempted to advocate for their civil rights in the early twentieth century. Genna Rae McNeil, *Charles Hamilton Houston*, 3 Black L.J. 2, 123, 123-124 (1974). Lack of empathy from the overwhelmingly white legal community was a significant obstacle to the fight for civil rights in Houston's time and the years that followed. In 1935, Houston wrote,

> [T]he average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He has too many conflicting interests, and usually himself profits as an individual by that very exploitation of the Negro which, as a lawyer, he would be called upon to attack and destroy.

Charles H. Houston, *The Need for Negro Lawyers*, 4 J. Negro Educ. 1, 49, 49 (Jan. 1935).

In 1935, there were only 14 black lawyers in all of Georgia, which had a black population of 1,071,125. *Id.* White lawyers, already materially interested in racial segregation, lacked the kind of diverse educational experiences that would expose them to different perspectives, especially on racial issues. "School segregation was embedded in the Georgia constitution," and integration did not begin in earnest until the 1960s. Gwen Y. Wood, A Unique and Fortuitous Combination: An Administrative History of the University of Georgia Law School, 100, 204 (1998).

Though *de jure* segregation ended more than five decades ago, minority populations throughout the United States still have vastly different experiences with private and public institutions than do members of the majority population. Minority populations can be the targets of "redlining" practices whereby bank and mortgage companies enact policies that are intended to deny equal credit opportunities to minority residential areas, *see, e.g.*, Mike DeNardo, *Wells Fargo Settles Gov't Complaint Over Home-Buyer "Redlining"*, CBS Philly (July 16, 2012) *available at* http://philadelphia.cbslocal.com/2012/07/16/wells-fargo-settles-government-complaint-over-home-buyer-redlining/ (last accessed Aug. 7, 2012), and minority U.S. residents are far more likely than their white counterparts to be incarcerated, *see, e.g.*, Office of Justice Programs, Dep't of Justice, NCJ 236096, Prisoners in 2010, 7, 27 (2011). Lawyers and judges hold a special position in the social order, guiding individuals through the complex framework of laws that undergirds our society. Members of the legal profession better serve this role when they come from minority backgrounds and when they gain exposure to their colleagues' diverse perspectives.

Diversity in the classroom is essential to ensuring that the legal profession ably serves all members of our society. Thanks in part to policies designed to promote diversity, minority students now comprise over twenty percent of law school student bodies. Robert A. Stein, *The Future of the Legal Profession*, 91 Minn. L. Rev. 1, 4 (2006-2007). This diversity is essential to the education of future legal professionals, and it must be allowed to continue.

B. Diversity in the Classroom Prepares Students to Effectively Contribute to an Increasingly Diverse and Globalized Workforce.

Diversity in the classroom prepares students to effectively contribute to an increasingly diverse and globalized workforce. People who graduate law school will undertake a variety of occupations, all of which require the ability to understand many different perspectives.

As the court below noted, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 219-20 (5th Cir. 2011) (quoting *Grutter* at 330) *cert. granted*, 11-345, 2012 WL 538328 (U.S. Feb. 21, 2012). The ability to work with diverse clients and colleagues is especially pertinent to legal work. As one prominent Atlanta law firm put it: "It takes diverse perspectives to examine client issues from many angles in order to find the best solutions." *An Inclusive Environment*, Troutman Sanders LLP, *available at* http://www.troutmansanders.com/diversity/ (last visited Apr. 4, 2012).

One reason that diversity is so essential to the legal profession is that lawyers must often encounter situations and people to whom they have seldom been exposed before. Large law firms often count multinational corporations among their clients. Pro bono attorneys often represent indigent clients who are minorities or immigrants. Judges must make decisions on cases involving parties from backgrounds very different than their own.

Being a member of a diverse group, and having been exposed to diversity in one's educational experience, are also valuable to law firms. Many firms view diversity as "a strategic asset that allows for more effective client service" and increasingly look for attorneys capable of contributing in a diverse workplace. *Racial Diversity*, King & Spalding, http://www.kslaw.com/About-Us/Diversity/Racial-Diversity (last visited Apr. 8, 2012). This demand for attorneys exposed to diversity is also being driven by clients; "[a]ll law firms want to improve their diversity," and they are also "under increasing pressure from their clients to do so." *King & Spalding Pioneers Diversity Program for Large Law Firms in Conjunction with American Institute for Managing Diversity*, King & Spalding (June 27, 2005), http://www.kslaw.com/NewsandInsights/NewsDetail?us_nsc_id=255 (last visited Aug. 9, 2012). Diversity in the classroom prepares attorneys to work with diverse clients and colleagues, a skill increasingly demanded by firms.

Unfortunately, respect for clients and colleagues with diverse backgrounds is still lacking in society at large. In one recent study, resumes with "White-sounding" names received approximately fifty percent more callbacks for job interviews in Boston and Chicago than similar resumes with "African-American-sounding" names. Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am.

Ec. Rev. 4, 991, 992 (2004). Other studies have shown the persistence of discrimination in employment, home mortgage lending, and even used car markets. *See* Richard Williams, Reynold Nesiba, and Eileen Diaz McConnell, *The Changing Face of Inequality in Home Mortgage Lending*, 52 Soc. Problems 2, 181 (2005); Vincent J. Roscigno, Lisa M. Williams, and Reginald A. Byron, *Workplace Racial Discrimination and Middle Class Vulnerability*, Am. Behavioral Scientist 10.1177/0002764211433805 (Feb. 13, 2012); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 4, 817 (Feb., 1991). Diversity in the classroom helps prepare legal professionals to work with clients and colleagues of different races and backgrounds.

Judicial diversity is especially important: "[J]udges from different backgrounds and a diversity of experiences help to guard against the possibility of narrow decisions." Lawyers' Comm. for Civil Rights Under Law, *Improving Diversity on the State Courts: A Report from the Bench*, Justice at Stake, 7 (2009), http://www.justiceatstake.org/media/cms/DiversityReport2009_4F739E0E55910.pdf. "To reinforce democratic values and strengthen the public's confidence in the justice system, it is crucial that the judiciary reflect the diversity of the citizenry and that judges have the background to appreciate the circumstances of those who appear before them." *Id.* at 35. It is impossible to achieve judicial diversity without a diverse pool of attorneys as candidates.

The ability to understand a variety of perspectives is perhaps more important now than it ever has been. "[I]n a global economy—and with a foreign policy premised on human rights and dignity—lacking a diverse workforce is embarrassing to the United States, undermines its credibility, and hurts its business success in dealing with other nations." Sally Coleman Selden, *A Solution in Search of a Problem? Discrimination, Affirmative Action, and the New Public Service*, 66 P. Admin. Rev. 6, 911, 911 (Nov.-Dec. 2006). This is especially true of law, which serves as a major conduit through which people around the world negotiate, coordinate their activity, and seek justice. Educational diversity aids students in developing their intercultural communication skills, sensitivity to cultural differences, and understanding of multicultural issues. Carol Logan Patitu and Melvin C. Terrell, *Benefits of Affirmative Action in Student Affairs*, 83 New Directions for Stud. Servs. 41 (Fall 1998). It equips students with the "skills in and awareness of language and culture" that drives the modern economy. *Id.* at 46. These skills are also important in public law, as the administrative state is expected to deal fairly with all citizens and engages with every community in America. Educational diversity, because of its importance in preparing leaders for the global economy and modern legal profession, is indispensable to the training of future lawyers.

C. Diversity in the Classroom Fosters Civic Engagement.

Diversity in the classroom fosters civic engagement by minority students. The court below recognized this, holding,

> A diverse student body is crucial for fostering this ideal of civic engagement, because "[i]n order to cultivate a set of leaders with legitimacy in the eyes of

> the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity" . . . "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."

Fisher, 631 F.3d at 220, 257 (quoting *Grutter*, 539 U.S. at 332).

When participation in universities is not visibly open to people of different races and ethnicities, minority students can feel unwelcome. Students quoted in one study conducted after California banned the consideration of race in public education admissions said, "[Campuses of the University of California] don't want people like me," and "When you're a minority as well as a woman, you just have . . . two major strikes against you." Robert T. Teranishi and Kamilah Briscoe, *Contextualizing Race: African American College Choice in an Evolving Affirmative Action Era*, 77 J. Negro Educ. 1, 20 (Winter 2008). Unfortunate though it is, the "many alternative strategies implemented at public universities . . . have not been able to maintain minority enrollment absent affirmative action." Mark C. Long, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 P. Admin. Rev. 2, 315, 315 (Mar.-Apr. 2007). Without affirmative action, "U.S. law schools would each year admit fewer than 2,000 blacks." George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. Legal Educ. 103, 104 (2003).

Becoming a leader in society by accessing legal education is difficult enough without the added weight of feeling like an institution is unwilling to consider one's unique racial and cultural identity as an asset. To expand on the baseball metaphor used by the student quoted above, actively fostering diversity in the classroom helps keep minority students in the game so that they can make their contributions to society.

Minority students who have become lawyers thanks to institutions being visibly open to them have done a commendable job of taking up leadership in the community over the past century. Thanks to the legacy of committed service to underrepresented people that minority lawyers have created and to the life experiences minority students bring to the classroom, minority students also help their peers to appreciate the need to work for justice and sympathize with others. Over the past century, minority lawyers have led the way to greater equality before the law and greater ideals for the entire legal profession. This has been especially true in the movement for civil rights, the pro bono movement, and contemporary volunteer work.

While "[t]he average white lawyer, especially in the South, [could not] be relied upon to wage an uncompromising fight for equal rights for Negroes," Houston at 49, black lawyers took up the mantle of civil rights. Professors and students affiliated with the Howard University Law School were active in so many cases involving desegregation in education, public accommodations, voting, and housing that its annual report for 1953-54 "reflected the institutional and collective nature of the struggle for liberty" throughout the country. Genna Rae McNeil, Comment *Justiciable Cause: Howard University Law School and the Struggle for Civil Rights*, 22 Howard L.J. 283, 295 (1979). The school, which was visibly open to minority students, "became a living laboratory where civil rights law was intervened by teamwork." *Id.* at 291 (quoting R. Kluger, Simple Justice, 128 (1975)).

It was not just at Howard that minority lawyers worked at the cutting edge of social justice. Even before the advent of the pro bono movement in the 1960s, "National Bar Association members were leaders of the pro bono movement at a time when they could least afford to provide free legal services to the poor . . . ." J. Clay Smith, Jr., *The Black Bar Association and Civil Rights*, 15 Creighton L. Rev. 3, 651, 663 (1981-82). The National Bar Association even set a goal of establishing free legal clinics "in all cities with a colored population of 5000 or more," despite there being only slightly more than 1,000 black lawyers nationwide at the time. *Id* at 664.

By the early 1980s, when institutions had begun in earnest to consider race an asset in school admissions, black lawyers contributed significantly to community and public interest groups. Geraldine R. Segal, Blacks in the Law: Philadelphia and the Nation, 107 (1983). They believed in continuing the legacy of service to others, as do minority lawyers today. One study of University of Michigan Law School graduates found that its minority graduates in private practice "performed an average of 121 hours per year of uncompensated legal service compared to 98 hours performed by white graduates." Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 Fordham L. Rev. 1409, 1425 (Mar.

2009). For black Harvard Law School graduates, the average amount of pro bono time was 133 hours annually, compared with a national average of 25 hours. *Id.* Part of this extensive commitment to pro bono work may stem from the role minority lawyers can play in helping poor members of their extended communities in "obtaining an informal referral to a lawyer willing to provide legal services for low or no cost." *Id.* at 1431. For at least some minority clients, a shared group identity with a legal professional encourages the rapport and trust that is essential to good lawyering. *See* Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Service Organizations Need African American Staff Attorneys*, 18 Cornell J.L. & Pub. Pol'y 1, 4 (Fall 2008).

Many law schools and firms view their own commitment to community engagement as entailing that they bring together students and employees who are diverse and who are capable of working effectively in a diverse environment. Starting from the belief that their commitment to diversity and community service "is not only a business imperative – it is also a moral one," law schools and firms have found that the benefits of diversity extend not only to education and meeting client needs, but to civic engagement as well. *Our Commitment*, McKenna Long & Aldridge, *available at* http://www.mckennalong.com/careers-diversity-commitment.html (last visited Apr. 9, 2012). One firm stated that a commitment to diversity enhances "both our ability to provide world-class services to clients and our collective and individual contributions to the strength and vitality of the communities in which we work and live." *Better*

Together: Diversity & Inclusion, Kilpatrick Townsend, *available at* http://www.kilpatricktownsend.com/en/About_Us/Diversity.aspx (last visited Apr. 8, 2012). Diversity in the classroom produces diverse and civic-minded attorneys whom firms view as essential to furthering their own commitments to civic engagement.

In the years since institutions began adopting affirmative action policies in school admissions, universities have appreciated more and more that race is an asset in the classroom. Thanks in part to that attitude and policies stemming from it, minority lawyers now serve as the President and Attorney General of the United States, sit on supreme courts throughout the nation (including in Georgia, where two black chief justices have held the office in the last two decades), sit on America's school boards and town councils, advise its museums and hospitals, and much more. Ensuring that primary, secondary, college, and graduate school classrooms are diverse galvanizes more students to join the legal profession, and to serve their communities with their legal degrees. Diversity in the classroom drives students into the legal and other professions, and then out into the world where they provide leadership for countless government and community organizations.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

In the Supreme Court of the United States

ABIGAIL NOEL FISHER,
PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF EMPIRICAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are leaders in the field of quantitative social science and statistical methodology. They file this brief in order to point out to the Court the substantial methodological flaws in the research discussed in the Brief *Amici Curiae* for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party. Based on over 255 collective years of social-science research experience, *amici* have concluded that the research on which that brief relies, Professor Sander's "mismatch" hypothesis, is unreliable, failing basic tenets of research design.

Guido Imbens is a Professor at the Graduate School of Business at Stanford University. He had held positions in the Economics Departments at UC Berkeley, UCLA, and Harvard University before joining Stanford in 2012. Professor Imbens's work has been supported by the National Science Foundation and he is a fellow of both the Econometric Society and the American Academy of Arts and Sciences. Imbens's primary field of interest is econometrics, and he has conducted influential research on a broad range of issues throughout the social sciences, greatly improving social scientists' ability to assess the causal effects of interventions from both field and experimental data. He also works with governments and policy institutions on designing and evaluating economic policy interventions in areas such as education and labor. Along with Professor Rubin, he is co-authoring a highly anticipated textbook on principles for causal inference.

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

Donald B. Rubin is the John L. Loeb Professor of Statistics at Harvard University, where he served as chairman for 13 years of three decades there as full Professor of Statistics. He has authored over 350 publications (including several books), including pioneering work on causal inference in experiments and observational studies. His publications have generated well over 100,000 citations. Rubin is a Fellow of the American Statistical Association, the Institute for Mathematical Statistics, the International Statistical Institute, the Woodrow Wilson Society, the John Simon Guggenheim Society, the New York Academy of Sciences, the American Association for the Advancement of Sciences, the American Academy of Arts and Sciences, and the Alexander von Humboldt Foundation. He is also the recipient of four of the most prestigious awards available to statisticians: the Samuel S. Wilks Medal of the American Statistical Association, the Parzen Prize for Statistical Innovation, the Fisher Lectureship, and the George W. Snedecor Award of the Committee of Presidents of Statistical Societies. He is an Elected Member of the U.S. National Academy of Sciences and an Elected Fellow of the British Academy. Furthermore, he is the recipient of many other awards and honors, such as an Honorary Doctorate from the Faculty of Social Sciences and Economics, Otto Friedrich University, Bamberg Germany.

Gary King is the Albert J. Weatherhead III University Professor at Harvard University—one of only 24 with the title of University Professor, Harvard's most distinguished faculty position. He is based in the Department of Government and serves as Director of the Institute for Quantitative Social Science. He has been elected Fellow in six honorary societies (National Academy of Sciences 2010, American Statistical Association 2009, American Association for the Advancement of Science 2004, American Academy of Arts and Sciences 1998, Society for Political Methodology 2008, and American Academy of Political and Social Science 2004) and has won more than 30 "best of" awards for his work, including leading contributions to the statistics of causal inference. He was listed as the most cited political scientist of his cohort. His research has been supported by the National Science Foundation, the Centers for Disease Control and Prevention, the World Health Organization, the National Institute of Aging, the Global Forum for Health Research, as well as numerous centers, corporations, foundations, and other federal agencies.

Richard A. Berk is a Professor of Statistics and Criminology at the University of Pennsylvania, where he has appointments in the Department of Statistics in the Wharton School and in the Department of Criminology in the School of Arts and Sciences. He was previously a Distinguished Professor of Statistics at UCLA, a Professor of Statistics and Sociology at UC Santa Barbara, and a Professor of Sociology at Northwestern University. He has held visiting appointments at the École Normale Supérieure in Paris in the Department of Earth, Atmosphere and

Oceans, and with the Statistics Group of the Los Alamos National Laboratories. He has authored over 190 publications (among them 15 books), including highly respected work on causal inference, regression analysis, machine learning, and forecasting. Professor Berk has been elected to the Sociological Research Association, and is an Elected Fellow to the American Association for the Advancement of Science, the American Statistical Association, and the Academy of Experimental Criminology. He has received the Paul S. Lazarsfeld Award for methodological contributions from the American Sociological Association. He is a founding editor of The Evaluation Review, a journal of applied social research. Professor Berk received his BA from Yale University and his Ph.D. from The Johns Hopkins University.

Daniel E. Ho is a Professor of Law and the Robert E. Paradise Faculty Fellow for Excellence in Teaching and Research at Stanford Law School, where he teaches statistics and administrative law. His scholarship centers on quantitative empirical legal studies, and he holds a J.D. from Yale Law School and a Ph.D. in political science from Harvard University. He was the Maurice R. Greenberg Visiting Professor of Law at Yale Law School and a Visiting Professor of Law at New York University School of Law. His work has been supported by the National Science Foundation, and his work has been awarded numerous prizes, including the Warren Miller Prize (for an article on causal inference), awarded to the best paper published in Political Analysis. He currently serves as President of the Society for Empirical Legal Studies.

Kevin M. Quinn is a Professor of Law at the UC Berkeley School of Law (Boalt Hall). Previously, he served as Associate Professor of Government at Harvard University, and as Assistant Professor of Political Science and Adjunct Assistant Professor of Statistics at the University of Washington. Quinn has written extensively on statistical methodology, and he teaches courses on applied statistics and empirical legal studies. He is a three-time winner of the Gosnell Prize for excellence in political methodology and his research has been supported by the National Science Foundation. He currently serves as an Associate Editor for the Journal of the American Statistical Association.

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SUMMARY OF ARGUMENT

In *Grutter v. Bollinger*, this Court held that a state has a compelling interest in attaining a diverse student body for the benefit of all students, and that this compelling interest justifies the consideration of race as a factor in university admissions. See 539 U.S. 306, 325, 328 (2003). In this, the latest case to consider the constitutionality of affirmative-action admissions policies, Professor Richard H. Sander, along with lawyer and journalist Stuart S. Taylor, Jr., filed a brief *amici curiae* arguing that social-science research has shown affirmative action to be harmful to minority students. See Brief *Amici Curiae* for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party ("Sander-Taylor Brief") 2. According to them, a "growing volume of very careful research, some of it completely unrebutted by dissenting work" has found that affirmative-action practices are not having their intended effect. *Id.*; see also Brief *Amici Curiae* of Gail Heriot et al. in Support of Petitioner ("Three Commissioners Brief") 14 ("The Commissioner Amici are aware of no empirical research that challenges [Sander's] findings.").

But, as *amici* will show, the principal research on which Sander and Taylor rely for their conclusion about the negative effects of affirmative action—Sander's so-called "mismatch" hypothesis[2]—is far from "unrebutted." Sander-Taylor Brief 2. Since Sander first published findings in support of a "mismatch" in 2004, that research has been subjected to wide-ranging criticism. Nor is Sander's research "very careful." *Id.* As some of those critiques discuss in detail, Sander's research has major methodological flaws—misapplying basic principles of causal inference—that call into doubt his controversial conclusions about affirmative action. The Sander

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[2] In essence, "mismatch" is said to result when a minority student attends a more selective university than he would have without affirmative action, based upon a "very large" racial preference. The claim is that because the student's test scores and high school or college grades indicate that he is not as academically qualified to attend the school at which he matriculates as other students, his admission there works to his detriment because "teachers would aim instruction at the median student, and those with weaker preparation would fall behind and learn less." Sander-Taylor Brief 4.

"mismatch" research—and its provocative claim that, on average, minority students admitted through affirmative action would be better off attending less selective colleges and universities—is not good social science.

Sander's research has "significantly overestimated the costs of affirmative action and failed to demonstrate benefits from ending it." David L. Chambers et al., *The Real Impact of Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855, 1857 (2005). That research, which consists of weak empirical contentions that fail to meet the basic tenets of rigorous social-science research, provides no basis for this Court to revisit longstanding precedent supporting the individualized consideration of race in admissions. Cf. *Grutter*, 539 U.S. at 334 ("Universities can * * * consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant.") (citing *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 315-316 (1978) (opinion of Powell, J.,)). In light of the significant methodological flaws on which it rests, Sander's research does not constitute credible evidence that affirmative action practices are harmful to minorities, let alone that the diversity rationale at the heart of *Grutter* is at odds with social science.

ARGUMENT

This Court has held the use of narrowly tailored race-based admissions constitutional in light of the "substantial * * * educational benefits that flow from student body diversity." *Grutter*, 539 U.S. at 330. In their brief *amici curiae*—nominally filed in support of neither party (see generally Sander-Taylor Brief) but nonetheless calling for the *judgment* of the Fifth Circuit to be reversed, *id.* at 36—Sander and Taylor argue that "a growing volume of very careful research * * * suggests that racial preferences in higher education often undermine minority achievement," *id.* at 2; accord Three Commissioners Brief 13-14, 20-21, 24, which in turn purportedly undermines the diversity holding in *Grutter*, see Sander-Taylor Brief 15-17. But that "growing volume of very careful research" consists mostly of Sander's own "mismatch" research along with unpublished papers by several others. As recognized by numerous publications refuting Sander's conclusions, that research contains basic methodological errors, thereby invalidating its conclusions. As a result, its conclusions are without value to the Court.

A. "Mismatch" Hypothesis In Brief

Although Sander was not the first researcher to use the term "mismatch" in discussing the effects of race-based admissions policies,[3] he has been rightly credited as a leading proponent of that theory since the publication of his controversial Stanford Law Review article finding "mismatch" in American law schools. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004). In that article and in later work, Sander argues that when a minority student attends a college or graduate school as a result of race-based admissions, and his academic credentials are substantially below those of his classmates, he does not thrive. For example, as a result of being surrounded by students with stronger academic credentials, a minority student may end up in the bottom of the grade distribution in difficult classes, and end up opting out of difficult majors that he may have chosen otherwise (often called "science mismatch"). Sander-Taylor Brief 6. Similarly, as a result of race-based admissions, a minority student may choose not to pursue graduate-school education ("academic mismatch"), *id.* at 7-8, or in the case of a law school student, may fail the bar exam ("law school mismatch"), *id.* at 8; see generally Sander, *A Systemic Analysis of Affirmative Action, supra.* Ultimately, the mismatch hypothesis holds that affirmative action does more harm than good for minority students, whom Sander and Taylor term the "the intended beneficiaries" (Sander-Taylor Brief 2) of affirmative action. Hence, by curtailing affirmative action, minorities would end up at schools more properly "matched" to their skill sets, and minority academic performance and graduation rates would rise, see *id.* at 32-35.

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[3] See Thomas Sowell, *Black Education: Myths and Tragedies* (David McKay 1972); Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier, and Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. in Higher Educ. 681 (1996).

Mismatch research is premised on a series of causal inferences. For example, the mismatch hypothesis is that African-American undergraduates have transferred out of rigorous science majors *because of* mismatch. *Id.* at 6-7; see also Richard Sander & Roger Bolus, *Do Credential Gaps in College Reduce the Number of Minority Science Graduates?* (Project SEAPHE Working Paper, July 2009), available at http://www.seaphe.org/working-papers/). Proponents of this research claim that mismatch at law schools has *caused* African-Americans to learn less in law school, earn lower grades, fail the bar, and fare worse in employment outcomes. Sander-Taylor Brief 8-9. And, most controversially, Professor Sander contends that affirmative action has had the effect of *decreasing* the total number of black lawyers. Sander, *A Systematic Analysis of Affirmative Action*, *supra*, at 473.

B. Sander's "Mismatch" Research Does Not Represent A Consensus In Social Science

Since the initial publication of his "mismatch" article, Sander's work has been subject to wide-ranging criticism for its methodological flaws. See, *e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1809 (2005) ("[E]ven within his [Sander's] framework, there is not persuasive evidence indicating that affirmative action is responsible for lowering the number of black attorneys."); Gregory Camilli et al., *The Mismatch Hypotheses in Law School Admissions*, 2 Widener J.L. Econ. & Race 165, 207 (2011) ("[T]his study has shown that regression analyses of the kind conducted by Sander are incapable of producing credible estimates of causal effects."); Chambers et al., *supra*, at 1857 ("The conclusions in *Systemic Analysis* rest on a series of statistical errors, oversights, and implausible assumptions."); Michele Landis Dauber, *The Big Muddy*, 57 Stan L. Rev. 1899, 1902 (2005) ("Unfortunately, Sander has muddied rather than clarified the waters with a flawed and ultimately misleading contribution."); Cheryl I. Harris &

William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, J. Blacks Higher Educ. (2005) ("Regrettably, Sander significantly underestimates the harms of ending affirmative action, and seriously overestimates the benefits of ending affirmative action. Even his own data do not support the mismatch hypothesis."); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 Yale L.J. 1997, 1997 (2005) ("[T]he [Sander] study draws internally inconsistent and empirically invalid conclusions about the effects of affirmative action. Correcting the assumptions and testing the hypothesis directly shows that for similarly qualified black students, attending a higher-tier law school has no detectable effect on bar passage rates."); Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 Yale L.J. 2011, 2011 (2005) ("[T]he impressive-sounding points in Sander's Response violate basic methodological principles and are incorrect."); Beverly I. Moran, *The Case for Black Inferiority? What Must Be True if Professor Sander Is Right: A Response to* A Systemic Analysis of Affirmative Action in American Law Schools, 5 Conn. Pub. Int. L.J. 41, 58 (2005) ("In the end, Professor Sander's arguments fail on their methodology, their logic, and their real-world application."); Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 Denv. U.L. Rev. 807, 834 (2011) ("[W]e perceive numerous defects in Sander's methodology that raise serious questions about the results in his article *Class in American Legal Education*.").

The hallmark of reliable empirical work is that it can be validated by other researchers. A wide array of social scientists have studied the impact of elite educational institutions on student outcomes, reaching conclusions directly contrary to those of mismatch. See, *e.g.*, Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 Soc. Educ. 294, 309 (2005) ("Minority students' likelihood of graduation increases as the selectivity of the institution attended rises."); Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas 10% Plan,* 29 Econ. Educ. Rev. 1110, 1122 (2010) ("[R]esults from the analysis run counter to the 'mismatch' hypothesis, which would have predicted both higher retention and college graduation rates for these lower-ranked minority students because they are now supposedly being better 'matched' to an institution under the Top 10% Plan."); Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 Soc. Sci. Res. 531, 544 (2007) ("If anything[,] minority students who benefited from affirmative action earned higher grades and left school at lower rates than others, and they expressed neither greater nor less satisfaction with college life in general."); Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 Ohio St. L.J. 971, 991 (1998) ("[E]ven if a student's characteristics are held constant, attendance at a more selective institution is associated with higher earnings and higher college completion rates for minority students as well as white and other non-Hispanic students."); Mark C. Long, *College Quality and Early Adult Outcomes,* 27 Econ. Educ. Rev. 588, 589 (2008)

("[C]ollege quality does appear to have positive significant effects on most of the outcomes studied * * *."); Tatiana Melguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities*, 49 Res. Higher Educ. 214, 232 (2008) ("[M]inorities benefit from attending the most elite institutions."); Tatiana Melguizo, *Are Students of Color More Likely to Graduate from College If They Attend More Selective Institutions? Evidence from the First Cohort of Recipients and Nonrecipients of the Gates Millennium Scholarship (GMS) Program*, 32 Educ. Eval. & Pol'y Analysis 230, 244 (2010) ("The results of this study suggest that the probability of attaining a bachelor's degree increases [for minority students] with the selectivity of the institution attended."); Jesse Rothstein and Albert Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. Chi. L. Rev. 649, 707 (2008) ("Even overstating mismatch effects and understating the importance of preferences to enrollment, the effects of eliminating mismatch are dwarfed by the first-order effect of eliminating preferences: the reduction in the number of black students admitted."); Mario L. Small & Christopher Winship, *Black Students' Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences*, 36 Soc. Sci. Res. 1257, 1257 (2007) ("[S]electivity improves black probabilities of graduation."); Doug Williams, *Does Affirmative Action Create Educational Mismatches in Law Schools?* 42 (Working Paper, Apr. 2009), available at econ.duke.edu/~hf14/ERID/Williams.pdf) ("All of the previous papers that have conducted formal tests of the mismatch hypotheses have concluded that there is no evidence of mismatch effects in the [Bar Passage Study]."); see also William G. Bowen & Derek Bok, *The Shape of the River* 259 (Princeton Univ. Press 2000) ("[T]he more selective the college attended, the lower the black dropout rate."); William G. Bowen et. al, *Crossing the Finish Line: Completing College at America's Public Universities* 210 (Princeton Univ. Press 2011) ("There is certainly no evidence that black men were 'harmed' by going to the more selective universities that chose to admit them. In fact, the evidence available strongly suggests that students in general, including black students, are generally well advised to enroll at the most challenging university that will accept them.").

In short, those relying on mismatch research mischaracterize the state of social-science evidence and describe a consensus that does not exist. The Court should not rely on the mismatch research.[4]

For clarity, *amici* will explain why the research on which mismatch rests is dubious.

C. The "Mismatch" Research Violates Basic Principles Of Causal Inference

The chief empirical research offered by the Sander-Taylor Brief—little of which is peer-reviewed and most of which remains unpublished—violates basic principles of causal inference that are widely accepted in the scientific community. As *amici* explain, there is no evidence that affirmative action hurts minority students who attend school under such programs.[5] Attending a more elite school does not appear to cause those students harm.

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[4] Indeed, were this a district court proceeding, mismatch research should not pass the core *Daubert* tests of surviving peer review and being generally accepted by experts in the field. See generally *Daubert* v. *Merrill Dow Pharm.*, 509 U.S. 579 (1993).

1. The Evidence

Although mismatch has been discussed in a variety of contexts, Sander posits that the law school setting is "uniquely appropriate for studying the mismatch effect," because, unlike in other higher-education settings, the bar exam is "more or less [a] uniform test[] taken by graduates to measure their legal learning." Sander-Taylor Brief 8. Much of the cited research has been in the law school context. *Amici* therefore focus the rest of their arguments on the methodological flaws contained in Sander's and economics professor Doug Williams's law-school mismatch research (which dominate the empirical findings of the Sander-Taylor Brief), although the same methodological challenges also affect mismatch research in other settings.

Law-school mismatch alleges that large racial preferences have "seriously damaged the academic performance of black law students, contributing to lower graduation rates and much lower success rates on bar exams." *Id.* at 8 (citing Sander, *A Systemic*

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[5] This proposition is counterintuitive because it would imply that the very fact of giving minority students extra options, by admitting them to more selective institutions, harms them, and that these students would personally benefit from being prevented from attending such institutions. It rests on the presumption that these students are themselves not good judges of what is in their interest, and that given the option of attending a more selective institution they would fail to make the "right" choice of attending the less selective institution.

Analysis of Affirmative Action, *supra*, at 440-448). Finding that a student's law school grades have a stronger association with bar passage than the tier of the law school the student attended, Sander concludes that less-qualified students are better off attending a less-selective school where they will perform better and thus be more likely to pass the bar exam. Sander, *A Systemic Analysis of Affirmative Action*, *supra*, at 426, 429. The central empirical claim is that going to a higher-tier law school causes less qualified students to learn less, as reflected through lower grades, and decreases bar performance by a greater factor than school quality increases it. See *id.* at 449-450; Williams, *supra*, at 9.

2. Research Principles For Causal Inference

A causal effect is the difference between two "potential outcomes." For example, a law student may have one potential outcome of career trajectory if he attended a higher-tier law school and another potential outcome of career trajectory if he attended a lower-tier law school. The difference between these two potential outcomes is the causal effect of law school tier on that student. The "fundamental problem of causal inference" is that researchers never observe both potential outcomes. See Paul W. Holland, *Statistics and Causal Inference*, 81 J. Am. Stat. Ass'n 945, 947 (1986); Donald B. Rubin, *Bayesian Inference for Causal Effects: The Role of Randomization*, 6 Annals of Stat. 34, 38 (1978). Causal inference thereby always involves estimating the *counterfactual* outcome with observed data, *e.g.*, how the student at a higher-tier school *would* have fared had he gone to a lower-tier school. An experiment addresses this problem, by comparing students who are similar in pre-existing characteristics (*e.g.*, ability), but are randomly assigned to different tier schools. Because the two experimental groups would differ only in tier of school attended, differences in the outcomes for the two groups would provide a valid estimate of the causal effect of law school tier. See generally Guido W. Imbens & Donald B. Rubin, *Causal Inference in Statistics and Social Sciences* (forthcoming Cambridge Univ. Press 2012); Donald B. Rubin, *For Objective Causal Inference, Design Trumps Analysis*, 2 Annals Applied Stat. 808 (2008); Donald B. Rubin, *The Design Versus the Analysis of Observational Studies for Causal Effects: Parallels with the Design of Randomized Trials*, 26 Stat. in Med. 20 (2007); Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies*, 66 J. Educ. Psychol. 688 (1974).

Although actually conducting such an experiment is obviously infeasible, the experimental model highlights the primary task of research with data in which students have not been randomly assigned. Specifically, to draw a causal inference, researchers should generate (a) comparison groups that are (b) as similar as possible in pre-existing characteristics, so that (c) differences in outcomes can be attributed to the selectivity of the institution. Imbens & Rubin, *supra*, at ch. 15. In each of these three regards, the Sander / Williams evidence falls short.

3. Methodological Flaws

The Sander empirical evidence consists of "regression analysis" that predicts bar passage for all students that graduated law school with the variables of undergraduate GPA, LSAT score, gender, race, law school tier, and law school GPA. See Sander, *A Systemic Analysis of Affirmative Action*, *supra*, at 444-445. The association between law school tier and bar passage is positive, but smaller in absolute magnitude than the association between law school GPA and bar passage. *Id.* Based on this analysis, Sander concludes that less-qualified students should attend lower-tier law schools where they would presumably achieve higher grades and that affirmative action hurts minority students. *Id.* at 444 tbl.6.1.

That inference is invalid for three reasons:

a. Invalid Comparisons

As to the broad claim about the causal effect of affirmative action, the current analyses are simply uninformative. All the schools in the bar-passage data employ some form of affirmative action. Because there is no comparison group of schools that do not practice affirmative action, no broad inference about the effects of affirmative action can be sustained.[6]

Moreover, the primary comparison that Sander and Williams employ is that of black and white students. See Richard H. Sander, *Mismeasuring the Mismatch: A Response to Ho*, 114 Yale L.J. 2005, 2006 (2005) ("The entire [Sander *Stanford Law Review*] paper is organized around a comparison of

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[6] The extent of preferential admissions may of course vary by school, and capitalizing on these differences may provide one approach to assess different types of implementations of affirmative-action programs.

'treatment' blacks * * * and 'control' whites * * *."); Williams, *supra*, at 18 ("[O]ne approach is to use black as a proxy for being negatively mismatched and white as a proxy for being matched."). This comparison assumes that black students at selective institutions would have fared similarly to white students at less-selective institutions in the absence of affirmative action. For example, the estimate for how a *black* student at Yale Law School would have performed at a lower-tier school might be based on a *white* student at the University of Alabama Law School.[7] This comparison violates the principle of creating groups that are comparable in all pre-existing respects except for law-school tier. Usual tenets of research design require that a study hold constant pre-existing attributes such as race and gender. See Imbens & Rubin, *supra*, at ch. 12. By comparing *black* students at higher-tiered schools with *white* students at lower-tiered schools, Sander and Williams violate these basic principles.

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[7] Using Yale Law School and the University of Alabama Law School is consistent with the Sander and Williams coding of the first two tiers of law schools, although no specific schools are ever disclosed in the data. The LSAC Bar Passage Study clusters anonymized schools based on factors such as cost, size, selectivity, faculty/student ratio, percent minority, and average LSAT and undergraduate GPA. See Linda F. Wightman, *User's Guide: LSAC National Longitudinal Data File* 8 (1999). Sander reorders these clusters by the median entering credentials of white students to create a tier system. Sander, *A Systemic Analysis of Affirmative Action*, *supra*, at 416. Sander's top tier includes 16 schools that "are the most selective and the most expensive" with "the highest UGPAs and LSAT scores." Wightman, *supra*, at 16; Sander, *A Systemic Analysis of Affirmative Action*, *supra*, at 430. Sander's second tier includes "14 large, highly selective law schools that enroll student bodies that have UGPAs and LSAT scores that are among the highest in the country." Wightman, *supra*, at 16; Sander, *A Systemic Analysis of Affirmative Action*, *supra*, at 430. Using the current U.S. News and World Report rankings (not tiers), Yale would likely be a tier-one school and the University of Alabama Law School would likely be a tier-two school under Sander's coding. See U.S. News and World Report Best Law Schools, http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings (last visited August 9, 2012).

b. Adjusting For Pre-Existing Characteristics

Proper research design requires that we compare students with similar pre-existing characteristics, who nonetheless attend different law-school tiers. Sander and Williams, however, adjust not only for pre-existing characteristics, but also for *outcomes*. Specifically, their bar passage analyses (i) hold constant law school graduation (by examining only students that graduated), see Sander, *A Systemic Analysis of Affirmative Action*, *supra*, at 444; Williams, *supra*, at 14, and (ii) control for law school grades, despite the fact that a central component of the mismatch hypothesis is that law school tier affects both law school graduation and grades. Not only is this approach inconsistent with mismatch, but it will also fail to generate valid inferences about the causal effect of law-school tier. Adjusting for outcomes will generally not result in valid estimates of causal effects. See Andrew Gelman and Jennifer Hill, *Data Analysis Using Regression and Multilevel/Hierarchical Models* 188-190 (Cambridge Univ. Press, 2007); Imbens & Rubin, *supra*, at ch. 12; Daniel E. Ho et al., *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 Pol. Analysis 199, 202 (2007); Paul R. Rosenbaum, *The Consequences of*

Adjustment for a Concomitant Variable That Has Been Affected by the Treatment, 147 J. Royal Sta. Soc'y Series A (Gen.) 656 (1984).[8]

Suppose, for example, that we conducted the ideal experiment, randomizing 200 students to attend selective and less-selective institutions. Assume that the results are that 95 out of 100 graduate at the selective institution, and that 70 pass the bar exam. Meanwhile, at the less selective institution, 80 out of 100 graduate, and 60 pass the bar. That experiment suggests that students *benefit* from attending a selective institution, both in terms of graduation and bar passage. If we focus only on those who graduated, however, the bar passage rate is 0.74 at the selective institution (70/95), and 0.75 at the less selective institution (60/80). Referring to these findings would lead a reader to wrongly infer that a more selective law school harms students. The selective law school, possibly via improved teaching and better resources, manages to graduate more students. But the subsets of students graduating from either school are not fully comparable.

Adjusting for such outcomes (rather than pre-existing characteristics), as the Sander studies do, contaminates inferences about the causal effect of law-school tier. Indeed, controlling for graduation and grades leads Sander to claim that there is *no economic return to attending an elite law school at all, regardless of ethnicity.* See Richard H. Sander & Jane Yakowitz Bambauer, *The Secret of My Success: How Status, Prestige and School Performance Shape Legal Careers* (UCLA School of Law Research Paper No. 10-26, July 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640058 (finding that law-school grades are more highly correlated than law-school tier in a regression of economic returns and that therefore elite law schools have no causal effect on income).

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[8] Principled methods for addressing these issues exist. For accounting for intermediate outcomes, see Constantine Frankgakis & Donald B. Rubin, *Principal Stratification in Causal Inference*, 58 Biometrics 21 (2002). For accounting for law school students that do not graduate, see Junni Zhang & Donald B. Rubin, *Estimation of Causal Effects via Principal Stratification When Some Outcomes Are Truncated by 'Death,'* 28 J. Educ. & Behav. Stat. 353 (2003); Donald B. Rubin, *Causal Inference Through Potential Outcomes and Principal Stratification: Applications to Studies with 'Censoring' Due to Death*, 21 Stat. Sci. 299 (2006).

c. *The Effect Of Law-School Tier*

The credibility of a causal inference depends on the credibility of the assumptions. One natural way forward with the bar-passage data is to compare students with identical observed pre-existing characteristics (*i.e.*, undergraduate GPA scores, LSAT scores, race, and gender) who attend different law-school tiers. The critical assumption is that holding constant these factors, there are no other systematic differences between students in the different law-school tiers. In other words, female black students with GPAs of 3.8 and LSAT scores of 168, some of whom attend Yale Law School and some of whom attend the University of Alabama Law School, are comparable, and any systematic differences in outcomes between those attending Yale versus Alabama are due to the difference in the law school attended. The existence of important unobserved differences between these students that affect bar performance invalidates the estimates. If the Yale Law student, for example, is already predisposed to taking the bar in a jurisdiction with a tougher exam such as California or New York, the assumption is violated, and the researcher would draw an inappropriate inference about the effect of law-school tier.

Research that applies these principles has not found any substantially and statistically significant effects on bar passage.[9] See Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, *supra*, at 2002-2004. Taking into account these principles of research design, there is simply no evidence of the harms of mismatch suggested by the Sander-Taylor Brief.

D. Better-Designed Studies Contradict "Mismatch"

It is possible to avoid the rather basic methodological problems underlying the mismatch research. To that end, *amici* draw this Court's attention to examples of recent research that employ better-conceived research designs with observational data.

Stacy Dale and Alan Krueger have employed careful methodology in two papers examining the return from college selectivity over a student's subsequent career. The first study was published a decade ago, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q.J. Econ. 1491 (2002). In 2011, Dale and Krueger returned to the topic in *Estimating the Return to College Selectivity over the Career Using Administrative Earnings Data* (Nat'l Bureau of Econ. Research Working Paper No. 17159, June 2011), available at http://www.nber.org/papers/w17159.

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[9] Without proper research design, causal-effect estimates are biased, and conventional tests for statistical significance (and confidence intervals) do not address that bias. Put differently, the fact that a result is "statistically significant" does not overcome the first-order issues of research design that *amici* highlight.

In the recent work, they utilize tax data to examine the earnings of students who attended college in both 1976 and 1989. The Dale and Krueger model considers the college the student attended, conventional characteristics, a plausible measure of what is typically unobserved (ability and motivation), and the monetary payoff of attending a more selective college against the student's actual earnings. See Dale & Krueger 2011, *supra*, at 5-8.

In both studies, Dale and Krueger examine characteristics that are commonly used as proxies for college quality (average SAT score, the Barron's index, and net tuition). They also adjust for certain "unobservable factors" by using a "self-revelation model." This model assumes that students signal their potential ability, motivation, and ambition (typically unobserved) by the choice of schools to which they apply. Dale and Krueger estimate, somewhat surprisingly, that better colleges generally do not increase earnings for either the 1976 and 1989 cohort of students. *Id.* at 25. They find, however, "[n]otable exceptions * * * for racial and ethnic minorities (black and Hispanic students) and for students whose parents have relatively little education; for these subgroups, our estimates remain large, even in models that adjust for [typically] unobserved student characteristics." *Id.* at 5. In other words, the Dale and Krueger research suggests—contrary to mismatch—that attending more selective colleges may result in an *increase* in minority earnings.

They conclude their paper by mentioning the caveats of their work, most notably that their analysis does not pertain to a nationally representative sample of schools and that their selection-adjusted model is imprecisely estimated. *Id.* at 25. Nowhere do Dale and Krueger control for outcomes, and their analysis holds constant minority status. Unlike Sander's mismatch research, Dale and Krueger exercise appropriate caution in making far-ranging conclusions from a limited set of data.

* * * * *

Whether one finds Sander's conclusions highly unlikely or intuitively appealing, his "mismatch" research fails to satisfy the basic standards of good empirical social-science research. The Sander-Taylor Brief misrepresents the acceptance of his hypothesis in the social-science community and, ultimately, the validity of mismatch. Numerous examples exist of better ways to perform the type of research Sander undertook. See Part D, *supra*. Sander's failure to set up proper controls to test his hypothesis and his reliance on a number of contradictory assumptions lead him to draw unwarranted causal inferences. At a minimum, these basic research flaws call into question the conclusions of that research.

CONCLUSION

In light of the many methodological problems with the underlying research, *amici curiae* respectfully request that the Court reject Sander's "mismatch" research discussed in the Brief *Amici Curiae* for Richard Sander and Stuart Taylor, Jr.

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ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF NEITHER PARTY

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ABIGAIL NOEL FISHER,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF NEITHER PARTY

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* pursuant to Rule 37 in support of neither party.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes nearly 300 of the nation's largest private sector companies that collectively employ roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's corporate members all are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other laws against workplace discrimination. Most also are federal government contractors subject to the affirmative action requirements of Executive Order 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended by Executive Order 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967), Executive Order 12,086, 43 Fed. Reg. 46,501 (Oct. 5, 1978), Executive Order 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002), and the implementing regulations under 41 C.F.R. ch. 60 (2012). In addition, many EEAC member companies have voluntary programs to ensure that their workforces are diverse with respect to race, gender, culture, background, and other characteristics. EEAC's member representatives typically are corporate officials charged with responsibility for implementing and complying with these nondiscrimination and affirmative action mandates and diversity initiatives.

The question presented for review is whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's consideration of race in undergraduate admissions decisions. Petitioners seek reversal of the decision below holding that the University's actions are lawful.

Although the question before the Court does not directly involve an issue of law applicable to private sector employers, EEAC's member companies nevertheless have a direct and significant interest in the outcome of the case. Diversity in higher education is essential to the ability of employers to (1) comply with their federally-mandated affirmative action requirements for government contractors, and (2) further their business objectives by employing individuals with backgrounds that represent and reflect the variety of markets in which they compete. EEAC's brief thus brings to the attention of the Court relevant matters not already brought to its attention by the parties.

STATEMENT OF THE CASE

Petitioner Abigail Fisher, a white female Texas resident, applied to the Respondent University of Texas at Austin (UT) for undergraduate admission to the class entering in the fall of 2008. Pet App. 3a. The University denied her application. *Id.*

Since 1997, the Texas "Top Ten Percent" Law has mandated that high school seniors in the top ten percent of their high school class be admitted automatically to any Texas state university. Tex. Educ.

Code § 51.803 (1997 & Supp. 2012). Under UT's undergraduate admissions policy, 90% of available seats in the freshman class are reserved for Texas residents.[2] Pet. App. 25a. In 2008, the Top Ten Percent Law filled 88% of those seats. Pet. App. 26a. Applicants who did not qualify under the Top Ten Percent Law, including Fisher, competed for the remaining seats. *Id.*

UT's admissions policy screens these applicants using an Academic Index, a formula that combines standardized test scores and class rank, and a Personal Achievement Index, which combines essay scores and an evaluation of the applicant's file as a whole, including demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service, plus a "special circumstances" element that involves consideration of the applicant's socioeconomic status and that of his or her high school, family status and family responsibilities, and other background elements, including the applicant's race. Pet. App. 26a-28a.

Fisher sued UT and a number of university officials in their official capacities, contending that the UT admission policy violated her right to equal protection under the Fourteenth Amendment to the U.S. Constitution, U.S. Const. amend. XIV, § 1, by discriminating against her on the basis of race. Pet. App. 3a. The district court granted UT's motion for summary judgment. Pet. App. 170a.

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[2] A 2009 amendment to this statutory code section, not relevant here, specifically limits admission to UT at Austin under the Texas "Top Ten Percent" Law to "75 percent of the university's enrollment capacity . . . ." Tex. Educ. Code § 51.803(a-1).

On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed. Pet. App. 71a. Interpreting this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Fifth Circuit ruled that UT's admissions policy consisted of "narrowly-tailored . . . procedures," and that "the University's decision to reintroduce race-conscious admissions was adequately supported by the 'serious, good faith consideration' required by *Grutter*." Pet. App. 71a.

Petitioner sought a writ of certiorari, which this Court granted on February 21, 2012.

SUMMARY OF ARGUMENT

Neither EEAC nor its member companies are public institutions of higher education. Accordingly, the Court's ruling on the specific admissions standards at issue in this case are of less importance to EEAC's members than are the resulting *consequences* of that ruling. Any decision that prevents our nation's public universities from utilizing race- or gender-conscious measures to attract, admit, educate and graduate diverse student bodies will have a direct, negative impact on the ability of federal contractors to satisfy their federally-imposed affirmative action mandates, and will pose significant hurdles for all employers seeking to derive a competitive business advantage by matching the diversity of their skilled workforces to the diversity of their customers and markets.

Being able to recruit qualified minority and female candidates is a key factor to the success of these efforts, and for positions requiring current college degrees is almost totally dependent upon the availability of diverse college and university graduates. Accordingly, whether or not this Court affirms or reverses the decision below with respect to the specific admissions formula used at UT Austin, we respectfully request that the Court weigh carefully the impact its decision will have on private sector employers, and allow public institutions of higher education some measure of latitude to ensure that their graduating classes have the diversity of skills, experiences and backgrounds required by U.S. employers.

ARGUMENT

REGARDLESS OF THE OUTCOME OF THIS CASE, THIS COURT SHOULD BE COGNIZANT OF THE POTENTIAL EFFECT OF ITS DECISION ON PRIVATE SECTOR EMPLOYERS

A. This Court's Decision Should Not Make It More Difficult For Federal Contractors To Comply With Federally-Mandated Affirmative Action Requirements

1. Companies That Contract with the Federal Government Must Meet Rigorous Affirmative Action Compliance Standards

Many businesses that contract with the federal government are subject to rigorous nondiscrimination and affirmative action obligations under Executive Order No. 11,246 (E.O. 11246).[3] The Executive Order is enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), pursuant to regulations promulgated at 41 C.F.R. ch. 60 (2012). Nearly all EEAC member companies are federal contractors subject to E.O. 11246 and its implementing regulations.

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[3] 30 Fed. Reg. 12,319 (Sept. 24, 1965).

E.O. 11246 contains a dual mandate. It requires federal contractors to refrain from discriminating against any employee or applicant for employment on the basis of their race, color, religion, sex or national origin. In addition, it obligates such contractors to undertake affirmative action (*i.e.*, positive, proactive steps) to ensure that no such discrimination exists in any term, condition or privilege of employment. In the words of the Order, covered contractors:

> will not discriminate against any employee or applicant because of race, color, religion, sex, or national origin, . . . [and] *will take affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) (quoting subpart B, § 202(1)) (emphasis added). *See also* 41 C.F.R. § 60-1.4(a)(1).[4] Examples of required affirmative action include such steps as proactively recruiting in geographic areas and at institutions likely to yield diverse candidate pools; monitoring the demographic patterns of actual selections made from those diverse pools; comparing the demographic profiles of the workforce to those of the labor markets from which they have been selected; and determining whether employees chosen for training programs, promotions, and other developmental opportunities reflect the diversity of the workforce segments from which they have been drawn.

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[4] Covered federal contractors also have a responsibility to take affirmative action to hire and promote individuals with disabilities, 29 U.S.C. § 793 and 41 C.F.R. § 60-741.5, and certain veterans, 38 U.S.C. § 4211 *et seq.* and 41 C.F.R. § 60-300.5.

The E.O. 11246 obligation to refrain from intentional discrimination can be implemented on a race and gender neutral basis – simply refrain from considering one's race or gender in making any employment decision. Affirmative action, in contrast, is an inherently race or gender "conscious" concept. It is simply not possible to take positive, proactive measures to ensure there is no race or gender discrimination without being conscious of the race and gender impact of the employment decisions that have been made.

While the affirmative action requirements under E.O. 11246 may be inherently race and gender "conscious," they are not "preferential." OFCCP has gone to great lengths to emphasize that nothing in its regulations should be interpreted as requiring or encouraging the use of quotas, set-asides or any other form of preferential treatment based upon an individual's race or gender. 41 C.F.R. § 60-2.16(e). Federal contractors' affirmative action obligations instead require taking positive, proactive measures to ensure that there is a "level playing field" for all individuals with respect to employment and career opportunities – in effect, that there are no intentional or unintentional organizational or attitudinal barriers that serve as artificial headwinds for certain racial or gender groups.

OFCCP's affirmative action regulations use both static and dynamic measures of whether a federal contractor is maintaining a level playing field. The static measure evaluates employee "representation" patterns – do the contractor's workforce demographic representation patterns reflect what might reasonably be expected given the race and gender composition of the qualified labor force from which the employees have been drawn? *See* 41 C.F.R. § 60-2.15(a). Current employment below expected levels could suggest to OFCCP the absence of a level playing field. This measure is often referred to as a contractor's "utilization" pattern.

The dynamic measure evaluates the relative rates at which different gender and race groups are selected for such things as hires, promotions, terminations, benefits, and training programs. *See* 41 C.F.R. § 60-3.4. Statistically significant disparities in selection rates between certain groups over a given period of time also could suggest to OFCCP the absence of a level playing field. This is often referred to as determining whether a contractor's employment decisions have an "adverse impact" against any particular race or gender group. *Id.*

A federal contractor's ability to demonstrate to OFCCP that it maintains a level playing field through the absence of underutilization in its representation patterns, and the absence of statistically significant adverse impact in its selection decisions, is dependent upon the contractor being able to identify and attract diverse pools of candidates with the skills and experiences necessary to perform its jobs successfully. As described below, the absence of a skilled and diverse labor pool to draw upon will not only make it difficult for federal contractors to avoid underutilization and adverse impact in the first instance, but will also make it difficult for contractors to satisfy OFCCP's expectations to address such patterns once discovered.

a. *The Static Measure of Affirmative Action – Evaluating Utilization Patterns*

OFCCP's regulations require covered federal contractors to prepare and annually update for each of its establishments written affirmative action programs (AAPs). 41 C.F.R. § 60-2.1. One component of each AAP is a "utilization analysis" which requires a contractor to:

- Segment its workforce into groups of employees having similar job content, wage rates, and promotional opportunities ("job groups") [41 C.F.R. § 60-2.12];
- Calculate the number and percentage of women and minorities currently employed in each job group ("current representation") [41 C.F.R. § 60-2.13];
- Calculate the theoretical availability of women and minorities for the jobs in each job group based upon the demographic composition of the internal and external sources from which job group incumbents have been drawn in the past ("availability estimate") [41 C.F.R. § 60-2.14]; and
- Compare the current representation and availability estimate percentages to determine whether women and minorities are currently employed at levels that would reasonably be expected given their availability for the jobs ("utilization analysis") [41 C.F.R. § 60-2.15(a)].

If women and minorities are currently employed at reasonably expected levels, the contractor is deemed to be "utilized" for that job group, and nothing further is required. On the other hand, if current employment is below reasonably expected levels for either women or minorities, the contractor is deemed to be "underutilized" for that job group and must establish an annual placement rate goal (for either women and/or minorities as the case may be) that is set at the level of estimated availability. 41 C.F.R. §§ 60-2.15(b), 2.16(c).

Contractors having placement rate goals are required to undertake "good faith efforts" to place women and/or minorities into the job groups at the prescribed rates through future hires, promotions or transfers. *See* 41 C.F.R. § 60-2.16(a). Placement rate goals are not deemed to be inflexible quotas that must be met, but rather are "objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work." *Id.*; *see also* 41 C.F.R. § 60-2.16(e)(1).

Contractors having placement rate goals in their AAPs are not deemed to be in violation of E.O. 11246 or out of compliance with OFCCP's implementing regulations so long as they can demonstrate that they are undertaking good faith efforts to address and eliminate the underutilization. On the other hand, a pervasive or prolonged pattern of placement rate goals in certain job groups often serves as indicator to OFCCP that the contractor may not be maintaining a level playing field for all, and thus may not be undertaking sufficient affirmative action to do so. In such situations the result often is an OFCCP investigation for statistically significant adverse impact in selections adverse to race and gender groups for which goals have been established.

b. *The Dynamic Measure of Affirmative Action – Evaluating Potential Adverse Impact*

OFCCP's regulations provide that when the selection rate for one group (say minorities or women) is less than 80% of the selection rate for a comparison group (say, non-minorities or men), "adverse impact" is said to exist against the disadvantaged group. 41 C.F.R. § 60-3.4. When the selection disparity not only exceeds 80% but also exceeds two standard deviations, the adverse impact is said to be "statistically significant." 41 C.F.R. § 60-3.14(B)(5). Statistically significant adverse impact in selection rates can give rise to an inference of unlawful discrimination under E.O. 11246. But even non-significant adverse impact in selection rates can be used by OFCCP to conclude that contractors are not meeting their affirmative action obligations to maintain a level playing field for all. Accordingly, adverse impact can serve as a dynamic measure of compliance with respect to both the nondiscrimination and affirmative action mandates of E.O. 11246.

In the context of hires, selection rates are calculated by dividing the number of individuals of a particular group that are selected for hire by the number of individuals of that same group that were considered for hire. Ten male applicants selected from a candidate pool of 100 qualified male candidates yields a 10% male selection rate. Traditionally, OFCCP has required contractors to compare for each AAP job group the selection rates of females to males and all minorities to non-minorities. Office of Fed. Contract Compliance Programs, U.S. Dep't of Labor, Fed. Contract Compliance Manual § 2O01.[5] Increasingly, OFCCP is requiring contractors to compare minority selection rates not only in the aggregate, but by minority subgroup as well – Black, Asian/Pacific Islander, American Indian, and White.

Avoidance of adverse impact in selections is dependent upon federal contractors being able to find, recruit and select from diverse pools of candidates having the skills and experience necessary to perform the job. For positions requiring baccalaureate or more advanced degrees, federal contractors must rely primarily upon our colleges and universities to provide those qualified candidate pools.

According to data for the year 2010 compiled by the Equal Employment Opportunity Commission (EEOC) from statistical reports filed by private sector employers,[6] more than 9.2 million of the nearly 47.5 million employees covered by the reports, or more than 19%, were in jobs that fell within the "professionals" category, [7] defined as those requiring a college degree or equivalent experience.[8] In the EEOC's own words, these jobs include "accountants and auditors, airplane pilots and navigators, architects, artists, chemists, designers, dietitians, editors, engineers, lawyers, librarians, mathematicians, natural scientists, registered professional nurses, personnel and labor relations specialists, physical scientists, physicians, social scientists, teachers, surveyors [and the like]."[9]

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[5] *Available at* http://www.dol.gov/ofccp/regs/compliance/fccm/ofcpch2.htm#2O01 (last visited May 25, 2012).

[6] The Equal Employment Opportunity Employer Information Report (EEO-1) is required annually by the Equal Employment Opportunity Commission from employers with 100 or more employees. 29 C.F.R. § 1602.7.

[7] U.S. Equal Employment Opportunity Commission, Job Patterns For Minorities And Women In Private Industry (EEO-1), *available at* http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/index.cfm (last visited May 25, 2012).

[8] The "professionals" category is defined in the EEOC's instructions for the report as "Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background." U.S. Equal Employment Oppor-

Another reporting category covers "[o]fficials and managers," defined as "[o]ccupations requiring administrative and managerial personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operations," including "officials, executives, middle management," and others.[10] Companies also reported 798,117 employees in the Executive/Senior Level Officials and Managers category and more than 4.3 million workers in the First/Mid Level Officials and Managers category in 2010, at least some of whom would have college degrees.[11]

For positions requiring a baccalaureate degree or higher, and particularly for future corporate leaders, the best and most qualified candidates are likely to come primarily from the graduating classes of our nation's colleges and universities. Accordingly, America's corporations look to these institutions to

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tunity Commission, Job Patterns For Minorities And Women In Private Industry: A Glossary, *available at* http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/glossary.cfm (last visited May 25, 2012).

[9] *Id.*

[10] *Id.*

[11] *Id.*

provide candidates with the skills necessary to succeed in today's business environment, including the ability to navigate diverse markets and customers.

c. *Federal Contractors Must Address Potential Problem Areas – Action-Oriented Programs*

The utilization and adverse impact analyses described above are two components of federal contractors' affirmative action obligations to analyze their workforces to identify problem areas. When such problem areas are revealed, contractors have a corresponding obligation to develop and execute "action-oriented programs" to address them. 41 C.F.R. § 60-2.17(c). These programs typically involve policies and initiatives designed to stimulate minority and female employment. Thus, as part of their written AAPs, contractors must describe the affirmative action efforts they have undertaken, or plan to undertake, to address statistical imbalances in the representation or selection of minorities and women, including the means they will use to monitor progress towards the accomplishment of any affirmative action placement rate goals.

Ensuring that the company's recruiting efforts reach out to a diverse talent pool has been the cornerstone of such action-oriented affirmative action programs for many years. 41 C.F.R. § 60-2.10(a)(1), (3). For this reason, federal contractors frequently undertake targeted recruiting from such organizations as the National Society of Black Engineers,[12] the Society of Hispanic Professional Engineers,[13] the American

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[12] http://www.nsbe.org/ (last visited May 25, 2012).

[13] http://www.shpe.org/ (last visited May 25, 2012).

Indian Science and Engineer Society,[14] the National Association of Black Accountants,[15] local affiliates of the National Urban League,[16] the NAACP,[17] and many others. Federal contractors also engage in targeted outreach through their college and university recruitment programs. In support of these efforts, EEAC in 2004 developed and made available to EEAC member companies a recruiting tool called the "Educational Attainment Benchmarks." This service provides access to college and university graduate diversity statistics collected annually through the U.S. Department of Education's Integrated Postsecondary Education Data System (IPEDS).[18]

Detailed figures on the race, ethnicity, and gender demographics of the nation's graduates are available on a national level by 39 broad degree families, by detailed degree, and by institution. In addition, EEAC members can focus their college campus recruitment programs by identifying specific colleges and universities that have graduated the greatest numbers (or percentages) of a specific race, ethnicity or gender group with a specific degree and award level – for example, those that have conferred the greatest number of MBA degrees to women or minorities.

EEAC member reliance upon the Educational Attainment Benchmarks underscores just how crucial the diversity of our nations graduates is to the ability of federal contractors to satisfy their affirmative action compliance obligations and to compete successfully on a global basis.

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[14] http://www.aises.org/ (last visited May 25, 2012).

[15] http://www.nabainc.org/ (last visited May 25, 2012).

[16] http://www.nul.org/ (last visited May 25, 2012).

[17] http://www.naacp.org/ (last visited May 25, 2012).

[18] http://nces.ed.gov/ipeds/ (last visited May 25, 2012).

2. OFCCP Is Increasing Its Scrutiny of Contractors' Affirmative Action Compliance Efforts

Over the past year and a half, OFCCP has proposed a series of changes to its implementing regulations and has initiated an aggressive enforcement program designed to enhance the agency's ability to scrutinize federal contractor affirmative action compliance efforts. The enforcement pressure applied by OFCCP for federal contractors to engage in more aggressive outreach and recruitment efforts than in the past has already increased and is likely to increase even further once these proposals are finalized.

In addition to enforcing the nondiscrimination and affirmative action obligations in E.O. 11246, OFCCP also enforces the nondiscrimination and affirmative action obligations pertaining to protected veterans under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)[19] and individuals with disabilities under Section 503 of the Rehabilitation Act of 1973 (Section 503).[20] Under pending VEVRAA and Section 503 regulatory proposals, federal contractors would for the first time be required to establish numeric hiring goals for veterans and individuals with disabilities similar to those required under E.O. 11246 for women and minorities.[21] In addition, the proposals require mandatory postings of job openings with state employment agencies, establishment of "linkage" agreements with designated employment referral agencies, and sweeping new recordkeeping requirements including the number of referrals from each recruitment source.[22]

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[19] 38 U.S.C. § 4211 *et seq.*

[20] 29 U.S.C. § 793.

[21] 76 Fed. Reg. 23,358-425 (Apr. 26, 2011) (VEVRAA); 76 Fed. Reg. 77,056-105 (Dec. 9, 2011) (Section 503).

Once these regulations are finalized, it is reasonable to expect that OFCCP will seek to impose similar job listing and recordkeeping requirements under Executive Order 11246, potentially converting current regulatory guidance and recommendations into highly prescriptive mandates, and rejecting "good faith efforts" as a measure of compliance in favor of extensive recordkeeping and accomplishment of numerical benchmarks.

In addition to these and other regulatory initiatives, OFCCP has also recently taken a significantly more aggressive posture in its compliance evaluations. Compliance evaluations are OFCCP-initiated investigative proceedings used by the agency to review a federal contractor's compliance status. Approximately 4,000 compliance evaluations are conducted each year.[23] During such reviews OFCCP typically examines the contractor's AAPs, including job groups where placement rate goals have been established; looks for evidence of adverse impact in selections; evaluates compensation patterns for pay equity; and otherwise evaluates the contractor's outreach, recruitment and other affirmative action efforts. 41 C.F.R. § 60-1.20(a)(1).

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[22] *Id.*

[23] FY 2013 Congressional Budget Justification, Office of Fed. Contract Compliance Programs, at 19, *available at* http://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-10.pdf (last visited May 25, 2012).

OFCCP's intention to conduct more thorough affirmative action compliance evaluations in the future is reflected in the agency's pending request to the federal Office of Management and Budget (OMB) for permission to collect expanded applicant flow information from contractors at the outset of compliance evaluations.[24] Currently, federal contractors must submit to OFCCP information on applicants, hires, promotions and terminations (1) by gender and minority/nonminority status, (2) for each AAP job group or each job title. This is the source information that OFCCP traditionally has used to determine whether there are any suggestions of statistically significant adverse impact in selections.

OFCCP is now seeking OMB approval to require contractors to submit applicant information (1) by job group *and* job title (rather than by job group *or* job title); and (2) by individual race/ethnicity categories (rather than by minority/non-minority status).[25] The granularity of this information will enable OFCCP in the future to apply its affirmative action standards by individual job title for each one of the four minority subgroups.

In addition to the prospect of more stringent regulatory requirements in the future, contractors are today already experiencing more aggressive OFCCP scrutiny of their affirmative action outreach and recruiting efforts. In Fiscal Year 2011, 28% of compliance evaluations conducted by OFCCP ended in a finding of noncompliance, up from 18.6% in FY 2010, a 48% increase, according to EEAC's analysis of OFCCP enforcement data posted in the Department of Labor's online enforcement database.[26] Despite the fact that OFCCP closed roughly 900 fewer compliance evaluations in FY 2011 than FY 2010, nearly 200 more (for a total of 1,109) ended with a finding of noncompliance. More than half (53.7%) of the cited violations concerned recruiting, which topped the list of cited violations. *Id.*

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[24] http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201104-1250-001 (last visited May 25, 2012).

[25] http://www.reginfo.gov/public/do/DownloadDocument?documentID=271526&version=0 (last visited May 25, 2012).

B. This Court's Decision Should Not Make It More Difficult For Employers To Maintain Successful Voluntary Diversity Initiatives

Many federal contractors are motivated to diversify their workforces less by OFCCP-imposed legal mandates than by business prerogatives. Compliance with OFCCP regulatory requirements often is inadequate for such companies to achieve the desired workforce diversification.

This disconnect is due in part to the fact that the concept of AAP job groups, which lies at the core of OFCCP's regulatory scheme, is inconsistent with the way many companies manage their businesses. For such companies, demographic statistical analyses of workforce representation and selection patterns by AAP job group have little practical value. The disconnect between legal mandates and diversity objectives may also be reflective of the fact that

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[26] U.S. Dep't of Labor, Data Enforcement, OFCCP Compliance Evaluation and Complaint Investigation Data, Dataset Summary (Apr. 7, 2010), *available at* http://ogesdw.dol.gov/ (last visited May 25, 2012).

OFCCP's legal requirements do not address the "cultural" or "environmental" issues inherent in workforce diversification – those practices that serve to nurture a welcoming and hospitable environment in the workplace for individuals of all backgrounds.

In part because of this disconnect, many employers voluntarily have instituted "diversity" initiatives to supplement their legally-mandated affirmative action programs. The business justification for such initiatives is typically threefold. First, U.S. companies increasingly are participating in the global marketplace, creating a need for employees at all levels that are sensitive to and skilled in dealing with the cultures of the countries in which they operate. Second, changing national demographics require companies to fill key management positions with diverse candidates in order to facilitate communication with potential customers and to manage effectively a diversified workforce. Third, companies have recognized that individuals from diverse backgrounds bring valuable differences in perspective and experience to all aspects of corporate decisionmaking, from operations, to marketing, to communications and human resources.

U.S. firms increasingly are expanding their markets beyond our nation's borders. According to statistics compiled by the World Trade Organization, the United States was the second leading world exporter of merchandise in 2010, with nearly a 9% market share, surpassed only by China at 10.4%.[27]

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[27] World Trade Org., Int'l Trade Statistics 2011,Table I.8, *Leading exporters and importers in world merchandise trade, 2010*, at 24, *available at* http://www.wto.org/english/res_e/statis_e/its2011_e/its11_world_trade_dev_e.pdf (last visited May 25, 2012).

U.S. exports were valued at nearly $1.28 trillion.[28] Approximately $364 billion dollars of U.S. merchandise was sold in Asia, $276 billion in Western Europe, $137 billion in Latin America, and almost $49 billion in the Middle East.[29]

Such global expansion requires an understanding of the unique customs, mores and traditions in each chosen market, as well as an ability to communicate effectively with customers and business partners. The identification and development of marketable products and services, the establishment of marketing plans, the creation of effective advertising, and the implementation of a strategy for interacting with customers all must be undertaken with local needs in mind. Employees having experience with these other cultures thus constitute a key component of a successful global operations plan.

Equally important in the development of corporate diversity initiatives is recognition that the U.S. workforce is itself becoming increasingly diverse. In 2000, 72.0% of the civilian work force was White, 11.5% Black, 11.7% Hispanic, 4.0% Asian, and 1.0% "All Other Groups", which includes Multiple Race, American Indian/Alaska Native, and Native Hawaiian/Other Pacific Islander.[30] Ten years later in

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[28] *Id.* at Table I.13, *Merchandise trade of the United States by origin and destination, 2010*, at 29, *available at* http://www.wto.org/english/res_e/statis_e/its2011_e/its11_world_trade_dev_e.pdf (last visited May 25, 2012).

[29] World Trade Org., Int'l Trade Statistics 2002,Table III.17, *Merchandise trade of the United States by region and economy, 2001*, *available at* http://www.wto.org/english/res_e/statis_e/its2002_e/section3_e/iii17.xls (last visited May 25, 2012).

[30] U.S. Dep't of Labor, Bureau of Labor Statistics, Employment Projections – Civilian Labor force by age, sex, race, and

2010, the minority percentages had increased to 11.6% Black, 14.8% Hispanic, 4.7% Asian, and 2.4% All Other Groups, while the percentage of Whites had decreased to 67.5.%. *Id.* at n.31. This trend has continued and as of 2020, the U.S. Department of Labor's Bureau of Labor Statistics predicts that only 62.3% of the U.S. workforce will be White, while minority percentages will increase to 12.0% Black, 18.6% Hispanic, 5.7% Asian, and 2.9% All Other Groups. *Id.*

Finally, companies have developed diversity initiatives based upon actual experience that where there is diversity of background and experience, there often flows a variety of perspectives and opinions that lead to more informed judgments.

Corporate diversity initiatives invariably extend well beyond legally mandated compliance efforts. They typically address a much broader range of demographic characteristics, encompassing such differences as age, cultural background, family responsibilities, sexual orientation and religion, in addition to race and gender. Specific components vary from one company to another but often include diversity education for managers and employees, "affinity groups" that provide forums for employees to discuss issues of common interest, work-life balance programs such as flexible work arrangements, onsite day care, elder care assistance, and establishment of diversity "councils" consisting of executives, managers and employees responsible for providing program direction and oversight.

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ethnicity, Table 3.4, *available at* http://www.bls.gov/emp/ep_table_304.htm (last visited May 25, 2012).

Diversity initiatives thus encompass a wide variety of programs that serve to advance a company's strategic business objectives by positioning it as a preferred employer for individuals of all backgrounds.

As with the affirmative action efforts that are mandatory for federal contractors, voluntary diversity initiatives are dependent upon the availability of qualified candidates who have not only the requisite degrees from American educational institutions, but also the diversity of experience that many of these institutions provide.

CONCLUSION

This Court observed in 2003 that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). In the intervening nine years that need has only increased, as witnessed by the explosion in voluntary corporate diversity initiatives.

In addition, the intervening years have witnessed heightened OFCCP scrutiny of federal contractors' compliance with their affirmative action mandates – mandates that seek to maintain level playing fields for individuals of all backgrounds through monitoring utilization and selection patterns and proactively addressing instances of underutilization and adverse impact.

Now as much as in 2003, our nation's colleges and universities – by attracting, educating and graduating individuals with the skills, backgrounds and experiences required for today's global competitive environment – play a key role in facilitating employers' ability to satisfy their legal obligations and accomplish their business objectives. Accordingly, regardless of the specific disposition of this case, we respectfully request the Court to be cognizant of these business needs and announce clear standards that allow colleges and universities some means of continuing to supply America's business with qualified diverse candidates.

Respectfully submitted,

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RECORD
AND
BRIEFS

In The
Supreme Court of the United States

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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

◆

BRIEF OF EXPERIMENTAL PSYCHOLOGISTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

◆

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QUESTION PRESENTED

Whether the Equal Protection Clause permits the University of Texas to consider applicants' race as one of the many factors that go into the university's admissions decisions.

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INTEREST OF AMICI CURIAE

Amici curiae, listed in the Appendix, are experimental social psychologists and other social scientists who study stereotype threat and related phenomena. Their research bears directly on the questions of (1) how to design a college admissions policy to admit the students with the greatest academic potential, and (2) how to ensure that those students will perform up to their capacities. They file this brief in order to acquaint the Court with this research and to explain its relevance to the constitutionality of affirmative action.[1]

◆

SUMMARY OF ARGUMENT

A substantial body of research by social scientists has revealed that standardized test scores and grades often underestimate the true academic capacity of members of certain minority groups. This result is attributable to a phenomenon scientists call *stereotype threat*.

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[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.

Stereotype threat is the pressure that people feel when they fear that their performance could confirm a negative stereotype about their group. This pressure manifests itself in anxiety and distraction that interferes with intellectual functioning. A student need not believe the stereotype is accurate to be affected. He or she need only be aware of the stereotype and care about performing well.

Stereotype threat has been one of the most extensively studied topics in social psychology over the past two decades. In hundreds of studies, scientists have confirmed the existence of stereotype threat and have measured its magnitude, both in laboratory experiments and in the real world. Because of stereotype threat, standard assessments of academic performance underestimate the ability of students targeted by negative stereotypes by an average of 0.18 standard deviations, the equivalent of 62 points on the SAT.

These findings have two important implications for college admissions.

First, because of stereotype threat, standardized test scores and high school GPAs systematically underestimate the true talents of many members of minority groups stigmatized as intellectually inferior. This means that the most promising students are not always the ones with the best numbers. A genuine merit-based admission policy therefore cannot rely on these numbers alone. An admissions policy that takes proper account of stereotype threat is not a *departure* from merit-based admissions, but is rather an effort to achieve *more accurate* merit-based admissions.

Second, stereotype threat in college depresses the grades of many minority students. The more a student experiences stereotype threat in an academic setting, the worse the student's grades. One way to mitigate stereotype threat is to provide a racially diverse environment, so that minority students do not feel that they are seen or evaluated as representatives of their group.

Because of stereotype threat, a college will thus have to take race into account if it wishes to admit the best students and to ensure that all students can perform to their potential.

◆

ARGUMENT

A substantial body of research by social scientists has revealed that standardized test scores and grades often underestimate the true academic capacity of members of certain minority groups. This result is attributable to a phenomenon scientists call *stereotype threat*.

Stereotype threat is the pressure that people feel when they fear that their performance could confirm a negative stereotype about their group. This pressure manifests itself in anxiety and distraction that interferes with intellectual functioning. If one belongs to a gender, ethnicity, or race that is viewed as intellectually inferior, a challenging academic task can trigger this particular form of anxiety, which prevents a student from performing as well as he or she is capable. The student need not believe that the stereotype is accurate to be affected. The student only needs to be aware that the stereotype exists and to care about performing well. This can occur regardless of the actual level of prejudice in a classroom or test-taking situation.

Stereotype threat is distinct from the vague intuition of teachers, coaches, or parents who have seen their kids "choke" at an important event. It is a cognitive phenomenon that has been painstakingly researched, documented, and quantified over the past two decades in hundreds of peer-reviewed studies. (For an engaging summary of this research, see C.M. Steele, *Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us* (Norton, 2010).)

Stereotype threat does not strike all students equally. It operates systematically against groups that are stereotyped as inferior in a particular domain. For example, the stereotype of Black intellectual inferiority has long been embedded in American culture, and many Black students are keenly aware of it. Latino students often experience the same stereotype. Women are often stereotyped as less able in math and science. These stereotypes have the effect of depressing the average grades and test scores of Black and Latino students, and they have the same effect for women in math and science. Scientists have also found that these negative effects can be mitigated by changing aspects of the academic environment that cue stereotype threat. In fact, research on this phenomenon highlights the often hidden ways in which educational contexts can bring to mind negative stereotypes that disrupt cognitive processing for students targeted by these stereotypes.

These findings have two important implications for college admissions.

First, because of stereotype threat, standardized test scores and high school GPAs systematically underestimate the true talents and potential for success of many members of minority groups stigmatized as intellectually inferior. A genuine merit-based admissions policy therefore cannot rely on these numbers alone. An admissions policy that takes proper account of stereotype threat is not a *departure* from merit-based admissions, but is rather an effort to achieve *more accurate* merit-based admissions.

Second, stereotype threat in college depresses the grades of many minority students. When stereotype threat is removed, this performance gap sharply diminishes. One way of mitigating stereotype threat is to provide a racially diverse environment, so that minority students do not feel that they are seen or evaluated as representatives of their group.

The purpose of this brief is to acquaint the Court with the research on stereotype threat and to explain its relevance to college admissions policies. The first section of the brief summarizes the research findings. The second section discusses how these findings bear on the questions of how to admit the best students and how to ensure that students who are admitted perform up to their capacities.

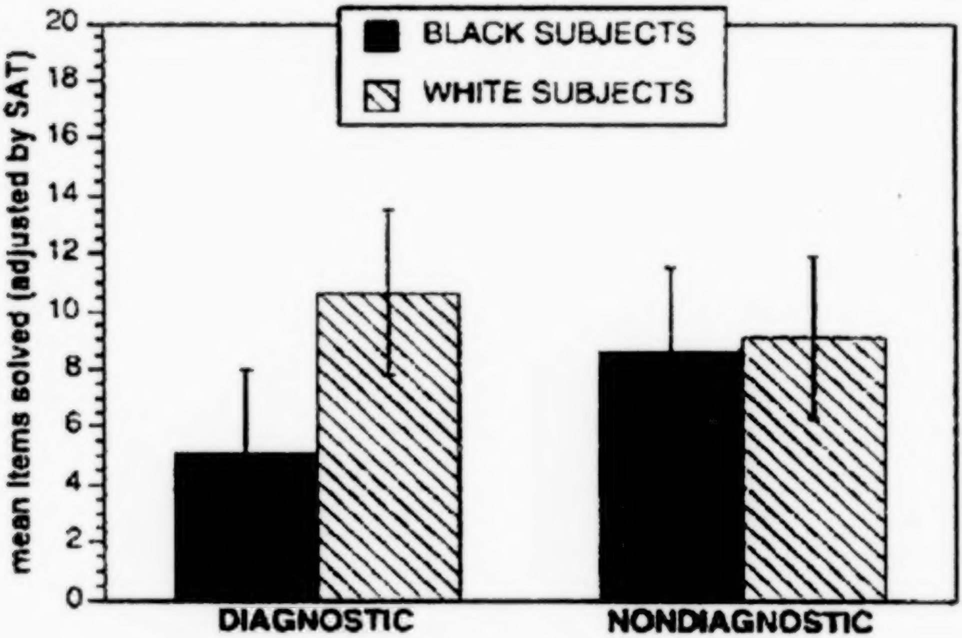
I. The Stereotype Threat Research

In 2008, a review of the large body of research on stereotype threat concluded that "[s]tereotype threat has become one of the most widely studied topics of the past decade in social psychology." The review explained that "a large body of work now testifies to the reliability and generalizability of stereotype threat effects on performance." T. Schmader et al., "An Integrated Process Model of Stereotype Threat Effects on Performance," 115 *Psychological Review* 336, 336 (2008).

As with most research on social-cognitive phenomena, the early findings of stereotype threat came from laboratory experiments. More recent work has confirmed the existence of stereotype threat in the real world.

A. Stereotype Threat in the Laboratory

A well-known early study of stereotype threat was conducted by psychologists Claude Steele and Joshua Aronson to understand the racial achievement gap. Steele and Aronson administered the same test, composed primarily of problems from the GRE, to Black and White Stanford students under two different conditions. In the "threat" condition, the students were told that the test would be diagnostic of their intellectual ability, an instruction that activated a negative stereotype of intellectual inferiority. By contrast, in the "no threat" condition, the test was characterized as a mere problem-solving task that was not intended to evaluate their intellectual ability. Under the "threat" condition, Black students performed substantially worse than White students with the same incoming SAT scores. But under the "no threat" condition, Black students' performance improved significantly, virtually eliminating the racial gap between Black and White students with the same incoming SAT scores. C.M. Steele and J. Aronson, "Stereotype Threat and the Intellectual Test Performance of African Americans," 69 *Journal of Personality and Social Psychology* 797 (1995).



The graph above is reproduced from the Steele-Aronson study. *Id.* at 802 (figure 2). The two bars on the left show the extent to which White students outperformed Black students under the "threat" condition. The two bars on the right show that this gap was nearly eliminated under the "no threat" condition.

Steele and Aronson concluded that when the test was represented as evaluative of ability, which is how most tests are represented and understood, the Black students became anxious that a poor performance could seem to confirm the negative stereotype of intellectual inferiority, and this anxiety disrupted their test performance. But when the test was characterized in the "no threat" condition, the instructions made negative intellectual stereotypes less relevant. With less burden of psychological threat, Black students' performance improved dramatically. A great deal of subsequent research, over a wide range of populations and testing conditions, has reached the same conclusion. *See, e.g.*, R.P. Brown and E.A. Day, "The Difference Isn't Black and White: Stereotype Threat and the Race Gap on Raven's Advanced Progressive Matrices," 91 *Journal of Applied Psychology* 979 (2006).

Similar experiments conducted concurrently at the University of Michigan, involving equally qualified men and women taking a math test, yielded identical results. In the "threat" condition, participants were told ahead of time that men performed better than women at math. In the "no threat" condition, participants were told ahead of time that men and women performed equally on the test. This seemingly small difference in instructions yielded sharply different results. In the former condition, the women performed substantially worse than the men; in the latter, men and women performed equally well. S.J. Spencer et al., "Stereotype Threat and Women's Math Performance," 35 *Journal of Experimental Social Psychology* 4 (1999). Subsequent research has confirmed that merely describing a math test as evaluative of math ability can trigger stereotype threat and undermine women's performance. D.M. Quinn and S.J. Spencer, "The Interference of Stereotype Threat with Women's Generation of Mathematical Problem-Solving Strategies," 57 *Journal of Social Issues* 55 (2001); P.G. Davies et al., "Consuming Images: How Television Commercials that Elicit Stereotype Threat Can Restrain Women Academically and Professionally," 28 *Personality and Social Psychology Bulletin* 1615, 1618 (2002).

Such findings – of very different test scores from the exact same pool of individuals simply because of subtle changes in the situation – have now been replicated in hundreds of studies. For example, when Latino college students were told that a math test would evaluate their intellectual ability, they scored much lower than White students, but when they were told that the test *did not* evaluate their ability, they performed as well as White students. P.M. Gonzales et al., "The Effects of Stereotype Threat and Double-Minority Status on the Test Performance of Latino

Women," 28 *Personality and Social Psychology Bulletin* 659 (2002). In the rare circumstances in which majority-group members face negative stereotypes, they too show stereotype threat. When White male Stanford students specifically selected for high math ability were given a math test and told that the goal of the experiment was to examine why Asians outperform Whites in math, their scores plummeted. J. Aronson et al., "When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat," 35 *Journal of Experimental Social Psychology* 29 (1999).

Why does stereotype threat have such striking effects? When people are aware of the stereotype, their attention is split between the test at hand and worries about being seen stereotypically. Research finds that anxiety about negative stereotypes can trigger physiological changes in the body and the brain (especially an increased cardiovascular profile of threat and activation of brain regions used in emotion regulation), cognitive reactions (especially a vigilant self-monitoring of performance), and affective responses (especially the suppression of self-doubts). These effects all divert cognitive resources that could otherwise be used to maximize task performance. T. Schmader et al., "An Integrated Process Model," 342-46; T. Schmader and M. Johns, "Converging Evidence that Stereotype Threat Reduces Working Memory Capacity," 85 *Journal of Personality and Social Psychology* 440 (2003). As a recent review of this research concludes, "[t]his pattern of evidence suggests that stereotype threat degrades the ability to regulate attention during complex tasks," because of the need to "inhibit thoughts, feelings, and behaviors counterproductive to one's current goals." T. Schmader et al., "An Integrated Process Model," 340. Because students under stereotype threat are automatically managing this anxiety, they may not admit it to others or even be aware of it themselves. *Id.* at 345. And because the students who care the most about their academic performance are the most likely to experience this anxiety, stereotype threat hits the most dedicated students the hardest. It is not their motivation to succeed that falters; what falters is their ability to maintain undivided attention.

B. Stereotype Threat in the Real World

More recent work has provided evidence that the effects shown in the laboratory also exist in the real world. J. Aronson and T. Dee, "Stereotype Threat in the Real World," in M. Inzlicht and T. Schmader, eds., *Stereotype Threat: Theory, Process, and Application* 264-79 (Oxford University Press, 2012); G.M. Walton et al., "Affirmative Meritocracy," *Social Issues and Policy Review* (forthcoming).

Stereotype threat influences performance in academic environments as early as middle school. Interventions designed to lift the threat reduced the gap between the GPAs of Black and White middle school students by 40%. G.L. Cohen et al., "Reducing the Racial Achievement Gap: A Social-Psychological

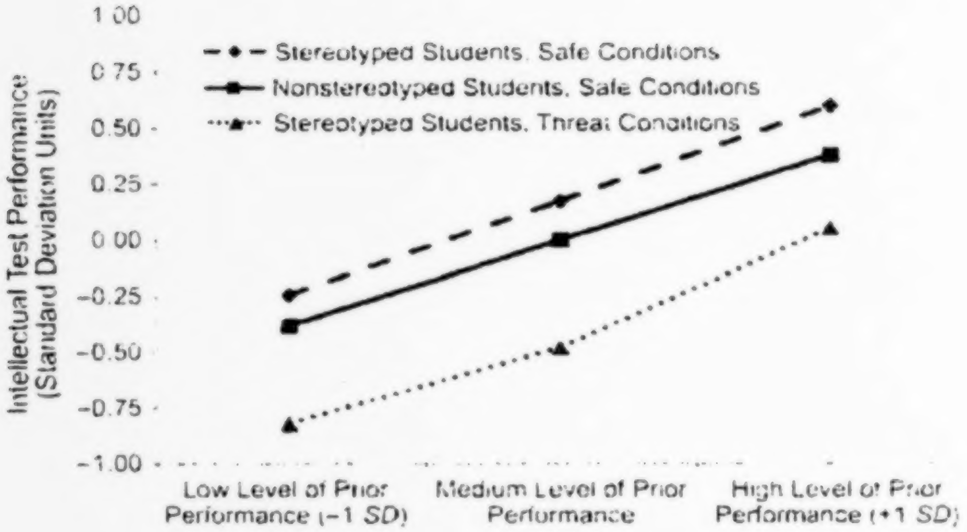
Intervention," 313 *Science* 1307 (2006). *See also* C. Good et al., "Improving Adolescents' Standardized Test Performance: An Intervention to Reduce the Effects of Stereotype Threat," 24 *Journal of Applied Developmental Psychology* 645 (2003); G.L. Cohen et al., "Recursive Processes in Self-Affirmation: Intervening to Close the Minority Achievement Gap," 324 *Science* 400 (2009).

Stereotype threat has also been found to exist in high school. For example, the California high school exit exam must be passed in order to graduate; for those who find this exam challenging, it is an extremely high-stakes test that is more likely to evoke stereotype threat. By contrast, California achievement tests, although they test similar material, have much lower stakes because they have no direct impact on the student. The achievement tests are thus less likely to trigger stereotype threat. Black and Latino students who performed as well as White students on the achievement tests (the "low threat" condition) performed markedly worse on the exit exam (the "high threat" condition). In math, girls who performed as well as boys on the achievement tests ("low threat") performed substantially worse on the exit exam ("high threat"). S.F. Reardon et al., *Effects of the California High School Exit Exam on Student Persistence, Achievement, and Graduation* (Stanford University Institute for Research on Education Policy and Practice Working Paper 2009-12 (2009)).

Stereotype threat has been measured most often in college. At the Air Force Academy, where students are randomly assigned to professors for mandatory standardized courses, female students do much better in math and science courses taught by women, a setting that implicitly negates the stereotype that women are bad at math. The difference in performance is most pronounced for the female students who are most skilled at math. S.E. Carrell et al., "Sex and Science: How Professor Gender Perpetuates the Gender Gap," 125 *Quarterly Journal of Economics* 1101 (2010). *See also* J.G. Stout et al., "STEMing the Tide: Using Ingroup Experts to Inoculate Women's Self-Concept in Science, Technology, Engineering, and Mathematics (STEM)," 100 *Journal of Personality and Social Psychology* 255 (2011). At another selective college, the GPA gap between Black and White students was cut in half over three years by an intervention that mitigated concerns about negative stereotypes. G.M. Walton and G.L. Cohen, "A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students," 331 *Science* 1447 (2011). *See also* J. Aronson et al., "Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence," 38 *Journal of Experimental Social Psychology* 113 (2002).

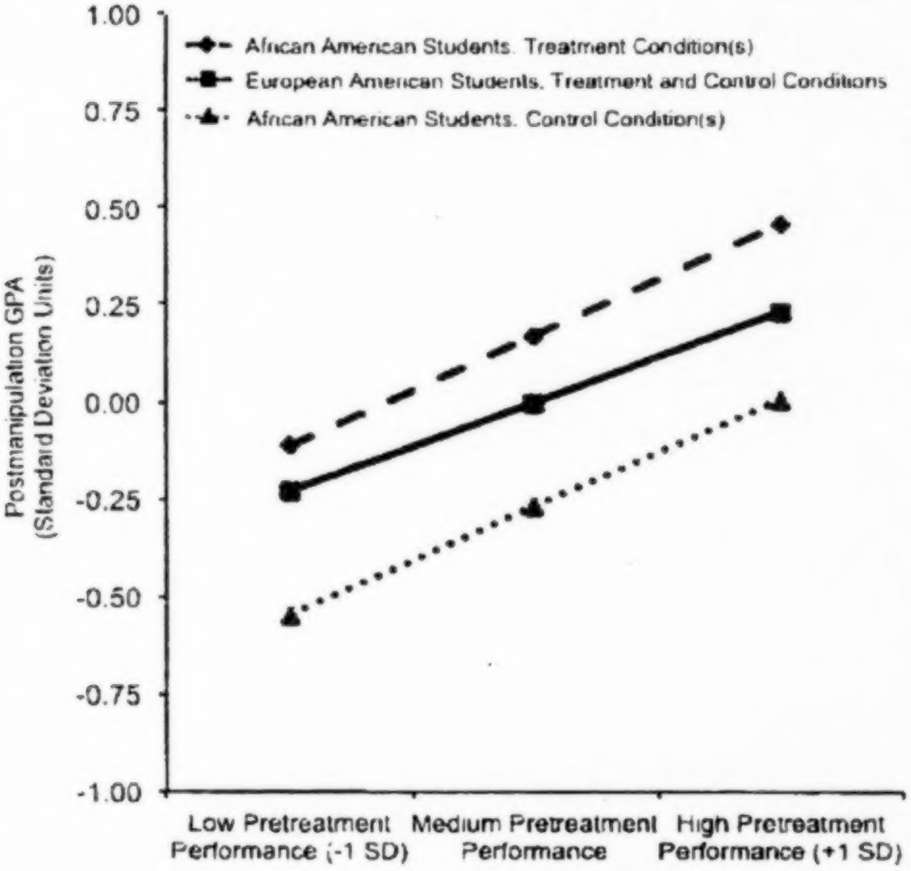
To see whether real-world measures of academic merit are distorted by stereotype threat, many researchers have studied what happens when the threat is removed. A recent meta-analysis, a statistical combination of 39 independent samples including over three thousand participants, examined the effects of reducing stereotype threat through laboratory manipulations. It found that standard measures of academic performance underestimate the ability of students targeted by negative stereotypes by an average of 0.18 standard deviations. G.M. Walton and S.J. Spencer, "Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students," 20 *Psychological Science* 1132, 1135 (2009). To put that figure in context, one standard deviation on last year's 2400-point SAT was 344 points. College Board, *2011 College-Bound Seniors: Total Group Profile Report* 1 (2011). To have one's score reduced by 0.18 standard deviations would thus cost a student 62 points on the SAT.

Another meta-analysis combined the results of randomized field experiments, involving more than fifteen thousand students, in which stereotype threat was reduced not in the laboratory but through interventions in the real world. The results were remarkably similar: conventional measures of academic performance underestimated the ability of members of stereotyped groups by 0.17 standard deviations. Walton and Spencer, "Latent Ability," 1137.



The graph above represents the first meta-analysis, the one showing the effects of laboratory interventions to reduce stereotype threat. Walton and Spencer, "Latent Ability," 1135 (figure 1). It shows the difference in academic performance between stereotyped students and non-stereotyped students who have equal levels of prior performance, as measured by past grades and real-world test scores. The data were aligned such that the prior performance was at the exact same level for all three groups. The gap between the top dashed line and the middle solid line shows that those measures of prior performance were biased by stereotype threat, because the stereotyped students perform *better* than the non-stereotyped students once the threat is reduced.

A useful analogy is to think of stereotype threat as a headwind, and to imagine a competition in which Runner 1 faces a headwind but Runner 2 does not. If the runners nevertheless tie in those conditions, we would expect Runner 1 to win a new race when the headwind is reduced. That is precisely what the data show. The size of this gap – 0.18 standard deviations, or 62 points on the SAT – is the size of the average headwind confronting stereotyped students. It shows the extent to which prior grades and test scores underestimated the true ability of stereotyped students, on average. These effects can be substantially greater in settings with higher stakes, more difficult material, or less representation of one's group, where the level of stereotype threat is likely to be higher.



The graph above represents the second meta-analysis, the one showing the effects of real-world interventions to reduce stereotype threat. *Id.* at 1138 (figure 2d). The gap between the top dashed line and the middle solid line again shows that when the headwind is reduced, stereotyped students perform better than non-stereotyped students who had the same incoming scores.

It is also worth focusing on the gap between the middle solid line and the bottom dotted line, which shows the converse effect of *underperformance*. Often stereotyped students perform worse than non-stereotyped students at a subsequent stage of education, even though they have the same incoming scores. One reason is that stereotype threat increases at later stages of education as academic work becomes more difficult (which pushes all students closer to the boundaries of their abilities) and as educational environments are often less diverse – in other words, the headwind blows even harder. If the two runners tie when Runner 1 faces a moderate headwind, we would expect Runner 1 to lose in a subsequent race with a stiffer headwind. Again, this is what the data show. Even with identical incoming scores, the non-stereotyped students outperform the stereotyped students.

Finally, the large gap between the top dashed line and the bottom dotted line in both graphs represents the dramatic difference between a world where stereotype threat is alleviated (the headwind weakens) and a world where stereotype threat is exacerbated (the headwind stiffens).

These findings yield a simple conclusion. If grades and test scores were used as the sole basis for admissions, the admissions process would systematically underestimate the ability of minority students by approximately two-tenths of a standard deviation. Because of the reality of stereotype threat, grades and test scores are not unbiased measures of talent.[2]

II. Implications for College Admissions

These research findings have two principal implications for college admissions. First, if a college wishes to admit the students with the greatest academic potential, it cannot rely solely on standardized test scores and high school GPAs, because these numbers are likely to have been distorted by stereotype threat. Second, if a college wishes to ensure that its admitted students perform up to their capacities, it needs to take steps to counter stereotype threat. One such step is to enroll enough minority students to ensure that students do not feel themselves merely as representatives of their race.

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[2] Petitioner's amici thus err when they assert that stereotype threat is merely a laboratory phenomenon with no real-world effects. *See* Brief for Richard Sander and Stuart Taylor, Jr., at 25-26; Brief of Scholars of Economics and Statistics at 31-32. Indeed, the stereotype threat research demonstrates the error in Sander and Taylor's assumption that real-world grades and test scores are unbiased measures of merit.

A. Admitting the Best Students

The problem of stereotype threat highlights something colleges already know well – standardized tests and high school grades are useful but imperfect predictors of college success. Thus, even if the goal of admissions is construed narrowly as selecting those students who are most likely to succeed academically, many colleges have always looked beyond the numbers to assess the whole person. Stereotype threat, from the perspective of an admissions officer, provides just one more reason not to use a rigid numbers-only admissions policy.

Admissions officers routinely admit students with lower grades or standardized test scores than others they do not admit, for reasons that are well known and widely accepted. Some applicants have jobs while in high school and thus do not have as much time to study as students who can afford not to work. Some devote comparable amounts of time to sports, or to volunteer work, or to caring for sick family members. Some applicants cannot afford elaborate test preparation courses. Others have grown up in crime- and poverty-ridden neighborhoods that are not conducive to educational achievement. Grades and standardized test scores may underestimate the true talents of such students and their potential for academic success in college, so selective colleges do not rely solely on the numbers. Selective colleges also seek applicants with particular talents or those from atypical locales. In evaluating these applicants, they consider whether numerical measures might miss an important part of the whole story.

Research on stereotype threat further demonstrates that the most promising students are not always the ones with the highest SAT scores or the best high school grades, because these measures systematically underestimate the ability of members of stereotyped groups. It is thus rational for a college that seeks to admit the students with the greatest potential, not just those with the highest numbers, to take stereotype threat into account. In doing so, colleges can use the same holistic method they use to take other factors into account. Just as colleges do not give mechanical preferences to applicants with full-time jobs or applicants who care for their grandparents, colleges need not use mechanical preferences to account for stereotype threat.

When colleges appropriately account for stereotype threat, the result may be a freshman class in which the average SAT score of minority students is lower than the average SAT score of White students. But this outcome may nevertheless be genuinely meritocratic, not a departure from meritocracy. J. Kang and M.R. Banaji, "Fair Measures: A Behavioral Realist Revision of Affirmative Action," 94 *Calif. L. Rev.* 1063 (2006). The freshman class would consist of the best students regardless of race.

B. Ensuring that Admitted Students Can Perform Up to Their Capacities

Stereotype threat in college depresses the performance of many minority students. The more a student experiences stereotype threat, the worse the student's grades, even controlling for the student's baseline level of academic preparation. J. Owens and D.S. Massey, "Stereotype Threat and College Academic Performance: A Latent Variables Approach," 40 *Social Science Research* 150 (2011); M.J. Fischer, "A Longitudinal Examination of the Role of Stereotype Threat and Racial Climate on College Outcomes for Minorities at Elite Institutions," 13 *Social Psychology of Education* 19 (2010); D.S. Massey and L. Probasco, "Divergent Streams: Race-Gender Achievement Gaps at Selective Colleges and Universities," 7 *Du Bois Review* 219 (2010); R.P. Brown and M.N. Lee, "Stigma Consciousness and the Race Gap in College Academic Achievement," 4 *Self and Identity* 149 (2005); R. Mendoza-Denton et al., "Sensitivity to Status-Based Rejection: Implications for African American Students' College Experience," 83 *Journal of Personality and Social Psychology* 896 (2002).[3]

There has accordingly been considerable interest in discovering methods to mitigate stereotype threat in college. One crucial factor is the extent to which students experience "solo status" – when they are the only representative, or one of few representatives, of their group. In one experiment, for example, when Black undergraduates took a test as the only Black member of a group, they performed worse than equally qualified Black undergraduates who took the same test as members of an all-Black group. D. Sekaquaptewa and M. Thompson, "The Differential Effects of Solo Status on Members of High- and Low-Status Groups," 28 *Personality and Social Psychology Bulletin* 694 (2002). In a similar experiment, female undergraduates did better on a math test when they took the test as part of a group in which they were not the only woman. M. Inzlicht and T. Ben-Zeev, "A Threatening Intellectual Environment: Why Females are Susceptible to Experiencing Problem-Solving Deficits in the Presence of Males," 11 *Psychological Science* 365 (2000). *See generally* N. Dasgupta, "Ingroup Experts and Peers as Social Vaccines Who Inoculate the Self-Concept: The Stereotype Inoculation Model," 22 *Psychological Inquiry* 231 (2011); M. Thompson and D. Sekaquaptewa, "When Being Different is Detrimental: Solo Status and the Performance of Women and Racial Minorities," 2 *Analyses of Social Issues and Public Policy* 183 (2002).

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[3] This research demonstrates the error in another of the assumptions underlying the "mismatch" theory advanced by amici Sander and Taylor – the assumption that poor performance in school is due entirely to lack of ability or preparation.

Numerous field studies have likewise found that the academic performance of women and minority students improves in more diverse settings. *See, e.g.*, E. Spangler et al., "Token Women: An Empirical Test of Kanter's Hypothesis," 84 *American Journal of Sociology* 160 (1978); L. Springer et al., "Effects of

Small-Group Learning on Undergraduates in Science, Mathematics, Engineering, and Technology: A Meta-Analysis," 69 *Review of Educational Research* 21, 34 (1999); E. Harskamp et al., "Group Composition and Its Effect on Female and Male Problem-Solving in Science Education," 50 *Educational Research* 307 (2008); N. Ding and E. Harskamp, "How Partner Gender Influences Female Students' Problem Solving in Physics Education," 15 *Journal of Science Education and Technology* 331 (2006).

These studies suggest that being severely underrepresented creates psychological threat and amplifies a student's worry that his or her performance will be seen as reflecting the capacity of his or her group. Walton et al., "Affirmative Meritocracy," 19; V. Purdie-Vaughns et al., "Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions," 94 *Journal of Personality and Social Psychology* 615 (2008); M.C. Murphy et al., "Signaling Threat: How Situational Cues Affect Women in Math, Science, and Engineering Settings," 18 *Psychological Science* 879 (2007). When you are one of only a few members of a racial or gender group, your group identity tends to define you in that setting, both in terms of how you think about yourself and how you are perceived by others. W.J. McGuire et al., "Salience of Ethnicity in the Spontaneous Self-Concept as a Function of One's Ethnic Distinctiveness in the Social Environment," 36 *Journal of Personality and Social Psychology* 511 (1978). When *A* is the only Black student taking Medieval Literature, he is likely to feel like, and to be perceived as, "the Black kid" in the class. When *B* is the only woman majoring in Mechanical Engineering, she is likely to feel like, and to be perceived as, not just an Engineering major, but a *woman* majoring in Engineering. But when there are multiple members of one's racial or gender group present, a person's identity is less defined by group membership. Now *A* is just a student taking Medieval Literature and *B* is just someone studying Engineering. Stereotype threat diminishes in diverse environments, because group membership tends to become less defining of individual identity.[4]

If a college wishes to ensure that equally qualified White and minority students can perform up to their capacities, this research indicates that one prudent strategy is to admit a diverse class. If the class is sufficiently diverse, students can avoid the stereotype threat triggered by severe underrepresentation. As a result, the performance gap between

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[4] Justice O'Connor tells a story that illustrates this point. She explains that the appointment of Justice Ginsburg "made an enormous difference. When I'd arrived there had been a large amount of media attention to the selection of a woman and then to see what that woman did, under all circumstances. And too much attention for any reasonable comfort level. And the minute Justice Ginsburg came to the court, we were nine justices. It wasn't seven and then 'the women.' We became nine. It was a great relief to me." This quotation is from a 2003 CNN interview entitled "Sandra Day O'Connor: 'The Majesty of the Law,'" available at http://articles.cnn.com/2003-05-20/politics/judy.page.oconnor_1_individual-rights-supreme-court-justice-sandra-day-o-connor/3?_s=PM:ALLPOLITICS.

White and minority students will diminish. Minority students' performance will be more commensurate with their talents.[5]

In short, because of the phenomenon of stereotype threat, a college will have to take race into account if it wishes to admit the best students and to ensure that all students perform as well as they are capable.

Amici are social scientists, not lawyers. It is beyond their expertise to say whether any particular affirmative action program is constitutional. But it would seem very strange to them if the Constitution barred colleges from trying to select the best students based on academic merit, or from trying to ensure that students perform up to their capacities. The best scientific evidence available indicates that in order to accomplish these goals, colleges cannot be colorblind.

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[5] Without considering any of the evidence, petitioner's amici speculate that stereotype threat is *caused* by race-conscious college admissions policies. Brief of Gail Heriot et al. at 31-32; Brief for Richard Sander and Stuart Taylor, Jr., at 26. As we have demonstrated in this brief, the research indicates otherwise. Stereotype threat has been shown to be pervasive in many non-collegiate settings, like middle schools and high schools, that lack race-conscious admissions policies. Stereotype threat also afflicts women on math exams in institutions without gender-conscious admissions policies. Finally, a sensibly designed race-conscious college admissions policy can mitigate severe underrepresentation, a result that has been shown to reduce stereotype threat, not to increase it.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE FAMILY OF HEMAN SWEATT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amici curiae are the daughter and nephews of Heman Marion Sweatt, who in 1946 was denied admission to The University of Texas Law School for one reason: "the fact that he is a negro." Texas law forbade UT from considering any of his other qualities: not his intelligence, not his determination, not the grit he gained living under and fighting Jim Crow.

In 1950 – four years before *Brown v. Board of Education* – this Court held that Sweatt must be admitted to UT, because the separate law school created to accommodate him was not equal in – among other things – intangibles such as reputation and because Sweatt would be "removed from the interplay of ideas and the exchange of views" with "members of the racial groups which number 85% of the population of the State."

Today, UT honors the legacy of Heman Sweatt in many ways, none more important than its commitment to creating a genuinely diverse student body. It does so through an admissions policy that considers (to the extent allowed by the Texas Top Ten Percent Law, which depends on secondary-school segregation to increase minority enrollment) all aspects of an applicant's character – including, in part, how that character has been shaped by race.

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[1] Pursuant to Supreme Court Rule 37.6 of the Rules of this Court, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that counsel of record for both petitioners and respondent were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

The Sweatt Family submits this brief to recount Heman Sweatt's story in the context of Texas's long and continuing history of segregation in education and to support UT's use of a holistic admissions policy as a narrowly tailored means of fulfilling its mission to prepare students to engage and lead Texas's diverse society.

INTRODUCTION AND SUMMARY OF ARGUMENT

Hemella Sweatt-Duplechan, M.D. is a dermatological pathologist. She has three children, ages 13, 8, and 3. Her oldest is serious about soccer, but more so about his studies. In his Cincinnati school, which his parents chose for its diversity as well as academic excellence, he has had the highest GPA for three years running. Last year he scored second among seventh graders in the country on the National Spanish Test. He is understandably a source of pride for the Sweatt Family, which is serious about education. Historically serious.

Dr. Sweatt-Duplechan's father was Heman Marion Sweatt, who for four years fought for the opportunity to study at the University of Texas Law School, which was refused for the sole reason that he was black. Sweatt's legal battle, led by Thurgood Marshall, culminated in this Court's ruling for the first time that an African American must be admitted to an all-white school.

The lessons from Heman Sweatt's struggle and from this Court's opinion in *Sweatt v. Painter*[2] resound in the issues once again before the Court.

In *Sweatt*, this Court first recognized that in higher education, the interplay of ideas and exchange of views among students are critical. It explained the educational importance of interaction among members of different racial groups representing a large percentage of the population of the state. It was in *Sweatt* – not *Bakke*[3] – that the Court first found that diversity, including racial diversity, was a compelling component of effective higher education. The Court's discussion in *Sweatt* of the benefits of diversity would echo more than a half-century later in *Grutter*.[4] The Court ultimately held in *Sweatt* that the separate school Texas cobbled together was unequal to UT Law School, in part because it could not provide these features of a first-class legal education.

Sweatt's story is but one chapter in Texas's long history of segregation in the education of its black and Hispanic citizens. That history, sadly, is turning back on itself. After years of steady integration (frequently under the firm hand of heroic federal judges), Texas schools are *de facto* resegregating.

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[2] 339 U.S. 629 (1950).

[3] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

[4] *Grutter v. Bollinger*, 539 U.S. 306 (2005)

Each year, more black and Hispanic students attend highly segregated schools, where less than 10% of the enrollment comprises other races. It is against this backdrop that UT faces its mission as a flagship university to train students to engage and lead Texas's increasingly diverse society.

In refusing Sweatt's application for admission, UT was compelled by Texas law to view him in one determinative dimension: his race. As an American – as a human – he deserved more. He deserved consideration of his whole, individual being: his strengths, his weaknesses, his talents, his character, his life experiences – including how they were shaped by his race. He was a black man who grew up in a predominantly white neighborhood, yet he was relegated to "colored" schools and suffered job discrimination and other indignities of Jim Crow, out of which grew his desire to study law and use the law to change the world in which he lived.

UT's admissions policy affords applicants falling outside the Top Ten Percent Law the holistic consideration Heman Sweatt was denied. UT reviews their individual strengths, weaknesses, talents, character, and – in a small, unquantified part – how their unique life experiences have been affected by race. The school neither admits nor excludes any applicant just because of race. True, UT's consideration of race as part of a holistic review produces fewer minority admissions than the Top Ten Percent Law, under which ten percent of graduates from highly segregated schools are automatically admitted. But such complaints miss the point. The purpose of UT's holistic review is not just to admit more minority students, irrespective of who they are as individuals. UT seeks to supplement its Top Ten Percent admissions with those individuals – be they black, white, Hispanic, Asian, Native American, or other – who will best contribute to a robust exchange of ideas and exposure to different views and life experiences.

Heman Sweatt's legacy lives on at UT and in Austin. Symposia, scholarships, a courthouse, and a side of UT's campus bear his name. But it is UT's commitment to creating a genuinely diverse student body – one based on a holistic review of applicants' unique history and persona, not just their race – that best honors Heman Marion Sweatt.

ARGUMENT

I. *SWEATT V. PAINTER*

A. Sweatt's Application and Painter's Response

Room 1 of the Main Building, contiguous with the iconic University of Texas Tower, houses UT's Office of the Registrar. There, on February 26, 1946, Heman Marion Sweatt, an African-American letter carrier from Houston, handed UT President Theophilus S. Painter a copy of his college transcript and asked to be admitted to study law. The meeting was largely courteous and wholly expected. Sweatt was accompanied by representatives of the NAACP's Texas State Conference of Branches; Painter was joined by UT's Registrar, a Vice President, and a lawyer for the Board of Regents. Painter told Sweatt that the Registrar was not officially accepting his application, but that Painter would ask the attorney general how UT should respond.[5]

Later that day, Painter requested an official opinion from Texas Attorney General Grover Sellers on Sweatt's application. Painter put the issue simply and starkly:

> This applicant is a citizen of Texas and duly qualified for admission to the Law School at the University of Texas, save and except for the fact that he is a negro.[6]

On March 16, 1946, the Attorney General released Opinion O-7126, "Re: Whether a person of negro ancestry, otherwise qualified for admission into the University of Texas, may be legally admitted to that institution."[7] After summarizing the facts, he began with the commentary:

> The wise and long-continued policy of segregation of the races in educational institutions of this State has prevailed since the abolition of slavery, and such

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[5] *See generally* GARY M. LAVERGNE, BEFORE BROWN: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE 97-103 (2010) [hereinafter BEFORE BROWN].

[6] Letter from Theophilus Painter to Grover Sellers (Feb. 26, 1946) (on file with Tarleton Law Library, The University of Texas at Austin), *quoted in* BEFORE BROWN, *supra* note 5, at 104.

[7] Op. Att'y Gen. Tex. No. O-7126 (Mar. 16, 1946), *available at* https://www.oag.state.tx.us/opinions/opinions/39sellers/op/1946/pdf/gs7126.pdf.

> policy is found incorporated not only in the Constitution of the State of Texas but also in numerous related statutes.[8]

He confirmed that the constitutionality of segregation had been repeatedly sustained by this Court, particularly in *Plessy v. Ferguson*,[9] but added:

> there is no doubt that if equal educational advantages are not provided for the applicant within the State, he must be admitted to the law school of the University of Texas.[10]

The Attorney General recounted that the Legislature had recently authorized Prairie View State Normal and Industrial College (which it renamed Prairie View University) to teach any graduate- or professional-level course UT offered to whites.[11] He concluded:

> [T]he segregation of races in educational institutions in Texas may not be abrogated unless and until the applicant in good faith makes a demand for legal training at Prairie View University, gives the authorities reasonable notice, and is unlawfully refused.[12]

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[8] *Id.* at 2 (citations omitted).

[9] 163 U.S. 537 (1896)

[10] Op. Att'y Gen. Tex. No. O-7126, *supra* n.7, at 2.

[11] *Id.* at 3.

[12] *Id.*

The next day, Painter wrote a letter to Sweatt returning his transcripts and enclosing a copy of the Attorney General's Opinion. He concluded: "in accordance therewith it becomes necessary at this time to finally refuse your application to the Law School at the University of Texas."[13]

B. Sweatt's Many Dimensions

Sweatt was denied admission to UT because of one determinative dimension: his race. Although Painter conceded Sweatt was otherwise "duly qualified," under Texas law, UT could not consider any of Sweatt's individual qualities and characteristics. It could not undertake a holistic review to put Sweatt's race in context with his unique life experiences.

If UT could have looked beyond "the fact that he is a negro," it would have learned that Sweatt grew up in a racially mixed Houston neighborhood,[14] yet was forced to attend schools set aside for "colored" children. UT would have learned that education was deeply important to the Sweatt family.

Heman's father was James Leonard Sweatt, Sr. The son of a slave, James was one of the first graduates of Prairie View State Normal School and Industrial College, then the only state-supported institution of higher education for African Americans in Texas.[15] He had been a teacher and principal in Beaumont, but Texas's poor pay for black educators led him to move to Houston, where he worked as a postal clerk. Nevertheless, he saw to it that each of his seven children who reached adulthood not only graduated from college, but earned advanced degrees.[16]

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[13] Letter from T. S. Painter to Heman Sweatt (Mar. 16, 1946) (on file with the President's Office Records, Dolph Briscoe Center for American History, Austin, Texas), *quoted in* BEFORE BROWN, *supra* note 5, at 109.

[14] According to the 1918 *Houston City Directory*, only 24% of the households surrounding the Sweatts' home on Chenevert Street were "colored." BEFORE BROWN, *supra* note 5, at 12, 297 n.21.

Heman ("Bill" to those who knew him) graduated from Jack Yates High School in Houston and Wiley College in Marshall, Texas, where he majored in biology. His teachers included Melvin Tolson, the legendary African-American writer and rhetorician, who in 1934 coached Wiley's debate team to a stunning victory over national champion University of Southern California.[17]

Like his father, Heman took a position as a teacher and substitute principal, but left due to the poor pay and facilities plaguing the colored schools in Cleburne, as in the rest of Texas. In 1937, he enrolled in the University of Michigan and maintained a B+ average in a pre-med curriculum. But Sweatt, in fragile health, found the northern winters too harsh and did not return after his first year. Having already passed the civil service exam, he took a job with the Post Office in Houston, and two years later he married his high-school sweetheart.[18]

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[15] Prairie View was created in 1876 as a "separate-but-equal" institution to enable Texas to accept federal Morrill Act funds to establish Texas A&M. *See* BEFORE BROWN, *supra* note 5, at 130-31.

[16] *Id.* at 9-11.

[17] *Id.* at 16-17. Tolson was portrayed by Denzel Washington in *The Great Debaters* (2007).

In the 1940s, Sweatt began a fight against racial discrimination that he would pursue for the rest of his life. He walked door-to-door asking for donations to finance lawsuits challenging Texas's whites-only primaries.[19] He saw that even in the federal postal service, white postmasters would not promote blacks to "indoor" positions, such as clerk, blocking them from moving up to management. In 1944, with the help of an attorney, Sweatt filed a grievance charging the Post Office with violating its own regulations.[20] From that experience grew his desire to study law and to use the law to combat discrimination.[21]

And in 1946, Heman Marion Sweatt was ready to battle UT and the State of Texas.

C. Sweatt's Suit and the "Basement School"

On May 16, 1946, Sweatt filed his landmark case against Painter and other UT officials in the 126th Judicial District Court of Travis County. He was represented by William Durham of Dallas, together with Thurgood Marshall of the NAACP Legal Defense Fund in New York.[22]

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[18] *Id.* at 18-19, 70.

[19] *Id.* at 61; *see also* DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY (1979).

[20] *Id.* at 70-71.

[21] *Id.*; *see also id.* at 137.

In reaction to Sweatt's suit, the Texas A&M Regents passed a resolution that black applicants who otherwise qualified to attend UT Law School would instead be admitted to study law at Prairie View University for the semester beginning February 1947; their courses would be taught by "qualified Negro attorneys."[23] On December 17, 1946, Judge Roy Archer denied Sweatt's Petition for Writ of Mandamus, finding that the legal training to be offered at Prairie View was "substantially equivalent to that offered at the University of Texas."[24] On February 1, the law school officially opened in a suite of offices at 409½ Milam Street in Houston. But no one applied for admission.[25]

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[22] Application for Writ of Mandamus, *Sweatt v. Painter*, No.74,945 (126th Judicial District Court of Travis County, Tex. May 16, 1946) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm; Relator's Second Supplemental Petition, *Sweatt v. Painter*, No.74,945 (126th Judicial District Court of Travis County, Tex. May 8, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm.

[23] BEFORE BROWN, *supra* note 5, at 131-32.

[24] Judgment of the Court, *Sweatt v. Painter*, No. 74,945 (126th Judicial District Court of Travis County, Tex. Dec. 17, 1946) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm.

[25] BEFORE BROWN, supra note 5, at 141-43.

While Sweatt appealed the denial of mandamus, the Texas Legislature worked swiftly on Senate Bill 140 to establish an "entirely separate and equivalent university of the first class for negroes" to be located in Houston.[26] To address Sweatt's suit, Section II enabled the UT Regents to establish a temporary law school in Austin.[27] On March 3, 1947, within hours of the Governor's signing SB 140, UT Registrar E. J. Mathews, who had been appointed to serve as registrar for the Texas State University for Negroes, wrote Sweatt:

> I am pleased to advise that your qualifications heretofore established and your application heretofore made will entitle you to attend the new school now being opened at 104 East 13th Street, Austin, Texas.[28]

Neither Sweatt nor anyone else registered for the three classes offered by the makeshift law school, which closed one week after it opened.[29]

The temporary School of Law of the Texas State University for Negroes was to occupy part of a three-story building just 100 yards from the State Capitol. Located on the first floor, entrance to the rooms leased for the law school required stepping down two or three steps from the sidewalk to an area shaded by the gallery of the floor above. At the trial to determine whether the separate school was equal to UT, and in the contemporaneous media campaign and in legend ever after, it would be derided as "The Basement School."[30]

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[26] 1947 Tex. Gen. Laws 36.

[27] *Id.* at 39-40.

[28] Letter from E. J. Mathews to Heman Sweatt (Mar. 3, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *quoted in* BEFORE BROWN, *supra* note 5, at 147-46.

[29] BEFORE BROWN, *supra* note 5, at 150-51.

D. The Trial of Intangibles and the Interplay of Ideas

The trial of *Sweatt v. Painter* and subsequent appeals were not really about whether the separate law school was in a basement or whether its physical facilities were equal to UT's. To be sure, the trial record is replete with metrics such as square footage and the number of faculty, course offerings, and books available (and argument over whether the volumes in the Texas State Library in the Capitol, open to the public, should be counted in favor of the separate school).[31] But Marshall shifted the focus to intangibles – what this Court would describe as "those qualities which are incapable of objective measurement but which make for greatness in a law school."[32]

Particularly relevant to the issues in *Fisher*, Dean Earl Harrison of the University of Pennsylvania Law School testified that in the "modern system of instruction," the professor does not lecture so much as direct a discussion among the students:

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[30] *Id.* at 148-49.

[31] Transcript of Record, Pt. 1, *Sweatt v. Painter*, No. 74,945 (126th Judicial District Court of Travis County, Tex. May 12-13, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svptr1.htm#statements; *see generally* BEFORE BROWN, *supra* note 5, at 155-59, 163-65.

[32] *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

> it is largely a matter of discussion in which the members of the class participate to a large extent, one commenting on the recital made by the previous; another criticizing his statement, either the facts of the case or the decision arrived at by the Court, and it is first and foremost a class discussion.[33]

The larger and more diverse the student body, Dean Harrison testified, the more powerful the teaching tool. The concept was just as important outside the classroom:

> Rubbing elbows with the other students in the law school, taking part in small discussion groups, discussion with advanced students, all are very important considerations, equally so, in my opinion, with the actual class room work itself.[34]

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[33] Transcript of Record, Harrison Direct Testimony, *Sweatt v. Painter*, No. 74,945 (126th Judicial District Court of Travis County, Tex. May 15, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svptr3.htm#directharrison, *quoted in* BEFORE BROWN, *supra* note 5, at 194-95.

[34] *Id.*, *quoted in* BEFORE BROWN, *supra* note 5, at 195-96.

As expected, on June 17, 1947, Judge Archer again denied Sweatt's petition, finding the Law School of the Texas State University for Negroes "substantially equal" with UT Law School.[35] But allowing Marshall, frequently over objection, to put on "sociological" evidence of intangibles, he created the record underlying this Court's opinion three years later.

Equally expected, the Third Court of Civil Appeals affirmed and the Texas Supreme Court denied further review.[36] In oral argument before the Austin appellate panel, Marshall attacked the isolation from other racial groups that marked the "basement education" Texas offered Sweatt:

> The modern law school is operated so the student can understand ideas of all stratas [sic] of society, so he can go out and be of service to his community, his state and his nation. . . . You tell [Sweatt], "You go over there by yourself. You don't have a chance to exchange ideas with anybody."[37]

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[35] Judgment of the Court, *Sweatt v. Painter*, No. 74,945 (126th Judicial District Court of Travis County, Tex. June 17, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm#judgmentdistct646.

[36] *Sweatt v. Painter*, 210 S.W. 442 (Tex. Civ. App–Austin 1947, writ ref'd).

[37] Margaret Mayer, *Counsels Argue Equality Clause In Sweatt Case*, AUSTIN AMERICAN, Jan. 30, 1948, *quoted in* BEFORE BROWN, *supra* note 5, at 231.

E. This Court's Opinions of June 5, 1950

On June 5, 1950, Chief Justice Vinson announced the unanimous decisions in *Sweatt v. Painter*[38] and *McLaurin v. Oklahoma State Regents*.[39]

In *Sweatt*, the Court first concluded that it "cannot find substantial equality in the educational opportunities offered white and Negro law students by the State."[40]

> In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.[41]

But the Court continued on to intangibles – and began the end of *de jure* segregated education in America. "What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement, but which make for greatness in a law school."[42]

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[38] 339 U.S. 629 (1950).

[39] 339 U.S. 637 (1950).

[40] *Sweatt*, 339 U.S. at 633.

[41] *Id.* at 633-34.

[42] *Id.* at 634.

> Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of alumni, standing in the community, traditions and prestige.[43]

The Court explained, moreover, that education "cannot be effective in isolation from the individuals and institutions with which the law interacts"; it "cannot be removed from the interplay of ideas and exchange of views with which the law is concerned."[44]

The Court emphasized that the law school to which Texas was willing to admit Sweatt "excludes from its student body members of the racial groups which number 85% of the population of the State" including those "with whom [he] will inevitably be dealing" when he becomes a lawyer.[45]

Justice Tom Clark, a UT Law School alumnus, had addressed these issues in a bench memorandum. He steered the other Justices away from counting bricks and books to considering what cannot be quantified. He concluded that the law school Texas offered Sweatt was not equal to his alma mater for many reasons, including that UT –

> attracts a cross section of the entire State in its student body—affords a wider exchange of ideas—and, in the

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[43] *Id.*

[44] *Id.*

[45] *Id.*

> combat of ideas, furnishes a greater variety of minds, backgrounds and opinions . . . .[46]

The Chief Justice, later writing for a unanimous Court, echoed:

> With such a substantial and significant segment of society excluded, we cannot conclude that the education offered [Sweatt] is substantially equal to that which he would receive if admitted to the University of Texas Law School.[47]

The Court held "that the Equal Protection Clause of the Fourteenth Amendment requires that [Sweatt] be admitted to the University of Texas Law School."[48]

The Court followed *Sweatt* with a unanimous opinion in *McLaurin,* which also underscored the importance in education of the exchange of ideas and interaction with different segments of society.[49] The

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[46] Memorandum from Tom Clark, Associate Justice, Supreme Court of the United States, to Supreme Court Justices (Apr. 1950) (on file with the Tom Clark Papers, Tarlton Law Library, The University of Texas at Austin), *available at* http://www.law.du.edu/russell/lh/sweatt/docs/clarkmemo.htm *quoted in* BEFORE BROWN, *supra* note 5, at 249-50.

[47] *Sweatt*, 339 U.S. at 634.

[48] *Id.* at 636.

[49] *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950). On the same day as *Sweatt* and *McLaurin*, the Court announced *Henderson v. United States*, 339 U.S. 816 (1950), holding that the Southern Railway Company's segrega-
continued...)

University of Oklahoma admitted George McLaurin to its graduate school of education and allowed him to attend the same classes and use the same facilities as other students, but physically isolated him in the classrooms, library, and cafeteria. The Chief Justice wrote that as a result of the restrictions, meant to preserve some semblance of segregation, McLaurin was "handicapped in his pursuit of effective graduate instruction."[50] In particular, "[s]uch restrictions impair and inhibit his ability . . . to engage in discussions and exchange views with other students . . . ."[51] The Court added that isolation from other racial groups impeded the public interest to prepare leaders for an "increasingly complex" society.[52]

Sweatt and *McLaurin* were this Court's first recognition of the importance of diversity in higher education.

II. SWEATT'S LIFE AND LEGACY AFTER *SWEATT V. PAINTER*

A. Sweatt at UT

On September 19, 1950, Heman Sweatt stood in line with five other African Americans and "scores of white boys" to enroll in UT Law School.[53] He would

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tion of its dining cars violated the antidiscrimination provision of the Interstate Commerce Act.

[50] *McLaurin*, 339 U.S. at 641.

[51] *Id.*

[52] *Id.*

[53] *Heman Sweatt's Victory*, LIFE, Oct. 16, 1950, at 64, *quoted in* BEFORE BROWN, *supra* note 5, at 264.

not graduate. While accounts of Sweatt's harassment in law school are inconsistent, the pressure put on him during the long litigation ordeal took its toll on his fragile health.[54] His first year at UT Law School (from which an estimated 50% of all students flunked out in the 1950s) was marked by illness compounded by a then-failing marriage.[55] Moreover, he was an older student who had not attended school since the 1930s. Sweatt left in 1951 before completing his second year.[56]

B. Sweatt at the Urban League

Recovering from health problems in the summer of 1952, Sweatt was offered a scholarship to attend the School of Social Work at Atlanta University. He accepted and in 1954 earned a master's degree with an emphasis in community organizations. He went to work for the Urban League, becoming the Assistant Regional Director responsible for organizing new chapters. During his service, the number of affiliates tripled. He worked for the Urban League for 23 years. [57]

At an Urban League picnic, Sweatt met Katherine Gaffney, whom he married in 1963. She gave birth to a daughter they named Hemella, but called

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[54] BEFORE BROWN, *supra* note 5, at 274-78.

[55] *Id.* at 279-81. Sweatt recalled that his wife left him the night before his first exam. *Id.*

[56] *Id.* at 279-81.

[57] *Id.* at 281.

Mellie, and who today is addressed professionally as Dr. Sweatt-Duplechan.[58]

On October 3, 1982, Heman Marion Sweatt died.[59]

C. Sweatt's Legacy

In Houston, the Texas State University for Negroes was renamed Texas Southern University, and today it is the second-largest predominantly African-American school in the United States. Informally, it is known as "The House That Sweatt Built," and its law school is formally named for his lawyer and champion, Thurgood Marshall, Associate Justice of the Supreme Court of the United States.[60]

In Austin, Sweatt is now a symbol of the equal justice and inclusiveness to which the city and the University of Texas aspire. UT Law School created a professorship and scholarship in his name.[61] In 1987, UT held the first Heman Marion Sweatt Symposium on Civil Rights, an annual event still hosted by the University's Division of Diversity and Community Engagement. That same year, UT renamed the southeast side of campus (then-known as the "Little Campus") the Heman Sweatt Campus.[62] In 2005, the Travis County Courthouse where *Sweatt v. Painter* was tried was renamed the Heman Marion Sweatt Courthouse.[63]

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[58] *Id.*

[59] *Id.* at 283

[60] *See generally* Marguerite L. Butler, *The History of Texas Southern University, Thurgood Marshall School of Law: "The House That Sweatt Built,"* 23 T. MARSHALL L. REV. 45 (1997).

[61] The University of Texas at Austin, Heman Sweatt Endowed Presidential Scholarship in Law, http://endowments.giving.utexas.edu/page/sweatt-heman-eps-law/2343/ (last visited Aug. 2, 2012); Richard Allen Burns, *Sweatt, Heman Marion*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/fsw23 (last visited Aug. 2, 2012).

Sweatt's legacy in Texas education extends to his own family members who, with his daughter Dr. Sweatt-Duplechan, submit this brief as *amici*. His nephew and namesake, Heman Marion Sweatt II, is a UT graduate who spent his career with AT&T and participated in the first symposium honoring his uncle.

Nephew James Leonard Sweatt III, M.D., a former member of the Texas State University System Board of Regents, is himself a pioneer. A board-certified thoracic surgeon, he was the first African American admitted to the Washington University School of Medicine. In 1995, he became the first African-American President of the Dallas County Medical Society.

But Heman Marion Sweatt's greatest legacy lives on in the more than ten thousand young men and women who each year graduate from UT, having benefited from the "interplay of ideas" and "exchange of views" with individuals of different backgrounds, which flow from UT's commitment to create and cultivate a genuinely diverse student body.

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[62] Burns, *supra* note 61.

[63] The University of Texas School of Law, *Travis County Courthouse Renamed in Honor of Heman Marion Sweatt*, Oct. 25, 2005, http://www.utexas.edu/law/news/2005/102505_sweatt.html (last visited Aug. 2, 2012).

III. SEGREGATION IN TEXAS EDUCATION

Sweatt v. Painter did not immediately end segregation of Texas schools. Nor did *Brown v. Board of Education.*[64] We turn to the history of desegregation of Texas public schools and, sadly, their recent trend toward resegregation.

A. A Brief History of Discrimination in Texas Education.[65]

"Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute."[66] Discrimination in Texas has been nowhere more pervasive than in Texas's public education system.[67] "The history of official discrimination in primary and secondary education in Texas is well documented in history books, case law, and the record of this trial."[68]

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[64] *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

[65] This brief encapsulation is not intended to be a comprehensive history of educational discrimination in Texas. A more detailed recounting is found in *Hopwood v. Texas*, 861 F. Supp. 551, 554-63 (W.D.Tex. 1994) (hereinafter *Hopwood I*), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); *see also* SCHOOL DESEGREGATION IN TEXAS: THE IMPLEMENTATION OF UNITED STATES VS. STATE OF TEXAS (Policy Research Report 51, Lyndon B. Johnson School of Public Affairs 1982).

[66] *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993); *see id.* at 915 (King, J., dissenting).

[67] *Hopwood I*, 861 F. Supp. at 554-57.

Texas's history of discrimination in primary and secondary education continues to have present-day effects. Even during the 1980s, many Texas students lived in school districts that courts and the United States Department of Justice had determined were still unconstitutionally segregated.[69] Over 70% of blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans.[70] School districts were found to have practiced official discrimination against Mexican-American as well as African-American students.[71] Indeed, Dallas public schools "opposed any student desegregation, no matter how feasible or how minimal,"[72] and Fort Worth still was not unitary.[73] Although Houston had been declared unitary, "70% of the black students in HISD still attend[ed] schools that [we]re 90% minority, including as minorities black and Hispanic students."[74]

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[68] *Id.* at 554. *See generally* AMILCAR SHABAZZ, ADVANCING DEMOCRACY: AFRICAN AMERICANS AND THE STRUGGLE FOR ACCESS AND EQUITY IN HIGHER EDUCATION IN TEXAS (2004); JACK BASS, UNLIKELY HEROES: A VIVID ACCOUNT OF THE IMPLEMENTATION OF THE *BROWN* DECISION IN THE SOUTH BY SOUTHERN FEDERAL JUDGES COMMITTED TO THE RULE OF LAW (1990).

[69] *Hopwood I*, 861 F. Supp. at 554.

[70] *Id.*

[71] *Id.* at 554, 572-73.

[72] *Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983).

[73] *Flax v. Potts*, 567 F. Supp. 859, 861 (N.D. Tex. 1983).

[74] *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 226-27 (5th Cir. 1983).

Many minority applicants to UT have spent all or most of their precollege education in school systems that had been unconstitutionally segregated and had never been declared unitary.[75] Texas's history of segregation in public education continues to be manifest in tangible harm suffered by minority students.[76] Indeed, official discrimination in Texas has "handicapped the educational achievement of many minorities."[77]

Despite *Sweatt v. Painter*, overt discrimination even at UT Law School continued "during the 1950s, and into the 1960s."[78] By the 1970s, the school began to consider race in its admissions process.[79]

For over thirty years the executive branch of the federal government forcefully insisted that Texas take affirmative, race-conscious measures to ensure that the current effects of past discrimination were eliminated in Texas's higher education institutions. In 1977, the District Court for the District of Columbia ordered the Office for Civil Rights ("OCR") of the United States Department of Health, Education and Welfare (now the Department of Education or DOE) to investigate discrimination in Texas's system of higher education.[80] Following a two-year investiga-

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[75] *Hopwood I*, 861 F. Supp. at 572-73.

[76] *Id.* at 554-55, 573.

[77] *Id.* at 573.

[78] *Id.* at 555.

[79] *Id.* at 558.

[80] *Id.* at 555. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). The *Adams* litigation was eventually dismissed *sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C.

continued...)

tion, OCR found that Texas had failed to eliminate the vestiges of its segregated higher education system and was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. OCR also found significant under-representation of Hispanics in state institutions of higher education and insisted on a desegregation plan that included enrollment goals for Hispanics as well as blacks.[81]

Because of OCR's findings, Texas submitted the Texas Equal Education Opportunity Plan for Higher Education (the "Texas Plan"), which included a general commitment to equal educational opportunity for both black and Hispanic students and student body desegregation. In 1982, DOE opined that the Texas Plan was deficient. Texas submitted a revised plan that OCR again rejected, in part because it did not seek to increase minority enrollment at *each* institution instead of on a statewide basis. The *Adams* court then found that "Texas has still not committed itself to the elements of a desegregation plan which in [DOE's] judgment complies with Title VI" and ordered enforcement proceedings to begin unless Texas submitted a fully conforming plan. OCR accepted a revised Texas Plan that included a commitment to

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Cir. 1990). But this dismissal of plaintiffs' claims for further relief did not affect the consent decrees with southern universities, which had been spun off from the *Adams* litigation. *See id.* at 746-47 n.4; *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983) (involving the enforcement action against North Carolina).

[81] *Hopwood I*, 861 F. Supp. at 556.

significantly increase the number of black and Hispanic students.[82]

By the late 1980s, it became clear that the Texas Plan was not working, and through the 1990s, OCR continued to oversee Texas's desegregation efforts and reevaluated the Texas system in light of *United States v. Fordice*, 505 U.S. 717 (1992).[83] Despite the Fifth Circuit's 1996 ruling in *Hopwood* that forbade race-based criteria in admissions decisions,[84] OCR remained insistent that Texas continue its affirmative action efforts, threatening, even, to cut off Texas's federal funding if the State followed the Fifth Circuit's ruling.[85] Today, the State of Texas remains subject to a higher education desegregation plan. OCR's evaluation of whether the vestiges of segregation have been eliminated, consistent with the *Fordice* decision, and its progeny, is ongoing.

Moreover, despite substantial outreach efforts, UT finds it hard to overcome its reputation among some groups as a "white" institution that does not provide a welcoming environment for underrepresented minority students.[86] *Amicus* Heman Sweatt II still recalls the excitement he felt seeing another black student on the UT campus. It was a rare sighting.[87]

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[82] *Id.*

[83] *Id.* at 557.

[84] *Hopwood v. Texas*, 78 F.3d 932, 935-38 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

[85] *See* Peter Applebome, *Texas Is Told to Keep Affirmative Action in Universities or Risk Losing Federal Aid*, N.Y. TIMES, Mar. 26, 1997, at B4.

[86] SJA 14a.

B. Resegregation of Texas Public Schools

Since the 1990s, elementary and secondary schools have resegregated in Texas, particularly in urban areas.[88]

In 2009-10, four out of ten black students in Texas attended a school that was "highly segregated" – defined as having 90-100% minority enrollment.[89] 82.4% attended schools with 50-100% minority enrollment.[90] The typical black student would see a white face in only a quarter of her schoolmates.[91]

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[87] *See generally* Katherine Leal Unmuth, *University of Texas Trails State Demographics with Minority, Low-Income Students*, DALLAS MORNING NEWS, Jan. 13, 2010, *available at* http://www.dallasnews.com/news/education/headlines/20100113-University-of-Texas-trails-state-demographics-6891.ece.

[88] In an extensive dissent, Justice Breyer described and documented "the growing resegregation of public schools" nationwide. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007); *id.* at 805-06, App. A. Three members of the Court joined Justice Breyer, and none questioned the fact that *de facto* segregation had returned.

[89] Computations by UCLA Civil Rights Project from National Center for Education Statistics, Common Core of Data, *available at* http://nces.ed.gov/ccd/ (last visited Aug. 2, 2012), *to be published in* GARY ORFIELD, JOHN KUSCERA & GENEVIEVE SIEGEL-HAWLEY, *E PLURIBUS*...SEPARATE: A DIVERSE SOCIETY WITH SEGREGATED SCHOOLS (2012), to be available at http://www.civilrightsproject.ucla.edu/.

[90] *Id.*

[91] *Id.*

The statistics for Hispanics are worse. In 2009-10, over half of Hispanic students in Texas attended schools that were 90-100% minority.[92] 87.4% attended schools with 50-100% minority enrollment.[93] And the typical Hispanic student attended a school with only 18.9% whites.[94]

The trend since 1990 is troubling.

School Year[95]	1991-92	2000-01	2009-10
% Blacks in 90-100% Minority Schools	34.9	37.3	39.9
% White in School of Typical Black	35.2	28.1	24.6
% Hispanics in 90-100% Minority Schools	41.8	47.8	52.7
% White in School of Typical Hispanic	25.8	21.9	18.9

In 2000-01, 42% of the students in Texas public schools were white. By 2010-11, that figure dropped to 31.2%.[96] Further reflecting and predicting this trend, 2010-11 white enrollment in public schools drops steadily by grade: 36.4% in twelfth grade, 29.5% in first grade, and 15.6% in pre-kindergarten.[97]

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[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* 1991-92 and 2000-01 statistics in part previously published in GARY ORFIELD AND CHUNGMEI LEE, *BROWN* AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE (2004).

[96] TEX. EDUC. AGENCY, ENROLLMENT IN TEXAS PUBLIC SCHOOLS 2010-11 8 (2011), http://www.tea.state.tx.us/acctres/Enroll_2010-11.pdf.

Public schools in Texas's major cities are even more highly segregated.

In 2011-12, only 8.1% of all students in the 279-school Houston Independent School District were white.[98] At Jack Yates High School, from which Heman Sweatt graduated, only 6 of the 1,179 students that year – or 0.5% – were white, and 91.7% were African American.[99]

In 2012, only 4.6% of the students in the Dallas Independent School District were white.[100] But at Highland Park High School only 4.3% of the student body was African American.[101]

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[97] *Id.* at 19.

[98] HOUSTON INDEP. SCH. DIST., 2011-2012 FACTS AND FIGURES 1 (2012), https://www.houstonisd.org/HISDConnectEnglish/Images/PDF/HISDFactsFigures2012Final.pdf.

[99] TEX. EDUC. AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM, 2010-11 CAMPUS PERFORMANCE REPORT, YATES HIGH SCHOOL, http://ritter.tea.state.tx.us/perfreport/aeis/2011/campus.srch.html (enter campus number "#101912020"; then click "continue") (last visited Aug. 2, 2012).

[100] DALLAS INDEP. SCH. DIST., ENROLLMENT STATISTICS (AS OF 01/20/2012), https://mydata.dallasisd.org/SL/SD/ENROLLMENT/Enrollment.jsp?SLN=1000.

[101] TEX. EDUC. AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM, 2010-11 CAMPUS PERFORMANCE REPORT, HIGHLAND PARK HIGH SCHOOL, http://ritter.tea.state.tx.us/perfreport/aeis/2011/

continued...)

In the San Antonio Independent School District, 1.9% of the 2012 enrollment was white.[102] Harlandale High School in 2011 was 98.7% Hispanic.[103]

Outside Texas's largest cities, a quarter of the school districts are more than 77% white.[104]

This is not to say that UT is responsible for or that its admissions policies attempt to remediate resegregation of Texas's primary and secondary schools. But it is from this racially isolated school system that UT must fulfill its mission as the State's flagship university to select and train students to engage and lead Texas's "increasingly complex" society. Indeed, many students – of all races – encounter a diverse educational setting for the first time when they arrive at UT for freshman orientation.

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campus.srch.html (enter campus number "#188903001"; then click "continue") (last visited Aug. 2, 2012).

[102] SAN ANTONIO INDEP. SCH. DIST., FACTS AND FIGURES (2012), http://www.saisd.net/main/index.php?option=com_content&view=article&id=1326:student-demographics&catid=8:about-us-left&Itemid=104 (last visited Aug. 2, 2012).

[103] TEX. EDUC. AGENCY: ACADEMIC EXCELLENCE INDICATOR SYSTEM, 2010-11 CAMPUS PERFORMANCE REPORT, HARLANDALE HIGH SCHOOL, http://ritter.tea.state.tx.us/perfreport/aeis/2011/campus.srch.html (enter campus number "#015904001"; then click "continue") (last visited Aug. 2, 2012).

[104] TEX. EDUC. AGENCY, SNAPSHOT 2011 SUMMARY TABLES DISTRIBUTION STATISTICS (2012), http://ritter.tea.state.tx.us/perfreport/snapshot/2011/distrib.html.

IV. THE LESSONS FROM *SWEATT V. PAINER*

A. The Importance of Diversity

The compelling importance of diversity in higher education, first recognized in *Sweatt v. Painter*, has been repeatedly reaffirmed. The Court's most extensive discussion of this principle is found in *Grutter.*[105] In *Parents Involved*, a majority of the Court wrote that diversity is a compelling interest in primary and secondary school education.[106] The plurality opinion was not ready to make that extension, but expressly recognized that diversity remains compelling in higher education.[107]

Racial diversity, of course, is important. It allows (indeed requires) students to interact with "members of the racial groups which number [a high percentage] of the population of the State" including those "with whom [they] will inevitably be dealing" when they graduate.[108] Making higher education accessible to individuals of all races and ethnicities legitimizes the state's expenditures of taxes collected from everyone.[109] This is especially true for flagship institutions, such as UT, charged with preparing the future leaders of the State and Nation.[110]

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[105] *Grutter v. Bollinger*, 539 U.S. 306 (2005).

[106] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 710, 789-92 (2007) (Kennedy, J., concurring in part); *id.* at 838-45 (Breyer, J., dissenting).

[107] *Id.* at 722 (Roberts, C. J.) ("[W]e have recognized as compelling ... the interest in diversity in higher education upheld in *Grutter*").

[108] *Sweatt*, 339 U.S. at 634. *See also Grutter*, 539 U.S. at 329-32.

[109] *Grutter*, 539 U.S. at 331-32.

> Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.[111]

But diversity in higher education is not just about different races. It is about the interplay of different ideas, the exchange of different views, and exposure to different life experiences.[112] As *Grutter* recognized, diversity's

> benefits are important and laudable because the classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.[113]

It follows that to be meaningful, diversity must be examined at two levels of magnification beyond the student body as a whole and broad racial classifications. First, for "classroom discussion" to benefit from diversity, there must be diversity in the classroom, not just the campus. College administrators must consider diversity across disciplines, and try to achieve "critical mass," such that minorities feel neither isolated nor responsible to speak for their race or ethnic group.[114] Otherwise, they – *and their white classmates* – lose the lively interplay of ideas and exchange of views that flow from true diversity.

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[110] *Id.* at 331-33 (discussing service academies and law schools).

[111] *Id.* at 332.

[112] *Sweatt*, 339 U.S. at 634.

[113] *Grutter*, 539 U.S. at 331.

Second, the academy must consider diversity of backgrounds, life experiences, and viewpoints across races – not just broad racial and ethnic groupings. The "white/non-white" dichotomy is simply too "blunt" to ensure meaningfully different life experiences and viewpoints.[115]

The Texas Top Ten Percent Law is a "blunt" tool to build a diverse student body.[116] Passed in reaction to *Hopwood v. Texas*,[117] it assures automatic acceptance to UT (or any other Texas public college) to the top ten percent of the graduating classes of Jack Yates High School and Harlandale High School, just as it does to Highland Park High School. Viewed only somewhat cynically, its success in increasing minority enrollment at UT depends on the continuing segregation of minorities in Texas secondary schools.

But does it truly produce "the greatest possible variety of backgrounds"? Today's school segregation is not *de jure*, but *de facto* – the result of segregated housing.[118] Unlike Heman Sweatt, children today do not walk past "white" schools to get to their "colored" schools.[119] Because *de facto* school segregation stems from residential patterns, students in the top ten percent of a highly segregated school likely grew up in the same inner-city attendance zone. The top 29 Jack Yates High School graduates live in the same predominantly African-American neighborhood of Houston's Third Ward, probably went to the same elementary and middle schools, had the same teachers, and hung out together watching the same TV shows and listening to the same music. We would expect them to share the views of their schoolmates and neighbors. The same holds true for the top 38 graduates of 98%-Hispanic Harlandale High in San Antonio and the overwhelmingly-white schools in Highland Park and a quarter of Texas school districts. Sweeping in the top ten percent of a highly segregated high school certainly increases minority enrollment at UT, but it hardly guarantees a genuine diversity of life experiences and viewpoints. Moreover, while the benefits of racial diversity in elementary and secondary education may be debated,[120] what is certain is that none flow to the students attending highly segregated schools. Not even the top ten percent.

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[114] *Id.* at 329-31.

[115] *Cf.*, *Parents Involved*, 551 U.S. at 803 (Kennedy, J., concurring in part).

[116] *Fisher v. Texas*, 631 F.3d 213, 242 (5th Cir. 2011) (Higginbotham, J.).

[117] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.) (forbidding any consideration of race in admissions decisions), *cert. denied*, 518 U.S. 1033 (1996).

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[118] *See Parents Involved*, 551 U.S. at 793-95.

[119] BEFORE BROWN, *supra* note 5, at 12-13. Nor do they, as did *Amici*'s Counsel of Record until 1968, walk past the "colored" school to get to his "white" school in East Texas.

[120] *Compare Parents Involved*, 551 U.S. at 839-42 (Breyer, J., dissenting) (citing studies) *with id.* at 761-63 (Thomas, J., concurring) (citing studies).

B. The Importance of the Individual

Seeking to create a student body of truly diverse backgrounds, UT supplements its Top Ten Percent admissions with students selected after evaluation of their entire record of achievements, interests, talents, character, and background. It includes, but is hardly limited to race, which is viewed as but one facet of their unique life experiences. In short, UT affords them the holistic review that UT and the State of Texas denied Heman Sweatt.

In UT's holistic review (consciously modeled after that approved in *Grutter*) race is not determinative. No one is admitted because of his race; no one is excluded because of his race. No one is assigned to a particular program based solely upon race. Rather, the individual's "whole range of talents and school needs" are weighed in seeking the benefits of truly diverse classrooms.[121] UT's holistic review takes consideration of race far past the "blunt distinction of 'white' and 'non-white'" condemned in *Parents Involved*.[122] It recognizes that diversity means more than a student's skin color or surname.[123] Reviewing the whole file and whole persona, UT admissions officers assess how the interplay of ideas will be furthered by the daughter of Jamaican immigrants living in a mixed-race neighborhood versus someone whose background differs little from the 29 top graduates of Jack Yates High School. They can consider the likely contribution to be made by the son of a Cuban father and Costa Rican mother, compared with a more typical top-ten-percent graduate of Harlandale High. They can appreciate the student of Indian descent from Highland Park who wants to follow UT alumnus Walter Cronkite into journalism rather than her father into computer science.

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[121] *Cf. Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring in part) (school district relied upon "mechanical formula" on the basis of "rigid criteria" to make school assignments).

[122] *See id.* at 786.

[123] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (Powell, J.).

Some criticize UT's consideration of race as only part of a holistic review as having "too minimal" an impact on diversity, because far fewer minority students are admitted through holistic review than through the Top Ten Percent Law. That simply misses the point. Race in the holistic review is but part of the mix intended not just to enroll more persons of a certain race or ethnicity, but to round out a student body with those who will contribute most to genuine diversity in the classroom and on campus. UT seeks to assess in applicants "those qualities which are incapable of objective measurement but which make for greatness in a" student body.[124]

No one is "stigmatized" with a racial "label" when no one in the pool of applicants afforded holistic review is either given or denied an offer based solely on race. Stigma attaches not when one is recognized as a member of a racial or ethnic group; stigma attaches when one is seen as nothing more. In UT's holistic review, applicants are appreciated for their many dimensions, not just race. This is precisely what Heman Sweatt deserved but was denied.

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[124] *Sweatt v. Painter,* 339 U.S. 629, 634 (1950).

C. The Importance of Race

Race matters. In the real world, it still matters. "The enduring hope is that race should not matter; the reality is that too often it does."[125]

But in UT's holistic review, race matters only in the context of an applicant's whole life experience and her ability to contribute to the interplay of ideas and exchange of different worldviews. In UT's assessment, an applicant's race can be a plus or it can have no impact whatsoever – for an applicant of any race. It all depends on context.

Consider the difference race makes to diversity in the context of these hypothetical applicants from the second decile of their graduating classes:

- John is captain of the track team at Jack Yates High School. It makes a difference whether he is African American or one of the six whites in the school.
- Janet is chair of the Spanish Club at Harlandale High. It makes a difference whether she is Hispanic or one of the twelve African Americans in the school.

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[125] *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part).

- Joseph is president of the senior class at Highland Park High. It makes a difference whether he is white or one of the few Hispanics in the school.

It is naïve in the extreme to think that race does not influence our lives and how we view the world. In UT's holistic review, however, race influences lives and views; it does not define them.

Would that a majority of the Court had joined Justice Harlan's dissenting opinion in *Plessy v. Ferguson*,[126] instead of providing the precedent Texas invoked to deny Heman Sweatt's admission to UT. "As an aspiration, Justice Harlan's axiom ['[o]ur Constitution is color-blind'] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle."[127]

D. The Importance of Patience

The 25-year horizon Justice O'Connor envisioned for race-conscious admissions decisions[128] may have been optimistic, particularly in light of recent resegregation of this country's elementary and secondary schools. The road is long, but it really hasn't been that long. Remember the 13-year-old Sweatt-Duplechan honor student in the Introduction? His grandfather was Heman Marion Sweatt. And Heman's grandfather, Richard Sweatt, was a slave.

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[126] 163 U.S. 537 (1896).

[127] *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part).

[128] *Grutter*, 539 U.S. at 343.

CONCLUSION

For these reasons, The Family of Heman Sweatt, *Amicus Curiae*, urges the Court to affirm the judgment below.

Respectfully submitted,

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August 13, 2012

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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In the
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF KIMBERLY WEST-FAULCON IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Equal Protection Clause permits the University of Texas to consider applicants' race as one of the many factors that go into the university's admissions decisions.

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INTEREST OF AMICUS CURIAE[1]

Modern research finding that tests based on improved theories of intelligence narrow "the black-white test score gap" undermines claims by rejected white college applicants that the admission of members of lower-scoring racial groups violates their equal protection rights under the Fourteenth Amendment. Rejected white litigants in "reverse discrimination" cases erroneously rely on differences in racial group mean (average) scores on traditional mental ability tests like the SAT,[2] Law School Admissions Test (LSAT), Graduate Records Examination ("GRE"), and Medical College Admissions Test ("MCAT") as well as misconceptions of the predictive power of such tests to support their contention that the admission of nonwhites with relatively lower scores demonstrates that a selective university has used a racial classification in a manner that fails strict scrutiny.

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[1] The parties have filed blanket consents to the filing of *amicus* briefs in this case. No party to this case or counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae and amicus counsel paid for or made a monetary contribution to fund the preparation or submission of this brief. *Amicus curiae* files this brief as an individual and not on behalf of the institution with which *amicus curiae* is affiliated.

[2] Originally called the Scholastic Aptitude Test, "SAT" no longer has an official meaning. TONY MONCHINSKI, CRITICAL PEDAGOGY AND THE EVERYDAY CLASSROOM 171 (2008) (observing that the acronym SAT once stood for "scholastic *aptitude* test" and later "scholastic *assessment* test" but that "[q]uestions of what the SAT supposedly assessed led to the jettisoning of that acronym and today the initials SAT stand for nothing").

The "mean test score fallacy"—the claim that black-white differences in racial group test score averages constitute proof of race discrimination against whites—has been undermined by empirical research finding that (i) differences in distributions of test scores by race result in differences in racial group average scores *even if admissions test score cut-offs are completely color-blind* and (ii) the use of multiple valid non-test-driven admissions criteria identifies applicants from lower-scoring racial groups who qualify for admission despite relatively lower test scores. This research exposes the invalidity of "folk" beliefs about traditional standardized tests as predictors of merit—"folk" beliefs which have been rightly rejected by Justices of this Court.

The claim that differences in average test scores evidence racially "preferential" treatment that will continue perpetually is further undermined by social science research. First, research shows that the "black-white test score gap" is narrowing over time. Second, theoretically-improved standardized tests narrow the "black-white test score gap"—have smaller racial skews—yet do a better job than conventional tests of predicting test-takers' future performance. Rejected white applicants alleging reverse discrimination lack awareness of the smaller black-white score differences of modern mental ability tests.

Amicus Curiae has written this brief to bring to the Court's attention the portions of this research that seem most relevant to the issues under consideration in *Fisher v. University of Texas, et al.*

Amicus curiae is, Kimberly West-Faulcon,[3] a nationally recognized scholar pioneering interdisciplinary research of law and intelligence testing that exposes the legal implications of modern research from the fields of psychology, statistics and psychometrics. Professor West-Faulcon's research bears directly on the questions of (1) whether the current admissions policy of the University of Texas ("UT") operates as a racial "preference" that should trigger the Court's strict scrutiny analysis and (2) assuming UT's current admissions policy does employ racial classifications in a manner subject to strict scrutiny, whether social science research finding smaller racial differences in more theoretically sophisticated modern intelligence and college admissions tests demonstrates that the minimal[4] racial attentiveness of UT's admissions policy is narrowly tailored.

She files this brief in order to acquaint the Court with this research and to explain its relevance to the constitutionality of UT's current admissions policy. Since relatively higher scores on conventional tests do not align in rank order with greater admissions-related merit, white applicants must point to more than their test scores to prove race discrimination. Accordingly, correcting for the theoretical inadequacies of traditional college admissions tests like the SAT is constitutionally permissible.

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[3] Kimberly West-Faulcon is the James P. Bradley Chair in Constitutional Law at Loyola Law School in Los Angeles.

[4] Petitioner in this case does not claim to be more qualified than the 81% of Texas white and nonwhite residents admitted to the UT under the high-school-grades-driven Top Ten Percent Law ("TTPL"). Moreover, petitioner concedes that the impact of race on admissions decisions for the less than 20% of the UT 2008 freshman class was "infinitesimal." Brief of Petitioner at 9.

INTRODUCTION AND SUMMARY OF ARGUMENT

It has long been erroneously claimed that differences in the average test scores of racial groups, most specifically differences in the average test scores of whites as compared to blacks, constitute strong evidence of widespread "reverse discrimination"—discrimination against white applicants.[5] The propriety of evaluating the constitutionality of a university's admissions policy by inferring racial discrimination from numerical differences in the average SAT scores of black and white admits turns on empirical questions that have been analyzed extensively by social science research. In the instant case, this social science research is particularly relevant because there is no evidence that the small degree of racial attentiveness exercised under UT's current policy had any substantive impact on petitioner's admissions decision.[6]

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[5] See, e.g., Brief Amicus Curiae of Richard Sander and Stuart Taylor at 15-17; Robert Lerner & Althea K. Nagai, *Racial Preferences in Higher Education: The University of California at Berkley* (1997) *available at* http://ceousa.org/berkeley.html; Robert Lerner & Althea K. Nagai, *Racial Preferences in Colorado Higher Education: Racial Preferences in Undergraduate Admissions at the Public Colleges and University of Colorado* (1997) *available at* http://ceousa.org/warp.html; Robert Lerner & Althea K. Nagai, *Racial Preferences in Michigan Higher Education* (1997) *available at* http://ceousa.org/michigan.html; STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 386-422 (1997); RICHARD J. HERNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 450 (1994).

This brief explains how social science research undermines the common misconception that black applicants must be receiving "preferential" treatment and that the magnitude of the so-called "preference" is large on the basis of a casual numerical comparison of the average test scores of black admits as compared to white admits. It also explains that "the gap" in black-white group average scores on traditional mental tests, while still in existence, has been narrowing for several decades. The brief describes the relevance of contemporary research finding that theoretically-improved and updated versions of such tests have been shown to narrow the black-white average score gap presumably because they are based on more theoretically robust and more outcome predictive theories of intelligence.

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[6] As explained by Harvard law professor Tomiko Brown-Nagin:

> [Petitioner] Fisher cannot and does not claim to have been a superior candidate relative to students of color admitted under the Top Ten Percent Law. The TTPL is a merit-based system. Fisher failed to gain admission because her grades were inferior to those of students admitted through this pathway. Fisher also does not categorically assert that she posted scores and a class rank superior to students admitted under the second (race-neutral) stream. Most importantly, Fisher does not claim that racial consideration under the holistic stream—the only avenue through which officials may explicitly consider race—necessarily doomed her prospects. No evidence supports that position.

Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 Vand. L. Rev. En Banc 113, 114-15 (2012).

Such research calls into question petitioner's allegation that UT's minimal consideration of race as a factor in admissions violates her Fourteenth Amendment constitutional rights because she is Caucasian.

ARGUMENT

I. Social Science Research Has Undermined the "Mean Test Score Fallacy" Underlying Petitioner's Claim: That Large Black-White Differences in Racial Group Average Scores Constitute Proof of Race Discrimination Against Whites

For decades, differences in the average test scores of racial groups, particularly the differences in black and white average group scores, have been misconceived as strong evidence of widespread race discrimination against whites—"reverse discrimination" in selective higher education admissions.[7] Despite the intuitive appeal of inferring race discrimination from numerical differences in black-white test scores, empirically-based social science research on this question has long shown that such arguments are fundamentally misleading. Contrary to the suggestion by petitioner and numerous amici, the magnitude of numerical differences in black-white racial group average test scores is not a measure of "racial preference" and it is not empirical proof of race discrimination against whites. This social science research explains why the racial group average SAT scores of applicants admitted to UT in 2008 differ even though the consideration of race by the university was "infinitesimal."[8]

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[7] *See, e.g.*, Hernstein & Murray, *supra* note 5; Thernstrom & Thernstrom, *supra* note 5; Brief Amicus Curiae of Richard Sander and Stuart Taylor.

As detailed in a 1999 study conducted by labor economists William T. Dickens and Thomas J. Kane, "one cannot simply compare the test scores of blacks and whites on the same job or at the same school to determine whether the process of choosing people for that job or school is race-blind."[9] It is a fallacy that the existence of black-white difference in mean test scores of admitted students proves reverse discrimination against whites because social science research has shown definitively that *averages* of black-white racial group scores also differ when admissions are completely race-blind. Dickens and Kane identify two reasons why it is a common[10] but misleading error "to infer racial preference based solely on the observed characteristics of admitted students."[11]

According to their study, the reason for differences in the *average* SAT scores of black and white admits is not race discrimination against whites in the form of racial preferences for nonwhites. Instead, social science research has found two central reasons that black-white admits' average scores will differ even if blacks and whites are required to exceed the same race-blind cutoff on test scores. First, differences in average black-white racial group scores exist due to the *distribution* of test scores between blacks and whites—among blacks who score high enough on the SAT to be admitted to highly selective universities, their scores are not the "highest of the high" scores. Second, because "[b]lack test scores are much worse, relative to whites, than their other qualifications,"[12] "it is easier to find blacks with low[er] test scores who make up for that deficiency with other redeeming traits."[13]

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[8] *See* Brief of Petitioner at 9.

[9] William T. Dickens and Thomas J. Kane, 38 INDUSTRIAL RELATIONS 331, 357 (1999).

[10] Prominent examples of reliance on this fallacy to support claims of extensive "reverse discrimination" include its use by Richard Hernstein and Charles Murray in their book, *The Bell Curve.* For its use in this litigation, see *e.g.*, Brief Amicus Curiae of Richard Sander and Stuart Taylor at 15-17.

[11] Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 19 (Gary Orfield and Edward Miller, eds., 1998).

Despite its repeated and definitive debunking by well-regarded social science,[14] the mean test score fallacy lives on because it perpetuates two myths. The fallacy relies substantially on the myth that standardized admissions tests like the SAT are such precise tools for measuring future success in college that non-test-driven admissions criteria are anti-meritocratic. It also perpetuates the myth that college grades are necessarily a more important measure of college success than successful graduation from a selective institution.

The idea that an applicant with a higher SAT score is *per se* more deserving of admission than a differentially credentialed applicant with a lower SAT score is based on a non-scientific "folk" understanding of the nature of mental ability and mental testing.[15] Justices of this Court have previously rejected such "folk" understandings of intelligence and the predictive capacity test scores.

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[12] Dickens & Kane, *supra* note 9 at 332.

[13] *Id.* at 332.

[14] *Id.;* Kane, *supra* note 11 at 19-20; Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, *in* THE BLACK-WHITE TEST SCORE GAP 431, 435 (Christopher Jencks & Meredith Phillips, eds.,1998).

A. Justices of this Court Have Previously Rejected "Folk" Understandings of Intelligence and the Predictive Capacity of Test Scores

Some members of the Court have recognized the folly of viewing test scores as perfectly precise measures of test-takers' admissions-related "merit." Justice Douglas, Justice Powell, and Justice Thomas are among the Justices who have most explicitly questioned the typical "folk" assumption that reliance on non-test-score-driven criteria is, by its very nature, a deviation from a "true" academic merit-based standard. In reference to tests designed to predict performance in law school, Justice Douglas observed:

> Certainly the tests do seem to do better than chance. But they do not have the value that their deceptively precise scoring system suggests. The proponents' own data show that, for example, most of those scoring in the bottom 20% on the test do better than that in law school—indeed six of every 100 of them will be in the *top* 20% of their law school class. And no one knows how many of those who were not admitted

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[15] *See* Kimberly West-Faulcon, ***More Intelligent Design: Testing Measures of Merit***, 13 U. PA. J. CONST. L. 1235, 1245 (2011).

because of their test scores would in fact have done well were they given the chance.[16]

Although he did not state so explicitly, Justice Douglas exhibited an understanding of the reality that conventional standardized tests are sufficiently imperfect that some lower-scoring applicants might nevertheless have greater admission-related merit than applicants with higher test scores. He noted, "Of course, the law school that admits only those with the highest test scores finds that on the average they do much better, and thus, the test is a convenient tool for the admissions committee. The price is paid by the able student who for unknown reasons did not achieve that high score...." In short, instead of presuming that admissions-related merit and rank-order test scores align perfectly, Justice Douglas' view of tests leaves open the possibility that a student who fails to achieve a high score is "able."

In a case involving test scores designed to predict success in medical school, Justice Powell also rejected the general presumption that rank-ordering by test score always aligns with rank-order admissions-related merit. Specifically, in his controlling opinion in *Regents of the University of California v. Bakke,* Justice Powell articulated a doctrinal framework for evaluating the constitutionality of the consideration of race as a factor in admissions if the rationale for its adoption was to cure "established inaccuracies" in the capacity of the admissions test to predict academic performance.[17]

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[16] *DeFunis v. Odegaard,* 416 U.S. 312, 329 (1974) (Douglas, J., dissenting) (internal citation omitted).

Additionally, Justice Thomas has also questioned the presumption that standardized admissions tests have the capacity to predict who will succeed in law school.[18] In fact, in *Grutter v. Bollinger*, Justice Thomas admonishes law schools for relying on LSAT admissions test scores "with full knowledge of their disparate impact" against groups like African Americans.[19] He also expresses the view that rank-order test scores and admissions-related merit are not perfectly aligned when he makes reference to "those students who, despite a lower [test] score or undergraduate GPA, will succeed in the study of law."[20] Like Douglas and Powell, Justice Thomas is among the members of the Court who have explicitly acknowledged the predictive limitations of the capacity of admissions tests to predict future academic success.

B. Differences in Distributions of Test Scores By Race Result in Differences in

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[17] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978). In his analysis, Justice Powell also made a point relevant to the case at hand—that the consideration of race as a factor to redress limitations in the predictive power of a particular test is not a racial preference. *Id.*

[18] *Grutter v. Bollinger*, 539 U.S. 306, 367 (2003) (Thomas, J., concurring in part and dissenting in part) (stating that "there is much to be said for the view that the use of tests and other measures to 'predict" academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law.")

[19] *Id.* at 369.

[20] *Id.* at 372.

Racial Group Average Scores Even if Admissions Test Score Cut-offs are Completely "Color-Blind"

The 1999 Dickens and Kane study empirically tested assertions that differences in black-white average test scores of selected applicants is evidence of widespread "reverse discrimination" against white applicants, specifically focusing on claims made by Richard Hernstein and Charles Murray—authors of *The Bell Curve*, Robert Lerner and Althea Nagai —authors of the Center for Equal Opportunity reports issued in 1997 examining differences in black-white test scores at state schools in California, Colorado, and Michigan, and Stephan Thernstrom and Abigail Thernstrom—authors of *America in Black and White*.[21] The study finds that all of these authors are "misinterpreting the significance of test score differences" and using "mistaken logic."[22] To demonstrate this error, Dickens and Kane construct mathematical models to explain why it is incorrect to point to differences between black-white mean test scores as proof of "massive" racial preferences.[23]

For reasons that modern social science research increasingly attributes to theoretical inadequacies in the theories of intelligence that underlie conventional mental tests like the SAT,[24] African American test-takers score, on average, about one full standard deviation lower than white test-takers on average.[25] This characteristic of traditional mental tests—that, when averaged, the scores *above* the qualifying test score level for selective universities of admitted blacks (and Latinos) are typically lower than the white admitted students' racial group test score average—is the first reason that differences in black-white average scores of selected applicants are not evidence of either the existence of race-consciousness nor evidence of the magnitude of the consideration of race in a university's admissions process.

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[21] Dickens & Kane, *supra* note 9 at 333.

[22] *Id.*

[23] *Id.* (observing that "[n]owhere in these [mean test score fallacy state] reports is there any discussion of the magnitude of the differences that might be expected in the absence of preferences").

[24] West-Faulcon, *More Intelligent Design, supra* note 15 at 1240, 1241 (describing new intelligence research finding "that

The study of the mean test score fallacy by Dickens and Kane explicates the mathematical reality that the *average* test score of high-scoring black test-takers will be lower than the *average* test score of high-scoring white test-takers *even when admissions decisions are completely race-blind.*[26] When "the distribution of standardized test scores" differs between any two groups, "the mean test scores will be lower for people drawn from the second distribution even though both must pass the same relatively high

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newly designed tests" are more valid and predictive than traditional factorist tests *and* "that differences in racial group average scores are smaller on tests based on more complete theories of intelligence (multi-dimensional conceptions of intelligence) than factorist tests"). "Such findings—essentially that at least some portion of the racial differences in factorist test scores are attributable to inadequacies in factorist tests as predictors of future academic success—have significant legal and policy implications related to race and selective higher education admissions." *Id.* at 1241.

[25] Robert J. Sternberg, *The Rainbow Project: Enhancing the SAT Through Assessments of Analytical, Practical, and Creative Skills,* 34 INTELLIGENCE 321, 322 (2006).

[26] Dickens & Kane, *supra* note 9 at 332.

standard."[27] Mathematical models of a hypothetical "color-blind" admissions process requiring all applicants "be above the white average" SAT score reveal that "no matter where the [test score cut-off] range is positioned," the average of the black distribution of test scores will be to the left (lower than) the average of the white distribution.[28]

In short, a numerical difference in racial group average scores of admitted freshmen is not proof that race factored in the admissions process. Even if UT's admissions process were totally "race-blind," "blacks and whites meeting the same standard will have different average scores" unless every applicant is required to have "the same test score." Since UT does not require all applicants have the same SAT score, irrespective of UT's policy on considering race in admissions, mathematics will dictate that the black racial group SAT score average at a selective university will differ from the white racial group average until the differences in black-white racial group averages in the general population are narrowed by use of more theoretically-sound mental tests.[29]

C. Use of Multiple Valid Non-Test-Driven Admissions Criteria Identifies Applicants From Lower-Scoring Racial Groups Who Qualify for Admission Despite Relatively Lower Test Scores

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[27] *Id.* at 335.

[28] *Id.* at 337-38.

[29] Correspondingly, black applicants are more likely to qualify based on non-SAT score admissions factors (in some cases, this may even be despite a relatively lower SAT score).

There is an additional mathematical reason that differences in the average SAT score of admitted black and the white admits are not evidence of the existence of racial preferences in favor of nonwhites or the magnitude of weight placed on race in a selective admissions process. Simply put, even when a university maintains extremely high academic selection standards, those African Americans who meet or exceed those standards are more likely to do so based upon their non-test-score qualifications. In that black applicants are less likely to be selected for admission *because of* their SAT score, the SAT scores of African American applicants who score high enough to be qualified for admission to selective universities will, on average, be lower as compared to qualified white applicants.[30]

The Dickens and Kane study explains the significance of the fact that universities rely on multiple types of qualifications in addition to SAT scores as follows:

> There are two reasons why introducing qualifications besides test scores into consideration will

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[30] A relatively higher-scorer on a standardized mental tests is not "entitled" to admission to a particular selective college or university. *See* West-Faulcon, *More Intelligent Design*, *supra* note 15 at 1292 ("evidence that tests like the SAT have less predictive power than systems tests, such as triarchic admissions tests designed according to the "theory of successful intelligence," also makes it less likely that rejected white applicants can demonstrate that inconsistent reliance on factorist test scores constitutes "reverse discrimination" in violation of the Fourteenth Amendment and federal statutes prohibiting race discrimination such as Title VI").

> result in blacks' test scores being lower than whites'. First, blacks' test scores tend to be their weakest credential relative to whites. Second, test scores (or what they represent) are only a small part of what is considered in most selection processes. . . . To see why this matters, it again helps to start with an extreme case. Suppose that test scores and any characteristic with test scores are completely irrelevant as qualifications for a particular task. Then, no matter what the level of qualification considered the distribution of test scores would just reflect that of the population. If it is confusing to do this thought experiment with test scores, think of doing it with eye color. Suppose that eye color is completely uncorrelated with any qualification an admissions committee considered important. If one group of people had a disproportionate number of blue-eyed members, we would not be surprised if those of that group who qualified for an elite school were more likely to have blue eyes than other students—even if the admissions committee had no idea what the eye colors of applicants were.[31]

The fact that some nonwhites, particularly African Americans, are among the students admitted to selective universities based on admissions factors other than the comparative rank of their SAT scores is not a racial preference in any sense. Instead, it is the result of the fact that selective universities do not base admissions decisions solely on SAT scores and the fact that the traditional SAT college admissions test has a significant racial "gap." The reason for the former and the latter are explained, at least in part, by the psychometric characteristics of the conventional SAT test. As to the former, universities do not rely solely on SAT scores to make admissions decisions because the test is not a perfect predictor of future academic or real-world success.[32] With respect to the latter, social science research that has emerged over the last several decades supports the theory that part of the racial gap in scores on currently-used mental tests is attributable to theoretical inadequacies in the theories of intelligence underlying such tests.

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[31] Dickens & Kane, *supra* note 9 at 338-41.

If the SAT had 100% percent predictive power with respect to test-takers' freshman-year GPA, test-takers' GPA at graduation, or whether test-takers graduate, universities would be able to predict future academic success in college based solely on an applicant's SAT score. This is not the case. Undisputed psychometric and statistical analysis of the SAT demonstrates its scientific value. Even when used in conjunction with high school grades, statistical models based on SAT score are far from perfectly correlated with the test-taker's GPA at the end of the freshman year of college. SAT correlates to an even lesser degree when the outcome criterion of interest is grades beyond the first year of college or whether the test-taker graduates from the college to which they are admitted.[33]

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[32] *See generally* Richard C. Atkinson & Saul Geiser, *Reflections on a Century of College Admissions Tests*, 38 EDUC. RESEARCHER 665 (2009).

[33] *See, e.g.*, *id.* at 672.

Unfortunately, "at the end of the roughly hundred-year period that mass-marketed standardized tests have been in existence, their predictive power still leaves substantial room for improvement."[34] Far from perfect prediction, the 13% power of predicting first-year college GPA based on SAT score and the 23% predictive power of using SAT score combined with high school GPA to predict the same early college outcome is helpful but not complete information for universities to use in assessing the academic merit of applicants.[35]

The science and statistics behind the meaning of SAT scores are clear in delineating the limits of the traditional SAT college admissions test's predictive power. Although advances in intelligence theory and mental testing show promise for the future, conventional currently-used admissions tests like the SAT require substantial augmentation with non-test score admissions criteria to explain the variation in later-college and real-life success left unexplained by SAT scores. In fact, quite contrary to the oft-repeated "mismatch" contention that African Americans are harmed by their admission to universities with white average SAT scores higher than their own because they earn lower college grades, a substantial body of social science research shows that African Americans admitted with lower SAT scores than the university's white average score succeed in graduating from selective universities and benefit greatly from their admission.

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[34] West-Faulcon, *More Intelligent Design*, *supra* note 15 at 1269 (examining modern innovation in mental testing in light of the fact that conventional standardized tests like the SAT "leave more of the variation in intelligence and future academic success unexplained than they actually explain"). Richard Atkinson is former President of the University of California and an expert in cognitive science and psychology. During his presidency, Atkinson gave a speech critical of the amount of weight placed on SAT scores in college admissions and announced plans to no longer require students applying to take the SAT I. *See* Richard C. Atkinson, President, University of California, The 2001 Robert J. Atwell Distinguished Lecture at the 83rd Annual Meeting of the American Council on Education (Feb. 18, 2001), *available at* http://www.ucop.edu/news/sat/speech.html.

[35] *See* West-Faulcon, *More Intelligent Design*, *supra* note 15 at 1264-68.

The now decades-old "mismatch" theory that nonwhites from racial groups with lower, on average, SAT scores are harmed by their admission is based on the unproven and unprovable assertion that blacks who graduate from selective colleges and universities but do so with relatively lower grades or class rank at the more selective university are harmed from graduating from that institution. The research contending to support the mismatch theory rarely acknowledges the fact that such contentions focus almost exclusively on college *grades*.[36]

While the *reasons* that some nonwhite high school students fail to attain the grades predicted by their SAT scores when they attend selective universities warrants further empirical analysis,[37] the inference that such high school students are harmed by attending elite educational institutions or would enjoy better life outcomes if they chose less selective institutions is unsupported by empirical research. Instead, social science research has consistently shown that the nonwhite, particular African American, students supposedly harmed by being "mismatched" at more elite universities are more likely to successfully *graduate* from the selective universities to which they are admitted *and to benefit substantially from living life as graduates of more prominent and elite educational institutions (even if their GPA's are lower than either the average white GPA, the GPA predicted by their SAT scores, or their GPA had they attended a less elite institution).*[38]

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[36] *Compare* Brief Amicus Curiae of Richard Sander and Stuart Taylor at 9-10, n. 25 (acknowledging that "some" studies find "high graduation rates for racial-preference recipients at more selective institutions" but suggesting, without empirical support, that graduation from selective universities is insignificant to African Americans in contrast to vaguely-referenced psychological harms or because "elite private colleges" commonly "adjust policies or inflate grades").

Because attending a more selective university does confer a benefit on students of any race, it is misleading for mismatch theorists to point to overall African American and Latino enrollment at *the various and differentially selective* University of California campuses to support the claim that the elimination of race as an admissions factor helps African Americans and Latinos. Since the implementation of California's state anti-affirmative action law, Proposition 209, African American and Latino applicants (including those with very high GPA's) to the University of California's two *most selective* campuses—UC Berkeley and UCLA—have been consistently denied admission at higher rates than whites.[39]

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[37] Some researchers inappropriately suggest their empirical findings prove that the consideration of race as a factor in admissions *causes* blacks attending more elite institutions to attain lower grades. *See, e.g.*, Brief Amicus Curiae of Richard Sander and Stuart Taylor at 3 (citing Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004)). Such suggestions improperly conflate "correlation" and "causation." For discussion of why such conflation is problematic, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 19-110 (2002).

[38] *See, e.g.*, WILLIAM G. BOWEN AND DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 59-70 (1998).

The mismatch theorists cannot point to any empirical study that finds that students who graduate with lower grades from the nation's most elite colleges and universities have worse professional and personal life outcomes than they would have if they had graduated with higher grades from a less elite educational institution.[40] Attending a more selective university may put a black student with a relatively lower SAT score at risk of graduating with a lower college GPA relative to his or her classmates, but "it is nevertheless associated with improved chances of graduating."[41] "To the extent that more selective institutions offer benefits to their students, these payoffs seem no smaller for black and Hispanic youth who gain admission to them than for other students."[42]

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[39] *See* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1131-1144 (2009).

[40] Richard Sander purports to have conducted empirical research that found such "harms" in the context of legal graduate school education. *See* Brief Amicus Curiae of Richard Sander and Stuart Taylor at 5-10. The methodology of Sander's empirical research has been severely criticized. *See, e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?* 57 STAN L. REV. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); Michele Landis Dauber, *The Big* Muddy, 57 STAN. L. REV. 1899 (2005); Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 YALE L.J. 2011 (2005); Daniel E. Ho, *Why Affirmative Action Does not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1991 (2005); Beverly Moran, *The Case for Black Inferiority? What Must Be True If Professor Sander is Right: A Response to a Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41 (2005); Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Le-*

In a highly-regarded longitudinal study published in 1998, former Princeton and Harvard university presidents, William Bowen and Derek Bok, found that the graduation rates of African Americans in the lower SAT score bands *increased* with the selectivity of the undergraduate institution they attended.[43] Institution-specific studies of the capacity of the SAT to predict later college academic success of African American students also highlight limitations in the usefulness of the SAT for black students who qualify for admission but do so with scores lower than the university average.

A study comparing the graduation rates of relatively higher-scoring and lower-scoring African

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gal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study, 46 J. BLACKS IN HIGHER EDUC. 102, 102–03 (2004). Even if Sander's purported findings were accurate for one particular type of graduate school education—if it were true that *law* graduates are better off attending less elite law schools if they rank higher in their graduating class—those findings do not demonstrate that the same holds true for undergraduate education and for real-world life benefits after *college* graduation and later in life.

[41] Thomas J. Kane, *Misconceptions*, *supra* note 11 at 23.

[42] *Id.*

[43] Bok & Bowen, *supra* note 38 at 61.

American students admitted to the University of California's most selective undergraduate institution—UC Berkeley—was undertaken to test assertions by Stephan Thernstrom and Abigail Thernstrom that black students with relatively lower SAT scores were less likely to graduate from UC Berkeley because they were "mismatched."[44] The institution-specific study of African American admitted students in a specific freshman class at UC Berkeley found "zero correlation between SAT score and eventual graduation for this cohort."[45] Actual graduation rates for African Americans were higher for blacks admitted with relatively lower SAT scores than for those African Americans admitted with ultra-high SAT scores.[46]

Similarly, an institution-specific study of the University of Texas School of Law strikingly revealed the limitations of conventional admissions test to predict the academic success of African American students. The study was conducted by the Law School Admission Services, Inc. (the "LSAC"), the publisher of the LSAT law school admissions test and the entity that provides its participating law schools in the United States and Canada with the values of the weights the school should give to LSAT scores and undergraduate GPA to predict applicants' first-year law school GPA.[47] The relationship between the LSAT scores of African American applicants to the UT School of Law and their predicted first-year law school GPA's resulted in a prediction equation from the LSAC that attributed a negative weight to black law school applicants' undergraduate GPA's.[48] This means the prediction equation was so invalid for African Americans that it only found correlations with LSAT scores based on a negative correlation between the undergraduate GPA of black applicants. The LSAC-generated equation for white applicants did not reach this bizarre result. In addition, it resulted in equations with less predictive power for black applicants than for white applicants (0.28 correlation for blacks—8% predictive power—compared to a 0.35 correlation for whites—12% predictive power). The UT law school-specific equation for black applicants not only called for admitting African American applicants with lower undergraduate GPA's, but it did not call for the same inappropriate treatment of white applicant college GPA's.[49]

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[44] Gregg Thomson, Is the SAT a "Good Predictor" of Graduation Rates? The Failure of "Common Sense" and Conventional Expertise and New Approach to the Question, Office of Research, University of California, Berkeley, (Dec. 1998) at 4 (unpublished manuscript) (an empirical analysis undermining claims made by the Thernstroms) (citing Abigail Thernstrom and Stephan Thernstrom, *The Consequences of Colorblindness*, Wall Street Journal, April 7, 1998 at A18.).

[45] *Id.* at 6.

[46] African Americans with the highest SAT scores graduated at a lower than expected rate—61% rate as opposed to the expected 84% rate—while African Americans with SAT scores in the two lowest tiers of the study graduated approximately double the expected rate—67% and 84% as opposed to the expected 32% and 45% rates. *Id.*

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[47] *See* Linda F. Wightman, *Predictive Validity of the LSAT: A National Summary of the 1990-1992 Correlation Studies,* Law School Admission Council Research Report 93-05, Dec. 1993, Plaintiff's Exhibit 136, 861 F. Supp. 551 (W.D. Tex. 1994), (No. A-92-CAA-563-SS), rev'd on other grounds, 78 F. 3d 932 (5th Cir.), *cert denied,* 518 U.S. 1033 (1996).

[48] *See* Declaration of Martin M. Shapiro at 15, *Hopwood v. Univ. of Tex.*, 861 F. Supp. 551 (W.D. Tex. 1994), (No. A-92-CAA-563-SS), rev'd on other grounds, 78 F. 3d 932 (5th Cir.), *cert denied,* 518 U.S. 1033 (1996) (explaining the significance of LSAC report). *See also* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal,* 84 CAL L. REV. 953, 972 (1996).

Contrary to the implicit suggestion by those asserting the correctness of the mean test score fallacy, sole reliance on the SAT to select high school students for admission to selective universities would certainly be anti-meritocratic because of the undisputed limitations in the predictive capacity of the SAT and other similar conventional mental tests. Moreover, it is important to recognize that neither the predictive limits of traditional mental tests nor the racial differences in scores on such tests will necessarily exist 25 years from now. Modern research of intelligence and mental testing shows promise in decreasing racial differences in mental test scores without sacrificing their accuracy and predictive power.

II. Narrowing of the Racial Test Score Gap Means Black-White Differences in SAT Scores Will Be Smaller in Future Years

In recent analyses of long-term data, "researchers are finding that the achievement gap between white and black students has narrowed significantly over the past few decades."[50] Social science study of innovations in mental testing has used knowledge of the limitations of conventional theories of intelligence to develop valid intelligence tests with *smaller* racial differences in scores.[51] Intelligence theories such as the Cattell-Horn-Carroll (CHC) theory of cognitive abilities, Robert Sternberg's triarchic theory of intelligence, and the PASS cognitive model of intelligence created by Jack Naglieri and J.P. Das purport to define intelligence more completely than the conventional theories of intelligence relied upon by traditional mental tests. [52] By designing "more theoretically based tests such as those that focus on measuring key factors of intelligence (e.g. fluid reasoning, general memory and learning),"[53] this research has shown it is possible to reduce racial differences in mental test scores.

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[49] *Id.* Specifically, the prediction equation called for multiplying African American undergraduate GPA by a negative number in the equation (-3.35) while the regression weight for undergraduate GPA for white applications was a positive number (+7.94). *Id.*

For instance, when revised to "better fit" the dimensions of the intelligence theory of John Carroll, traditional intelligence tests such as the Woodcock-

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[50] Sabrina Tavernise, *Education Gap Grows Between Rich and Poor, Studies Say*, N.Y. TIMES, Feb. 9, 2012 at A1 (referencing Sean F. Reardon, *The Widening Academic Achievement Gap Between The Rich and the Poor: New Evidence and Possible Explanations, in* WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND LIFE CHANCES' OF CHILDREN 93-94 (Greg J. Duncan & Richard Murnane, eds., 2011)). *See also* CHRISTOPHER JENCKS & MEREDITH PHILLIPS, THE BLACK-WHITE TEST SCORE GAP 182-223 (1998) (noting that the black-white test score gap "has narrowed since 1970).

[51] West-Faulcon, *More Intelligent Design supra* note 15 at 1241.

[52] Harold W. Goldstein, et. al., *Revisiting g: Intelligence, Adverse Impact, and Personnel Selection, in* ADVERSE IMPACT: IMPLICATIONS FOR ORGANIZATIONAL STAFFING AND HIGH STAKES SELECTION 102-108 (James Outtz, ed., 2010).

[53] *Id.* at 124.

Johnson III, Stanford-Binet 5, and WISC-IV tests have shown significantly decreased racial difference in scores without decreasing these tests' capacity to measure intelligence.[54] Instead of the one standard deviation typically reported as the difference between scores of African American and white test-takers, the revisions to the tests that aligned with Carroll's well-regarded intelligence theory substantially reduced the gap between African-American and white test scores. Instead of one standard deviation between the scores of the two racial groups, the difference was cut in almost half in some instances to 0.54.[55]

Another example of innovation in mental testing is the Cognitive Assessment System ("CAS") designed based on the PASS theory of intelligence. The CAS test, an intelligence test used to predict achievement of children and adolescents in school settings, shows "much lower racial differences than found with other traditional tests of intelligence."[56] In contrast to the often reported one standard deviation between black and white test-takers, the CAS test has been reported to have a black-white score difference of 0.26 standard deviation—only a little more than one-fourth the size of the racial gap typically reported for conventional intelligence tests.[57]

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[54] *Id.*

[55] *Id.*

[56] *Id.* at 125. *See also* Jack A. Naglieri & J.P. Das, *Planning, Attention, Simultaneous, Successive (PASS) Theory: A Revision of the Concept of Intelligence, in* CONTEMPORARY INTELLECTUAL ASSESSMENT: THEORIES, TESTS, AND ISSUES 120-35 (Dawn P. Flanagan & Patti L. Harrison eds., 2005).

[57] Goldstein, *supra* note 52 at 125. Similar innovations in the development of employment tests have yielded tests with pre-

Lastly, and particularly relevant to the claims of petitioner, similar research undertaken in the context of college admissions testing has revealed that the conventional SAT test—the test currently operational and available to colleges and universities—has larger racial differences than a more predictive prototype college admissions tests developed according to a modern theory of intelligence. Robert Sternberg's study with the College Board of the "Rainbow Measures"—tests of the three intelligences conceived as constituting intelligence under his "triarchic theory"—was based on data collected at fifteen schools across the United States.[58]

The Sternberg Triarchic Abilities Test ("STAT") alone was shown to have smaller racial differences and twice the predictive power of the traditional SAT in predicting college GPA—"approximately double the predicted amount of variance in college GPA when compared with the SAT alone (comparative r^2 values of .199 to .098 respectively)."[59] While Sternberg's research did not find that the new college admissions test eliminated racial group score differences completely, the STAT had smaller racial differences than the traditional SAT. The study's conclusion was that valid and reliable tests "can be designed that reduce ethnic and socially defined racial group differences on standardized tests, particular

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dictive power equal or better than traditional mental tests, and with no black-white mean differences. *Id.* at 127. *See also* Kimberly West-Faulcon, *Fairness Feuds: Competing Conceptions of Title VII Discriminatory Testing*, 46 WAKE FOREST L. REV. 1035, 1065-1071 (2011).

[58] Sternberg, *Rainbow Project*, *supra* note 25 at 326-28.

[59] *Id.* at 343-44.

for historically disadvantaged groups such as blacks and Latinos."[60]

CONCLUSION

Modern social science research has found that differences in racial group average SAT scores of UT admits are not evidence that petitioner was negatively impacted by the consideration of race under UT's admissions policy. Moreover, modern research of intelligence and mental testing shows that conventional admissions tests have predictive limits that warrant the consideration of non-test-driven criteria until new and improved mental tests with smaller racial differences are available for use by selective universities. In light of this research, UT's admissions policy does not confer a racial "preference." Instead, UT adopts a constrained and constitutionally narrowly-tailored attentiveness to race that does not harm whites who apply to the University of Texas as undergraduates.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[60] *Id.* at 344.

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BRIEF

RECORD
AND
BRIEFS

No. 11-345

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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

—v.—

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF FORDHAM UNIVERSITY, BOSTON COLLEGE, DEPAUL UNIVERSITY, GEORGETOWN UNIVERSITY, COLLEGE OF THE HOLY CROSS, MARQUETTE UNIVERSITY, UNIVERSITY OF NOTRE DAME and UNIVERSITY OF SAN FRANCISCO IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici curiae Fordham University, Boston College, DePaul University, Georgetown University, College of the Holy Cross, Marquette University, University of Notre Dame, and University of San Francisco are private, Catholic universities subject to Title VI of the Civil Rights Act of 1964. The Society of Jesus (known as the Jesuits) established Boston College, Holy Cross, Fordham, Georgetown, Marquette, and U.S.F. The Congregation of the Mission (known as the Vincentians) founded DePaul University. Notre Dame was established by the Congregation of Holy Cross. As expressed by Fordham University, each of the *amici* universities "strives for excellence in research and teaching, and guarantees the freedom of inquiry required by rigorous thinking and the quest for truth."[2] Whether rooted in the Jesuit tradition of teaching and scholarship "vital" to the Jesuits' "intellectual apostolate,"[3] the Vincentian mission to serve the poor,[4] or the Congregation of Holy Cross's expression of mission through the education of youth in colleges and universities,[5] each *amici* aspires to foster "the intellectual, moral, and religious development of its students,"[6] and "personal and professional excellence, . . . a life of faith, and . . . leadership expressed in service to others."[7] Each of the *amici* colleges and universities believes that both a qualitatively and a quantitatively diverse student body is necessary to accomplish its educational mission.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel for the parties have consented to its filing.

[2] Fordham University, Mission Statement, *available at* http://www.fordham.edu/discover_fordham/mission_26603.asp.

[3] Association of Jesuit Colleges and Universities, The Jesuit, Catholic Mission of U.S. Jesuit Colleges and Universities (2012), *available at* http://www.ajcunet.edu/The-Jesuit-Catholic-Mission-of-U.S.-Jesuit-Colleges-and-Universities.

[4] Saint Vincent de Paul, Letter 180: Observance of the Rules (May, 17 1658), *in* CORRESPONDENCE, CONFERENCES,

- Fordham University is a Jesuit university in New York City founded in 1841 to serve the immigrant Church in New York. "In order to prepare citizens for an increasingly multicultural and multinational society, Fordham seeks to develop in its students an understanding of and reverence for cultures and ways of life other than their own."[8] Fordham has concluded that a diverse student body is necessary to develop such understanding and reverence.
- Boston College is a Jesuit University founded in 1863 to serve the sons of Irish immigrants and other working class Catholics. Boston Col-

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DOCUMENTS 1-12 (John Marie Poole ed., Helen Marie Law et al. trans., New City Press 1985), *available at* http://via.library.depaul.edu/coste_en/16/.

[5] Congregation of Holy Cross, Constitution 2 Mission ¶ 16, *available at* http://www.holycrosscongregation.org/resources-and-links/constitutions/constitution-2/.

[6] Fordham University, Mission Statement, *supra* note 2.

[7] Marquette University, Our Mission, *available at* http://www.marquette.edu/about/mission.shtml.

[8] Fordham University, Mission Statement, *supra* note 2.

lege believes that a diverse student body is important to the fulfillment of its mission.[9] Boston College was one of the first colleges in the country to establish an administrative office dedicated to diversity.[10]

- DePaul University is a Vincentian university in Chicago established in 1898. With a long history of educating underserved populations, DePaul "seeks diversity in students' special talents, qualities, interests, and socio-economic backgrounds."[11] Today, DePaul "continues its commitment to the education of first generation college students, especially those from diverse cultural and ethnic groups in the metropolitan area."[12]
- Georgetown University, founded in 1789, is the oldest Catholic and Jesuit university in the nation. Georgetown believes that a diverse student body is important to its founding principle that "serious and sustained discourse among people of different faiths, cultures, and beliefs promotes intellectual, ethical and spiritual understanding."[13]

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[9] Boston College, The Mission of Boston College, *available at* http://www.bc.edu/cwis/mission/mission.html.

[10] Boston College, Office for Institutional Diversity, About Us, *available at* http://www.bc.edu/content/bc/offices/diversity/about.html.

[11] DePaul University, Mission Statement, *available at* http://mission.depaul.edu/AboutUs/Pages/MissionStatement.aspx.

[12] *Id.*

[13] Georgetown University, University Mission Statement,

- The College of the Holy Cross was founded in 1843 in Worcester, Massachusetts. From 1847-1865, Holy Cross was denied a charter by the Commonwealth of Massachusetts, in part because of lingering anti-Catholic sentiment on the part of some state legislators.[14] In fact, during that period, graduates' diplomas were signed by the president of Georgetown. "Informed by the presence of diverse interpretations of the human experience, Holy Cross seeks to build a community marked by freedom, mutual respect, and civility."[15] Holy Cross seeks to achieve diversity within each entering class, including socio-economic diversity, geographic diversity, and ethnic diversity.
- Marquette University is a Jesuit university in Milwaukee, founded in 1881. Marquette's Statement on Human Dignity and Diversity states that "a diverse university community helps us achieve excellence by promoting a culture of learning, appreciation and understanding."[16]

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available at http://www.georgetown.edu/about/governance/mission-statement/index.html.

[14] Congregation of Holy Cross, History and Traditions, *available at* http://offices.holycross.edu/about/history.

[15] Congregation of Holy Cross, College Mission Statement, *available at* http://offices.holycross.edu/about/president/mission.

[16] Marquette University, Statement on Human Dignity and Diversity, *available at* http://www.marquette.edu/about/diversity.shtml.

- The University of Notre Dame was founded in 1842 in South Bend, Indiana. Notre Dame's Mission Statement asserts that: "The intellectual interchange essential to a university requires, and is enriched by, the presence and voices of diverse scholars and students."[17]
- The University of San Francisco was founded in 1855 by the Jesuits. During its early years, U.S.F. served the children of Italian and Irish immigrants. U.S.F. is ranked among the most diverse universities in the nation by *U.S. News and World Reports*.[18] One of its missions is to advance a "diversity of perspectives, experiences and traditions as essential components of a quality education in our global context."[19]

In order to promote diversity, each of the *amici curiae* considers race in aspects of its admission program consistent with this Court's holding in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). Each of the *amici* has an admission program tailored to its particular circumstances, which includes geography, peer institutions, specific missions, and competitiveness. Each of the *amici* conducts a holistic review of every application received. In doing so, the *amici* institutions may consider some or all of a variety of factors, including high-school performance (including grade-point average), high-school quality, class rank, standardized-testing results,[20] letters of recommendation, writing ability, participation in extracurricular activities, whether the applicant is a first-generation college attendee or has special artistic talents, community service experience, state (or country) of residence, ethnic background and race. Predictors of academic ability (test scores, class rank, high-school performance) are the primary factors considered in the admissions process. The other factors, including an applicant's race or ethnic background, are secondary considerations.

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[17] University of Notre Dame, Mission Statement, *available at* http://nd.edu/about/mission-statement/.

[18] Campus Ethnic Diversity, U.S. NEWS AND WORLD REPORT (Sept. 12, 2012), *available at* http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity.

[19] University of San Francisco, Vision, Mission, Values, *available at* http://www.usfca.edu/about/values/.

The *amici* institutions illustrate the need for institutional discretion in evaluating the efficacy of competing admission programs. In order to achieve the necessary student-acceptance rates to build their incoming classes, *amici* extend offers at rates of approximately 18% (for the most competitive universities) to 50%. The differing applicant pools and recruitment goals require each *amici* to consider independently how best to achieve the diversity necessary to further its educational mission and to tailor its holistic evaluation accordingly. In addition, the ability of the universities to determine how they conduct their admission process is imperative to fulfilling their obligation that "Catholic ideals, attitudes and principles penetrate and inform university activities."[21] Considering an applicant's race or ethnicity as a factor (but not a defining one) in a holistic review of a student is more than a means of promoting diversity, it enables *amici* to more fully realize their missions of recognizing the dignity and uniqueness of each person during the admission process.

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[20] DePaul and Holy Cross are "testing optional" schools, meaning that the submission of standardized-testing scores is not required.

[21] John Paul II, *Ex Corde Ecclesiae* ¶ 14 (August 15, 1990), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990.ex-corde-

Amici have concluded that race-blind admission practices frustrate or impede the achievement of a diverse student body. Several of the *amici*'s admission programs include a program targeted at first-generation, underprivileged students. By way of example, Fordham administers a program under the aegis of New York State's Higher Education Opportunity Program ("HEOP"). This program admits approximately 125 economically disadvantaged students per year and provides support and resources to assist in the transition to college and to help such students succeed in their studies.[22] Marquette and DePaul participate in similar programs administered through the U.S. Department of Education. *See* 20 U.S.C. § 1070a-11 *et seq*. These programs identify students from economically disadvantaged backgrounds and provide services in order to improve retention and degree attainment. Although each of these programs has a higher percentage of racial minorities than is found in the general student population, they are insufficient in themselves to achieve diversity as they focus only on the economically disadvantaged. It

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ecclesiae_en.html.

[22] Students in Fordham's HEOP program are chosen from a separate admission pool as a consequence of New York's requirement that those who participate in the program must be students who would otherwise not have been admitted to the university. 8 N.Y. Comp. Codes R. & Regs. 27-1.1(a).

would be entirely inconsistent with the missions of these *amici* to be forced to rely only on programs such as these to increase diversity thereby helping to perpetuate a stereotype that minorities are more often poor. Therefore, use of socio-economic factors alone does not enable these Catholic universities to achieve the diverse student bodies necessary to fulfill their educational and religious missions.

SUMMARY OF ARGUMENT

In the course of the wrenching legal and public policy debate about university admission programs that take account of race to some degree or other, little has been said about the First Amendment rights of the universities themselves. Academic freedom has frequently been said by this Court to be a "special concern of the First Amendment" and the right of a university to determine whom to admit has been said to constitute a central element of academic freedom. But the core question in cases such as this has commonly been phrased in a one-dimensional way, just as Petitioner has phrased it here, by simply asking whether a university's "use of race in undergraduate admissions decisions is lawful under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment." Brief for Petitioner at i.

What this debate has failed to recognize is that there is another constitutional provision at issue—the First Amendment—and that it should be understood to *limit* the power of the government to require all universities—public and private—to adopt completely race-neutral admission programs. We urge that First Amendment interests can be accommodated and

Fourteenth Amendment and Title VI interests still vindicated by providing, as this Court often has, a degree of deference to a university's good-faith determination as to how to further its academic mission. We urge specifically that when a university (especially a private university) determines that a constitutionally permissible goal—such as diversity within its student body—is essential to providing the highest quality educational experience for its students, a university's judgment about whether a race-conscious admission program is necessary to achieve that goal should not be easily ignored. This is not an abdication of the judiciary's duty strictly to scrutinize such programs as it leaves to the courts the ultimate determination as to what interests are compelling and whether a particular university has employed means narrowly tailored to achieve its goal.

ARGUMENT

A. Academic Freedom Has Long Been Protected by this Court and Is a Special Concern of the First Amendment

Since its earliest decisions, this Court has adhered to the principle that academic institutions must remain free from interference if they are to engender the "tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger* v. *Rector*, 515 U.S. 819, 835 (1995). Indeed, long before this Court recognized academic freedom as a "special concern of the First Amendment," *Keyishian* v. *Board of Regents of University of State of N.Y.*, 385 U.S. 589, 603 (1967), it afforded academic institutions the breathing space necessary to pursue their educational missions.

As early as *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), this Court recognized the damaging effects of government interference with academic institutions.[23] In that case, the New Hampshire legislature enacted measures effectively usurping control of Dartmouth College after the college's trustees took certain controversial actions. *See* JURGEN HERBST, FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT 1636-1819, at 235-36 (1982); Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX L. REV. 817, 831 (1983). In striking down those measures, Chief Justice John Marshall acceded to the argument that it would be "a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties and the fluctuation of political opinions." *Dartmouth College*, 17 U.S. (4 Wheat.) at 599; *see also Vidal* v. *Girard's Executors*, 43 U.S. (2 How.) 127, 197, 199 (1844) (permitting testamentary devise establishing school free from sectarian influence and refusing to second-guess whether "the [challenged] scheme of education . . . is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education").[24]

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[23] In fact, the tradition of institutional academic freedom is far older than the *Dartmouth* decision. It has its roots in the tradition that existed in the medieval universities of Europe and particularly England, after which the earliest colonial colleges were consciously modeled. *See* RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 120-44 (1955); *see also* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 949-51 (2009); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 951-53 (1989).

Although the term "academic freedom" would not appear in the United States Reports until the middle of the twentieth century, when it did, the concept of academic institutional autonomy "was no Johnny-come-lately to education law." Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1315 (1988); *see also Farrington* v. *Tokushige*, 273 U.S. 284, 298 (1927) (invalidating law proscribing extensive controls over school curriculum). In a series of decisions arising out of state and federal efforts to eliminate communist and other supposed "subversive" influences from public institutions, however, this Court for the first time expressly grounded its long-standing protection of academic institutions in the First Amendment's guarantees of freedom of thought and expression. Beginning with the separate opinions in *Adler* v. *Board of Education of City of New York*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting), and *Wieman* v. *Updegraff*, 344 U.S. 183, 194 (1952) (Frankfurter, J., concurring), members of this Court described the chilling effect such laws would have on the scholastic environment:

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[24] Chief Justice Marshall made the same argument as an attorney in *Bracken* v. *Visitors of William & Mary College*, 7 Va. (3 Call.) 573 (1790), where the Virginia Supreme Court agreed that, because actions by the Visitors of William & Mary College were authorized by that College's charter, "it is not for this Court to enquire, whether they have legislated wisely, or not, and if the change should even be considered as not being for the better."

> Supineness and dogmatism take the place of inquiry. A "party line"—as dangerous as the "party line" of the Communists—lays hold. It is the "party line" of the orthodox view, of the conventional thought, of the accepted approach. . . . [Such a system] cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down.

Adler, 342 U.S. at 510-11 (Douglas, J., dissenting); *see also Wieman*, 344 U.S. at 197 (Frankfurter, J., concurring) ("The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of [the First Amendment's] limitations upon State and national power.").

The same concerns animated this Court's decision in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957). *Sweezy* arose out of the contempt citation of a professor who refused to answer questions about the content of his lectures during the course of an investigation by the Attorney General of New Hampshire. In vacating the citation, a plurality of this Court identified the "essentiality of freedom in the community of American universities" and agreed that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Id.* at 250.

In a concurring opinion that has been analyzed and relied upon for over a half century, Justice Frankfurter warned of the "grave harm resulting from governmental intrusion into the intellectual life of a university," *id.* at 261 (Frankfurter, J., concurring), and remarked that "[p]olitical power must abstain from intrusion into this activity of freedom," *id.* at 262. According to Justice Frankfurter, "[t]his means the exclusion of governmental intervention in the intellectual life of a university." *Id.*

In its most celebrated portion, Justice Frankfurter's opinion quoted with approval a report written by two South African universities opposing their government's efforts to enforce racial segregation in that nation's universities. *See* THE OPEN UNIVERSITIES IN SOUTH AFRICA 5 (Albert van de Sandt Centlivres et al. eds. 1957) [hereinafter "OPEN UNIVERSITIES"] (stating that "legislative enactment of academic segregation on racial grounds is an unwarranted interference with university autonomy and academic freedom"). In the portion relied on by Justice Frankfurter, the report stated:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

Sweezy, 354 U.S. at 263 (quoting OPEN UNIVERSITIES at 10-12).

A decade after this seminal articulation, a majority of this Court again invoked academic freedom in *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), this time to invalidate New York's Feinberg Law. That law required the removal of any teacher in a New York school who engaged in certain "subversive" activities. After describing how the law would "stifle 'that free play of the spirit which all teachers ought especially to cultivate and practice,'" *id.* at 601 (quoting *Wieman*, 344 U.S. at 195), the Court observed:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id. at 603. Finding that the Feinberg Law infringed this "vital" and "most precious" freedom, the Court invalidated the law as impermissibly vague.

Since *Sweezy* and *Keyishian*, this Court has consistently acknowledged that the First Amendment protects academic institutional autonomy. As a consequence, it has deferred to those institutions when called upon to review their legitimate academic decisions, especially those pertaining to the fourth of the "four essential freedoms" identified in *Sweezy*—the right to determine "who may be admitted to study."

In his critical concurring opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 311 (1978), Justice Powell relied upon that freedom in offering his analysis of the very issue now before this Court. The attainment of a diverse student body, Justice Powell wrote, is "clearly . . . a constitutionally permissible goal for an institution of higher education." *Id*. at 311-12.

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

Id. at 312. Summarizing the university's argument, Justice Powell wrote:

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

Id. at 313. Justice Powell concluded that (a) the special admission program at issue in *Bakke* involving an explicit racial quota could not pass Fourteenth Amendment review but that (b) race could constitutionally be considered as one factor in university admission programs as a part of a broader review of a variety of factors determined by the university to serve its pedagogical ends.

This Court adopted Justice Powell's view in upholding the University of Michigan Law School's race-conscious admission program in *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003). In concluding that the interest in achieving diversity in higher education was compelling, this Court relied on its "tradition of giving a degree of deference to a university's academic decisions" and deferred to the law school's "educational judgment that such diversity is essential to its educational mission." *Id.* at 328. This conclusion "informed" the Court's ultimate conclusion that the challenged race-conscious admission program advanced an interest that was compelling. *Id.* at 329.

In deciding that the challenged admission program was narrowly tailored, the Court concluded that the law school's program: (i) did not establish quotas for select racial or ethnic groups, *id.* at 335-36; (ii) considered race only as a "plus factor" in a holistic review of each application, *id.* at 337; and (iii) gave substantial weight to "all pertinent elements of diversity," not merely racial diversity, *id.* at 337-39. This Court refused, however, to second-guess the law school's determination that a race-conscious admission program was necessary to achieve its pedagogical goals. Instead, given the law school's "serious, good faith consideration of workable race-neutral alternatives," *id.* at 339, this Court held that flaws in those alternatives identified by the law school rendered them an inadequate substitute for its race-conscious program, *see* Brief for Respondents at 33-38, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236 at *33-38.

Elsewhere, the Court has exercised the same deference to academic decisions. In *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), a student challenged her dismissal from the University of Missouri-Kansas City Medical School. Rejecting the claim, this Court distinguished disciplinary and academic decisions and refused "to further enlarge the judicial presence in the academic community" by requiring review of the latter:

> Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Id. at 90. This Court made the same point more forcefully in *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214 (1985), emphasizing its limited ability to review an institution's decision to dismiss a student on academic grounds:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225 (footnote omitted); *see also id.* at 227 (prescribing a "narrow avenue for judicial review" solely into whether "the faculty did not exercise professional judgment"). This injunction resulted not merely from the recognition that courts are not well "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members," *id.* at 226, but also from this Court's "reluctance to trench on the prerogatives of state and local educational institutions and [its] responsibility to safeguard their academic freedom," *id.*[25]

B. The First Amendment Rights of Universities Must Be Considered in Reviewing a University's Admission Program

Because it implicates Fourteenth Amendment concerns, an admission program that considers an applicant's race is subject to strict scrutiny. *See, e.g.*, *Grutter*, 539 U.S. at 326. When that legal framework is applied in the context of higher education, however, it must also reflect the First Amendment rights of academic institutions. *See id.* at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."). That accommodation is achieved in this context in two modest respects:

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[25] In *University of Pennsylvania* v. *E.E.O.C.*, 493 U.S. 182 (1990), this Court again confirmed the principle that government may not interfere with "legitimate academic decisionmaking," *id.* at 199, and as recently as *Christian Legal Society* v. *Martinez*, 561 U.S. ___, 130 S. Ct. 2971, 2988 (2010), this Court observed that its tradition of affording deference to academic decisions was consistent with its ultimate role as the arbiter of constitutional questions.

first, the Court should defer to a university's determination that diversity will yield educational benefits; and second, the Court should defer to a university's ultimate conclusion that employing a race-conscious admission program is necessary to achieve the educational benefits of diversity. This approach best synthesizes the First Amendment rights of academic institutions with this Court's obligation to subject racial classifications to "searching judicial inquiry." *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

1. A University's Determination that Diversity Will Yield Educational Benefits Is Entitled to Deference under the First Amendment

An academic institution's determination that diversity yields educational benefits is a uniquely pedagogical one within the institution's exclusive prerogative. *See Parents Involved in Community Schools* v. *Seattle School Dist. No. 1* (*"Parents Involved"*), 551 U.S. 701, 792 (2007) (Kennedy, J., concurring) ("First Amendment interests give universities particular latitude in defining diversity[.]"). Such a determination is functionally equivalent to the determination that educational benefits will result from the use of a particular curriculum or the promotion of extracurricular activities, decisions which this Court has consistently consigned to an academic institution's sole judgment. *See Christian Legal Society*, 561 U.S. at ___, 130 S. Ct. at 2988-89 ("A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process."); *see also Board of Regents of Universi-*

ty of Wisconsin System v. *Southworth*, 529 U.S. 217, 233 (2000); *Rosenberger*, 515 U.S. at 833.

Affording deference in this narrow manner does not undermine judicial review because this Court still must determine whether the asserted interest is a compelling one. Of course, this Court has already concluded that achieving diversity in higher education is a compelling interest, *see Grutter*, 539 U.S. at 328-33; *Bakke*, 438 U.S. at 311-14; *see also Parents Involved*, 551 U.S. at 722; *id.* at 791 (Kennedy, J., concurring), but nothing would prevent it from concluding that a different interest—for example, that of achieving racial segregation in higher education—is not constitutionally compelling, *see Grutter*, 539 U.S. at 365-66 (Thomas, J., dissenting). Indeed, were such an interest advanced, this Court would be free to reject it so long as it remained willing to distinguish between the interest in achieving racial diversity and the interest in achieving racial isolation. *See Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 228 (1995) ("[T]he point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race."); *see also Parents Involved*, 551 U.S. at 832-33 (Breyer, J., dissenting) (stating that *Adarand* "sought to '*dispel the notion* that strict scrutiny' is as likely to condemn *inclusive* uses of 'race-conscious' criteria as it is to invalidate *exclusionary* ones" (emphases in *Parents Involved*)); *cf. Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Notwithstanding the deference owed on this point, Petitioner and her *amici* challenge at length the premise that diversity yields educational benefits, *see* Brief for Amicus Curiae Gail Heriot et al., and, borrowing from this Court's decision in *Ricci* v. *DeStefa-*

no, 557 U.S. 557 (2009), suggest that a university must demonstrate the existence of such benefits by a "strong basis in evidence." Even if this Court were willing to adjudicate matters of pedagogy—a task it has itself previously avoided, *see Parents Involved*, 551 U.S. at 726, and has often described as falling outside the institutional competence of the judiciary, *see, e.g.*, *Christian Legal Society*, 561 U.S. at ___, 130 S. Ct. at 2988 (recognizing that "judges lack the on-the-ground expertise and experience of school administrators" and should therefore "resist substituting their own notions of sound educational policy for those of the school authorities" (internal quotation marks and alterations omitted))[26]—the test announced in *Ricci* would still be inappropriate here because it fails to account for the First Amendment rights this Court has long afforded academic institutions. *Ricci* involved the quantum of evidence an employer must possess of its own Title VII disparate-impact violation before it may permissibly engage in intentional discrimination to remedy that violation. *Ricci*, 557 U.S. at 583-86. The employer in *Ricci*—a municipality—did not enjoy a First Amendment right protecting its decisions from government interference. Far from reflecting such a right to institutional discretion, the *Ricci* standard was specifically intended to restrict discretion. For that reason alone, its application here would not only be inconsistent with, but completely antithetical to, the First Amendment rights of academic institutions.

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[26] If courts were to engage on such pedagogical matters presumably they would do so by evaluating the views of experts. Such an inquiry would undoubtedly and unfortunately devolve entirely to "the evanescent views of a handful of social scientists." *Parents Involved*, 551 U.S. at 765 (2007) (Thomas, J., concurring).

2. A University's Determination that Race-Conscious Measures Are Necessary to Achieve Diversity Is Entitled to Deference under the First Amendment

A university's determination that race-conscious measures are necessary to achieve its interest in student body diversity is undeniably an academic decision. The mix of admission programs selected by a university is calibrated to produce the type of diversity that it believes will yield educational benefits based on criteria unique to it. As a result, determining what admission programs are most suitable to achieve the sought-after diversity necessarily reflects the same pedagogic judgment intrinsic in determining whether and what type of diversity will yield the desired educational benefits.

The facts of this case illustrate how this is true. After this Court's decisions in *Grutter* and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), the University of Texas reviewed the adequacy of its admission program. Its review was based on the premise that "[a] comprehensive education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." SJA 23a. In the University's judgment, such an educational experience could only be obtained if "the undergraduate experience for each student . . . include[s] classroom contact with peers of differing racial, ethnic, and cultural backgrounds." SJA 24a.

A separate study demonstrated that the University's race-neutral admission program was not meeting this goal. SJA 66a. That study found that the race-neutral program had only maintained aggregate diversity at its historic levels, while classroom diversity had decreased with minority students more concentrated in particular disciplines. SJA 70a (indicating that in 2002, "nearly 90% of UT undergraduate classes with five to twenty-four students had no or only one African American to contribute their experiences or perspectives" and that "[o]ver 40% had no or only one Hispanic or Asian American"). In the University's judgment, "[w]ith so few underrepresented minorities in the classroom, the University is less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society." SJA 25a. This finding was corroborated by a student survey revealing that "[m]inority students reported feeling isolated, and a majority of all students felt there was 'insufficient minority representation' in classrooms for 'the full benefits of diversity to occur.'" *Fisher* v. *University of Texas at Austin*, 631 F.3d 213, 225 (5th Cir. 2011).

As a result, the University concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin," SJA 25a, and authorized its admissions office to consider race and ethnicity as one part of a holistic review of students' applications, *see Fisher* v. *University of Texas at Austin*, 645 F. Supp. 2d 587, 596-98 (W.D. Tex.

2009) (describing University's admissions criteria in detail).

As this record demonstrates, the University sought to provide the educational benefits of a particular type of diversity and determined that, based on its experience with race-neutral admission programs and in light of the unique circumstances of its student body and applicant pool, the addition of a race-conscious admission program to its other admission programs was necessary to obtain the desired diversity. This is precisely the discretion that academic institutions require in evaluating admission programs and that the First Amendment protects.

The need for institutional discretion in evaluating the efficacy of competing admission programs is even more profound for institutions like *amici*. Of course, this Court acknowledged in *Grutter* that smaller institutions such as *amici* simply are not capable of implementing plans similar to the Top Ten Percent law utilized in Texas. *See Grutter*, 539 U.S. at 340. Even if they could, however, *amici* could reasonably reject such plans as fundamentally incompatible with their shared educational mission. Such plans typically use social injustice as a proxy for racial and ethnic diversity in a manner that is at its core dishonest.[27] Moreover, in relying on social injustice, those plans legitimate it in a way that renders *amici* complicit in the underlying societal inequities from which it arises. Given their institutional commitment to eradicating such ills, *amici* could easily conclude that use of such "race-neutral" plans to achieve diversity conflicts irreconcilably with their educational mission.[28] Using social disadvantage as a proxy for diversity also conflicts, somewhat counter-intuitively, with *amici*'s mission of serving socially disadvantaged students. Using disadvantage as the sole means by which to achieve diversity would discourage *amici* from serving disadvantaged applicants whose admission would *not* advance diversity. In effect, it would force *amici* to decide between providing their students with the educational benefits of diversity and their institutional commitment to aiding a broad range of economically disadvantaged students.

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[27] Texas's Top Ten Percent law, although facially race-neutral, only achieves diversity as a result of *de facto* statewide racial segregation. *See, e.g.*, *Gratz*, 539 U.S. at 303 n.10 (Ginsburg, J., dissenting). Other purportedly race-neutral programs, such as those that target economically disadvantaged students, only advance diversity by acknowledging the unfortunate reality that minorities more frequently occupy that status.

These considerations only make more plain why each academic institution should have discretion to evaluate the efficacy of competing admission programs and determine, based on its particular circumstances, what programs are necessary to achieve its institutional goals. Meanwhile, Petitioner would strip academic institutions of their right to make such decisions and replace it with her own vision of what diversity means and how best to achieve it. For instance, she suggests that because the Top Ten Percent law has maintained historic levels of aggregate diversity in the University's freshman class, that race-neutral law has achieved "diversity" and race-conscious programs are therefore unnecessary. *See* Brief for Petitioner at 34-36. Likewise, she contends that because the race-conscious facet of the University's admission program ultimately accounts for only a small percentage of each incoming freshman class, it cannot meaningfully alter the percentage of minority students in that class and, perforce, cannot be necessary. *See id.* at 38-40.

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[28] *Ex Corde Ecclesiae* ¶ 34 ("The Christian spirit of service to others for the promotion of social justice is of particular importance for each Catholic university, to be shared by its teachers and developed in its students.").

Both arguments are premised on a conception of diversity that the University has not sought to pursue and that Petitioner now seeks to impose. The University has determined that the educational benefits of diversity result where each undergraduate student has "classroom contact with peers of differing racial, ethnic, and cultural backgrounds." 2004 REPORT at 24. As its multiple studies show, such educational benefits are not reflected by aggregate levels of diversity in the incoming freshman class; indeed, that metric in fact masks increasing levels of on-campus racial isolation.

No matter, says Petitioner. But in doing so, she ignores the University's First Amendment right to determine for itself on academic grounds what manner of education it will provide. It is no more her prerogative to dictate what type of diversity the University should seek to achieve than it is for her to dictate how the University will teach calculus or chemistry, or how it will assign grades in those courses. To the contrary, the First Amendment commands that such decisions are the University's to make.

Petitioner and her *amici* fall back on the argument that observing this limited degree of deference will require the Court to "abdicate[] its constitutional duty to give strict scrutiny" to race-conscious admission programs. *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting); *see* Brief for Petitioner at 54-56. But this confuses "deference to a university's definition of its educational objective with deference to the implementation of this goal." *Grutter,* 539 U.S at 388 (Kennedy, J., dissenting). A university's determination that *some* race-conscious admission program is necessary does not entail the conclusion that *this particular* race-conscious admission program is narrowly tailored. Authority to make that decision remains solely with this Court.

The Court's evaluation of narrow tailoring is not mere window dressing, but preserves meaningful judicial review in several respects. For instance, it requires an academic institution to demonstrate in detail how its race-conscious admission program functions. *See, e.g.*, *Parents Involved*, 551 U.S. at 783-87 (Kennedy, J., concurring).

It also requires an academic institution to demonstrate that its race-conscious admission program ensures individual consideration. This is no simple task. The university must establish that the program (i) only takes race into account as one factor in a holistic review of each application, *see Grutter*, 539 U.S. at 334; (ii) does not implement a system of racial quotas, *see Bakke*, 438 U.S. at 315-16, or otherwise fail to evaluate applicants individually, *see Gratz*, 539 U.S. at 271; *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting); and (iii) considers "all pertinent elements of diversity," not merely racial diversity, *Grutter*, 539 U.S. at 337-39.

Finally, narrow tailoring requires this Court to ensure that an academic institution's evaluation of necessity results from "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339. This enables this Court to determine that an academic institution's decision to employ race-conscious measures is one that is entitled to deference under the First Amendment.[29] For instance, the failure adequately to consider alternatives might suggest that the adoption of race-conscious measures was predicated on non-academic grounds not warranting deference.

Amici do not dispute that such searching judicial review is required in the context of college and university admission programs that look to race as one of many factors in the service of achieving a diverse academic environment. But they believe that review must also reflect our nation's fundamental commitment to academic freedom in higher education. The modest deference *amici* suggest should apply gives force to both the Fourteenth Amendment's promise of equal protection and the First Amendment's defense of academic freedom.

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[29] First Amendment deference extends only to academic decisions; it does not extend, for instance, to a university's decision to exclude military recruiters from on-campus recruiting, *see Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006), to prohibit non-students from distributing materials on campus, *cf. Princeton University* v. *Schmid*, 455 U.S. 100, 101 (1982), to discipline a student for non-academic reasons, *see Horowitz*, 435 U.S. at 90, or any other decision predicated on ideological inculcation, *see Rosenberger*, 515 U.S. at 836; *Healy* v. *James*, 408 U.S. 169, 187-88 (1972).

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

August 10, 2012

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF FORMER COMMISSIONERS AND GENERAL COUNSEL OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF FORMER COMMISSIONERS AND GENERAL COUNSEL OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

Amici Andrew C. Barrett, Tyrone Brown, Michael J. Copps, Reed E. Hundt, Nicholas Johnson, and Gloria Tristani are a bipartisan group of former

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[1] All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the preparation or submission of this brief.

Commissioners from the Federal Communications Commission. Christopher Wright previously served as General Counsel of the FCC. These former officials join this brief in their individual capacities, but with the benefit of their years of experience at the FCC. They recognize the paramount interest in supporting diversity in higher education, an interest that serves as a necessary predicate to the equally strong governmental interest in media diversity.

The Minority Media and Telecommunications Council ("Council") is a nonprofit organization founded in 1986, dedicated to promoting racial diversity and equal opportunity in mass media, telecommunications, and broadband industries. The Council promotes FCC rules and private-sector initiatives aimed at increasing opportunities for minorities to own media and telecommunications facilities and at promoting a diversity of viewpoints in the media. In addition, the Council represents civil rights groups and other organizations interested in media diversity in proceedings before the FCC and in the federal courts.

The Council has also been an advocate before the FCC for state and local control of cable rates and conditions and for years has been a champion of local-access television, which provides public, educational, and governmental programming at the community level. Further, the Council serves as a member of the Subcommittee on Utility Market Place Access of the National Association of Regulatory Utility Commissioners, where it works with State Utility Commissions in their efforts to promote diversity.

Amici urge the Court to reaffirm that efforts by States to promote diversity in higher education on the terms prescribed by this Court in prior decisions and in reliance on this Court's directives are constitutionally permissible under *Grutter v. Bollinger*, 539 U.S. 306 (2003). What this Court said in *Grutter* remains true today: Diversity in higher education improves learning, promotes cross-cultural understanding, fosters equal access to academic institutions, and contributes to our national prosperity by producing leaders equipped to thrive in a globalized, multicultural marketplace. *Id.* at 330.

Amici have a strong interest in this case because the promotion of diversity in higher education is essential to the promotion of diversity in the mass media—an objective for which Amici have long strived. Amici share a commitment to the preservation of federal policies that seek to broaden the ethnic, racial, and cultural diversity of owners and managers of the nation's mass media and thereby contribute to "the widest possible dissemination of information from diverse and antagonistic sources," which this Court has said is "essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Diversity in the media, in turn, contributes to the robust exchange of ideas that is critical to civic engagement in this Country. But the possibility of building an inclusive public dialogue capable of engaging an increasingly diverse Country would itself be imperiled if the Nation's colleges and universities—the pipeline for opportunity in the mass media and the trainers of future media programmers and journalists—were themselves hamstrung in their efforts to further the compelling governmental interest in diversity in higher education.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici urge the court to reaffirm that diversity in higher education is a compelling governmental interest, and to affirm that the State of Texas's admission program for the University of Texas is narrowly tailored to serve that interest.

1. Media companies serve as a critical vehicle for the exchange of information and ideas in this Country. Given the vital role they play, the public welfare depends on the ability of these purveyors of information to convey ideas and disseminate knowledge in a way that communicates effectively and fairly to all audiences, and encourages full participation in the civic discourse and public dialogue of this Country. Diversity in higher education allows not only for a robust exchange of ideas on campus; it is an essential predicate for ensuring a robust exchange of ideas in communication through mass media.

As set forth in this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the compelling governmental interest in diversity in higher education is grounded in the recognition that a diverse student body enriches the academic environment for all students, by allowing a more robust exchange of ideas, overcoming stereotypes, and promoting cross-racial understanding. Graduates schooled in more diverse environments, whatever their race, are more likely to be effective leaders in a multicultural and multiracial global economy. And, for those trained in journalism or communications, an environment that alerts them to the continued existence of racial bias and stereotypes, and affords them the opportunity, by living example, to dispel such biases, is doubly important.

Diversity in mass media is likewise a compelling governmental interest that has long been recognized by this Court, Congress, and the FCC as essential to the promotion of First Amendment values. That interest is directly served by the continued fostering of diversity in higher education. A more diverse pool of graduates will be better able to serve as future business leaders and leaders in communications, and to compete on an equal footing for scarce communication resources, including sharply limited broadcast licenses. More diverse media ownership can help to ensure that programming content serves all communities and will thereby encourage greater civic engagement. And journalists, programmers, and media owners—of all races—who have been educated in a diverse and culturally sensitive environment will be better able to avoid unconscious racial biases and to more effectively communicate in a way that fosters understanding across racial and ethnic divides, rather than exacerbating such divisions.

In short, a more diverse and diversity-conscious media, populated by a pool of well-trained graduates, can only strengthen the vital link between informed citizens and a healthy democracy that has been recognized since our Nation's founding.

2. Acting in reliance on *Grutter*, the University of Texas faithfully applied this Court's teachings in

shaping an admissions program where race is but a "factor of a factor of a factor," Pet. App. 159a, in an individualized and holistic assessment, that itself is a modest component of the admissions profile. This Court should affirm. In so doing, moreover, this Court should reaffirm *Grutter's* core holding that there is a compelling governmental interest in achieving diversity in higher education through appropriately and narrowly tailored means—a holding that is not even in dispute in this case. Principles of stare decisis, strengthened by the Constitution's assignment of primary responsibility for education to the States, command enhanced judicial fealty to precedent when States, as co-equal sovereigns, have relied on this Court's direction in formulating core governmental policies

ARGUMENT

I. GREATER DIVERSITY IN HIGHER EDUCATION IS ESSENTIAL TO A ROBUST PUBLIC DIALOGUE.

1. This Court in *Grutter* made three critical observations about diversity in higher education. First, the Court recognized that greater diversity among the student body in higher education leads to a more robust exchange of ideas and perspectives on campuses and thus enhances the academic environment for all students. *Grutter*, 539 U.S. at 328-330. In making this observation, the Court reaffirmed the foundational opinion of Justice Powell in ***Regents of the University of California v. Bakke***, 438 U.S. 265 (1978), which held that academic diversity was central to the education mission of our

colleges and universities. *Grutter*, 539 U.S. at 325, 328-329 (citing *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)).

Second, the Court explained that greater diversity "promotes cross-racial understanding, [by] help[ing] to break down racial stereotypes" that students may bring with them to the campus. *Grutter*, 539 U.S. at 330 (internal quotation marks and citation omitted). Further, the Court expressed its agreement with the position of Fortune 500 companies and military leaders on the benefits of academic diversity, and concluded that exposure on campus to a cross section of society and across racial and ethnic groups leaves students better equipped to operate and thrive in the increasingly multicultural world they will encounter in business and other professions upon graduation. *Id.* at 330-331.

Third, the Court stressed that its acceptance of the asserted benefits of academic diversity was not itself premised on a rigid, stereotypical "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333 (internal quotation marks and citation omitted). Rather, the Court stated that its decision rested on the common sense judgment that, "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Id.*

2. Similar conclusions apply to the critical role of diversity in the Nation's mass media. For one, this

Court, Congress, and the FCC, all have long recognized that greater diversity in the ranks of owners and managers of our radio and television networks and stations can contribute to dissemination of more diverse viewpoints on the Nation's airwaves and thus exposes society to a richer and wider variety of programming. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 569-579 (1990), *overruled on other grounds by Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978); 47 U.S.C. § 309(j)(3)(B); 47 U.S.C. § 309(i)(3)(A); *In the Matter of Promoting Diversification of Ownership in the Broad. Servs.*, 24 F.C.C.R. 5896, ¶ 12 (2009). "Recognizing the importance of ensuring that minorities have the opportunity to air their viewpoints through broadcast outlets, the Commission adopted its minority ownership policy [which serves to] enhance the diversity of views and information available over the airways by promoting ownership of broadcast stations by minorities."[2]

Through the proliferation of voices that it produces, diversity in the mass media also reinforces First Amendment values and the objectives of federal telecommunications policy, both of which seek "the widest possible dissemination of information from diverse and antagonistic sources [in order to serve] the welfare of the public." *Turner Broad. Sys., Inc. v.*

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[2] *Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Science, and Transp.*, 101st Cong. 1 (1989) (statement of Sen. Daniel K. Inouye, Member, S. Comm. on Commerce, Science, and Transp.).

FCC, 512 U.S. 622, 663 (1994) (internal quotation marks and citation omitted).

Further, diversity in the mass media dilutes the concentration of ownership that characterizes the national telecommunications industry and thereby promotes free market values. *See* Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235, 255 (2004) (because most minority broadcasters "operate a single commercial radio or television station," whereas "[a]ll broadcast networks are majority owned," efforts to increase media diversity will also increase the number of discrete media owners in a given market) (internal quotation marks and citation omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("[T]he First Amendment * * * preserve[s] an uninhibited marketplace of ideas in which truth will ultimately prevail, [and does not] countenance monopolization of that market.").

As with diversity in higher education, diversity in broadcast programming helps to dispel unfortunate stereotypes about minorities that otherwise may be perpetuated in the media. *See* Baynes, 57 RUTGERS L. REV. at 247. Broadcast media, for example, has in the past cemented audience perceptions regarding crime and poverty in minority communities. *Id.* at 255-259. Indeed, an important recent study found that the majority of Black viewers and listeners believe that news coverage of Blacks is "too negative."

Pew Research Center, *Many Say Coverage of the Poor and Minorities Is Too Negative* (Aug. 19, 2010).[3]

The evidence shows that the coverage is often different, however, for stations that are minority-owned. As this Court noted, "[m]inority ownership does appear to have specific impact on the presentation of minority images in local news, inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities." *Metro Broad.*, 497 U.S. at 581 (internal quotation marks omitted). From 1948, when the first radio station to appeal to a Black audience was launched, to the present, where media outlets run a range of programming in a multitude of languages for a variety of audiences, diverse channels of communication are effective because they respond to the desire, of people of all backgrounds, "to see themselves reflected," in media coverage, "warts and all." Steve Waldman, Federal Communications Commission, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, 252 (2011) ("FCC INC Report").[4]

More diversity in media ownership is likely to increase the odds that all communities will be served with programming that reflects their reality and is tailored to their specific interests. *See, e.g.*, Joel Waldfogel, *Radio Station Ownership Structure and*

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[3] *Available at* http://pewresearch.org/pubs/1703/views-of-news-coverage-of-poor-blacks-hispanics-gays-muslims-rich-middle-class.

[4] *Available at* http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

the Provision of Programming to Minority Audiences: Evidence from 2005-2009, 1 (2011) (stating that the racial identity of radio station owners affects the target audience of those stations).[5] Thus, minority owners of independent television stations produce local news content at levels higher than non-minority independent station owners. FTC INC Report at 252-53; *see also* Fordham Univ., *The Case Against Media Consolidation: Evidence on Concentration, Localism and Diversity*, 14 (Mark N. Cooper, ed. 2007).[6]

And such diverse coverage makes a difference, not just in broadening the sources of critical information, but also in increasing the civic involvement of the target audience. *See* Felix Oberholzer-Gee & Joel Waldfogel, *Media Markets and Localism: Does Local News en Espanol Boost Hispanic Voter Turnout?*, 99 AM. ECON. REV. 2120 (Dec. 2009) (showing that Hispanic voter turnout increased by 5 to 10 percentage points, relative to non-Hispanic voter turnout, in markets where local Spanish language television news became available).

While owners of radio and television stations may not themselves be involved in day-to-day programming choices, there is empirical support for the proposition that minority-owned broadcasters succeed in hiring significantly increased numbers of minorities into managerial, staff, and reporting positions. *Metro Broad.*, 497 U.S. at 582 n.34; *see*

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[5] *Available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307480A1.pdf.

[6] *Available at* http://www.fordham.edu/images/undergraduate/communications/caseagainstmediaconsolidation.pdf.

also Christine Bachen et al., *Diversity of Programming in the Broadcast Spectrum* 7 (1999) (noting that minority-owned radio stations employ significantly more minorities in their news and public affairs staffs).[7]

Diverse perspectives of managers, staff, and reporters derive not only from their own racial and ethnic backgrounds, but also from their exposure to cross-cultural training and education in a diverse setting. Such exposure serves to build awareness of patterns of racial bias, and to generally inform programming and content choices. In training journalists, in particular, higher education has a critical role to play in ensuring that implicit racial biases do not infect reporting. Thus, the Columbia University Graduate School of Journalism has developed "The Authentic Voice" project, a multimedia teaching tool based on a series of 15 case studies. The project aims to "help[] journalists, educators and the public get better at handling one of the country's most profound and challenging issues -- relations between people of different races and ethnicities."[8] Assuredly, the more diverse the environment in which such training occurs, the more effective it will be.

The connection between greater diversity among owners and managers of mass media organizations and greater diversity of programming does not rest on a reflexive presumption that all members of a particular racial or ethnic group think alike and that their programming choices will be dictated by their background. In some cases, individual choices and market forces may render the programming content of a minority-owned station no different from the programming content of a majority-owned station, *Metro Broad.*, 497 U.S. at 580; *id.* at 619, 626 (O'Connor, J., dissenting). In the aggregate, however, diversification of the ranks of owners and managers of mass media is bound to make a difference in programming, just as the diversification of the ranks of students on campuses is bound to make a difference in the perspectives that are conveyed in higher education. In both the academic and mass media setting, and in the workplace at large, this link reflects the continued salience of race and ethnicity in shaping views and perspectives and how they are communicated to others. *Id.* at 580; *see, e.g.*, Daphne A. Jameson, *Reconceptualizing Cultural Identity and Its Role in Intercultural Business Communication*, 44 J. BUS. COM. 199, 215-16 (2009) (arguing that racial and ethnic identity inform conceptions of cultural identity, which influences the nature and manner of intercultural business communications).

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[7] *Available at* http://transition.fcc.gov/opportunity/meb_study/content_ownership_study.pdf.

[8] *See* http://www.theauthenticvoice.org.

The need for *all* media industry participants to be able to identify implicit racial bias and to be attuned to cross-cultural issues is all the more acute in an industry that is frequently criticized for unfair reporting, and in a world where cultural and racial divides contribute to so much conflict. *See, e.g.*, Riddi Shah, *Sikh Temple Shooting: Why Do the Media Care Less About this Attack?*, THE HUFFINGTON POST, Aug. 7, 2012 (contrasting media coverage of movie theatre shooting in Aurora, Colorado, with that of

Sikh temple shooting in Wisconsin)[9]; The Opportunity Agenda, *Opportunity for Black Men and Boys: Public Opinion, Media Depictions, and Media Consumption*, 2 (2011) (noting that one of the "best-documented themes in the research is that the overall presentation of Black men and boys in the media is a distortion of reality in a variety of ways")[10]; Carmen T. Joge et al., National Council of La Raza, *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the '90s*, 31 (1999) (noting that "Latinos rarely appear in the media, but when they do appear, they are consistently portrayed more negatively than other ethnic groups")[11]; Children Now, *Prime Time Diversity Report: Fall Colors 2003-04*, 12 (2004) ("The vast majority of programs shown on prime time – especially those most watched by youth audiences – depicted a world where people primarily associate with members of their own racial group, where some racial groups remain non-existent and where males significantly outnumber females.")[12]; Andrew M. Carton and Ashleigh Shelby Rosette, *Explaining Bias against Black Leaders: Integrating Theory on Information Processing and Goal-Based Stereotyping*, 54 ACAD. OF MGMT. J. 1141 (2011) (study finding that media coverage rarely gave African American quarterbacks credit for leadership, blaming them more for losses but given less credit for success, and finding disturbing implications for hiring and promotion in the workplace).

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[9] *Available at* http://www.huffingtonpost.com/riddhi-shah/sikh-temple-shooting_b_1749866.html.

[10] *Available at* http://opportunityagenda.org/black_male.

[11] *Available at* http://www.nclr.org/images/uploads/publications/1377_file_HateCrimesRpt.pdf.

[12] *Available at* http://www.childrennow.org/uploads/documents/fall_colors_2003.pdf.

Such biases are all the more difficult to dispel, in an industry where minority ownership and employment are on the decline, FCC INC Report at 248, and where the ranks of minority journalists, in particular, have significantly decreased in recent years. *Id.* at 253 ("Minority journalists have lost ground in terms of employment in recent years, and industry experts doubt that the trend will reverse any time soon.").

3. Not only are the benefits of diversity in mass media similar to the benefits of diversity in higher education, diversity in mass media actually depends on diversity in higher education. This interconnection stems from the fact that higher education institutions serve as "the training ground for a large number of our Nation's leaders." *Grutter*, 539 U.S. at 332. Simply put, if "th[is] path to leadership [is] open to talented and qualified individuals of every race and ethnicity," *id.*, then there will be greater diversity among the ranks of key decision-makers in our Country's businesses, including in mass media organizations. But if the higher education pipeline to leadership positions is less diverse, corporations will become less diverse and, in the case of mass media, television and radio stations will look and sound less diverse, and less like the public that broadcasters have been charged with serving. For this reason, race-conscious admissions policies that ensure diversity in higher education are essential to programming diversity in mass media. A diverse, and diversely trained, pool of graduates will

yield future communicators that can more effectively convey information in a manner that better reflects, and engages with, this Country's increasingly multi-racial, multi-ethnic, and multicultural citizenry.

The need for diversity in higher education as a means of promoting diversity in mass media is particularly pronounced because minorities are profoundly underrepresented as owners of mass media outlets. According to a 2009 study, ethnic minorities owned only 7.24% of the 11,249 commercial radio stations in the Country. Catherine J. K. Sandoval et al., *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest*, 5 (2009).[13] Similarly, a 2007 study by the FCC found that ethnic minorities owned only 0.96% of the Country's television stations. Kiran Duwadi et al., Federal Communications Commission, *Media Ownership Study Two: Ownership Structure and Robustness of Media*, 17 (2007).[14] And the trends in minority ownership and employment in traditional media are not promising. FCC INC Report at 248.[15]

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[13] *Available at* http://mmtconline.org/download/law_and_policy/Minority_Commercial_Radio_Broadcasters_Sandoval%20_MMTC_2009_final_report.pdf.

[14] *Available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf.

[15] Minority representation in the media has been waning at the same time that the population of the United States is becoming increasingly diverse. Between 2000 and 2010, the Black population in the United States increased by 15% to roughly 13.6% of the population. U.S. Census Bureau, *The Black Population: 2010*, 3 (2011), *available at*

Inroads into newer media outlets, although more positive, also face challenges. By a recent estimate, only one percent of Internet company founders are Black; eighty-seven percent are White, and Asian/Pacific founders account for 12% of start-ups. FCC INC Report at 256. Although that gap is narrowing, racial inequalities persist not only there, but also in the use of the Internet and adoption of high speed broadband connections in the home. *See* Aaron Smith, Pew Internet & American Life Project, *Commentary: Technology Trends Among People of Color* (Sept. 17, 2010).[16]

In sum, a more diverse, and diversely schooled, pipeline of future media leaders can contribute to more effective dialogue, not only on campus, but also through all media outlets and all aspects of public

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http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf. During the same time period, the Hispanic population increased by 43% to roughly 16.3% of the population. U.S. Census Bureau, *The Hispanic Population: 2010*, 2-3 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf. Finally, the Asian population increased during that period by 45.6% to roughly 5.6% of the population. U.S. Census Bureau, *The Asian Population: 2010*, 4 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf. Between 1980 and 2007, the percentage of the U.S. population that spoke a language other than English at home increased by 140.4%, to roughly 55 million people. U.S. Census Bureau, *Language Use in the United States*, 6 (2010), *available at* http://www.census.gov/hhes/socdemo/language/data/acs/ACS-12.pdf.

[16] *Available at* http://www.pewinternet.org/Commentary/2010/September/Technology-Trends-Among-People-of-Color.aspx.

communication. Graduates who have been educated in an environment where they were constantly challenged to understand and value the racial and ethnic differences that permeate the Nation's population are better positioned to ensure that all voices are heard, and that this Country's increasingly rich mosaic of ethnic, racial, linguistic, and cultural communities are fairly served by broadcast media. Furthering the higher education of students from all backgrounds will yield a pool of diverse—and diversity-attuned—graduates who can more fully contribute to building a social and political dialogue that bridges and heals racial divides.

II. TEXAS'S FAITHFUL ADHERENCE TO THIS COURT'S DIRECTIONS SHOULD BE UPHELD, AND *GRUTTER'S* CORE HOLDING SHOULD BE REAFFIRMED.

Texas's university admissions program is a "faithful application of *Grutter's* teachings," Pet. App. 98a (Garza, J., concurring), and a sovereign State's adherence to this Court's constitutional judgments should be sustained. In language that closely hews to *Grutter*, the June 2004 *Proposal to Consider Race and Ethnicity in Admissions* explained the compelling interest in race-based admissions by recognizing that a "comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." Pet. App. 23a (internal quotation marks and citation omitted); *see Grutter*, 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.")

These objectives, moreover, were especially important for Texas to implement at its University in light of the University's public mission and flagship role of preparing students to be leaders in the State. Given Texas's increasingly diverse population profile, the State realized that its future leaders must be prepared to helm a multicultural workforce, to formulate programs and businesses that meet the needs of multiple racial and ethnic communities, and to communicate policy to a diverse electorate. Pet. App. 23a.

Texas acted in reliance on *Grutter* in crafting an admissions policy for its flagship university that was uniquely designed to serve its sovereign interests. Texas's approach was properly upheld by the Fifth Circuit as a faithful application of *Grutter's* teachings. Principles of stare decisis, strengthened by the federalism interests implicated here, provide ample ground for affirmance.

1. With an eye trained on *Grutter*, Texas crafted a narrowly tailored admissions process in which race is only a "factor of a factor of a factor of a factor," Pet. App. at 159a—the very antithesis of an inflexible quota. *Compare Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (striking down quota-like Michigan undergraduate admissions policy giving applicants points based on minority status). More specifically, in setting the personal achievement score of applicants—which is just one of multiple scores factored into admissions decisions—Texas gave race

no rigid or dispositive weight. To the contrary, Texas undertakes a comprehensive, holistic, and individualized assessment, in which race is but one factor weighed alongside other factors such as whether the applicant was the first in their family to attend college, had lived or traveled widely abroad, grew up in a non-English speaking home, or had unusual family responsibilities. Pet. App. 28a. Thus, Texas's program properly "focus[es] on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007). Texas, in short, has done only what this Court has said it could do for the last three and a half decades since *Bakke*.

The Fifth Circuit, moreover, properly accorded good-faith deference to the academic judgment made by Texas's University administrators regarding the imperative of racial and ethnic (as well as experiential) diversity on campus. To be sure, this Court has applied a more rigorous, substantial-basis-in-evidence standard to determine whether historical practices justify race-conscious corrective measures. *See, e.g.*, *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500 (1989); *see also* Pet. App. 40a (higher standard applied to "backward-looking attempt[s] to remedy past wrongs.").

But Texas's University admissions program is a different endeavor. Its aim is not to remediate past discrimination, but to implement "complex educational judgments," *Grutter*, 539 U.S. at 328, about how to best assemble a varied student body in order to achieve, in the training of future leaders, those very real but hard-to-quantify educational and societal benefits that arise from diversity.

Because judges are far less equipped to make those predictive judgments than professional university administrators, a greater level of deference under the good-faith formulation is warranted. *See, e.g.*, *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232, 234 (2000) (deferring to university administrators on distribution of mandatory student fees); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("Considerations of profound importance counsel restrained judicial review of the substance of academic decisions."). This Court's deference is particularly strong in the realm of higher education, because universities serve as laboratories of speech and thought, and thus occupy a "special niche in our constitutional tradition." *Grutter*, 539 U.S. at 329.

In any event, Texas's *Grutter*-tailored program withstands the strictest of scrutiny. Months of careful study preceded the State's adoption of a program where race was considered only as a factor thrice removed, Pet. App. at 159a, and operates as just one component of a comprehensive and individualized assessment of personal achievement, that itself is only one out of two composite scores considered in the overall admissions portfolio for each applicant. Such a carefully tailored program is a far cry from adoption of an "unyielding racial quota" to address an "amorphous claim" of past discrimination. *Croson*, 488 U.S. at 499.

The University's studied approach, grounded solidly in this Court's precedents, also sharply contrasts with *Ricci v. DeStefano*, 557 U.S. 557 (2009), a case in which this Court applied the more demanding substantial-basis-in-evidence standard. There, the Court rejected attempts by New Haven, Connecticut to justify remedial race-based action in fire department promotions. *Compare id.* at 591 (the City cannot justify race-based action based on a "few stray (and contradictory) statements"), with Pet. App. 34a ("[I]t is evident that the efforts of the University have been studied, serious, and of high purpose.").[17]

In sum, the Court should resist petitioner's invitation to convert the narrow-tailoring test into a trump card that invariably would result in federal courts overriding the judgments of state education officials. Public institutions of higher learning, as well as private ones, would be shackled in their pursuit of the benefits of a racially diverse learning environment, and the innovation, accountability, and educational excellence that are fostered by local control of public education—and by federalism principles generally—would be undermined.

While the narrow-tailoring test ensures that the means chosen closely fit the stated goal of race-conscious action, *Croson*, 488 U.S. at 493 (plurality opinion), it is not a mechanism by which courts get to second-guess politically accountable State officials at every conceivable turn. This Court has not applied the narrow-tailoring test in that fashion in other contexts. *See Grutter*, 539 U.S. at 326 ("Strict scrutiny is not 'strict in theory, but fatal in fact.'") (quoting *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 237 (1995)); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion) (The least restrictive means component of strict scrutiny in First Amendment cases should be applied "without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."). To do so here in the context of higher education would compromise the paramount interests of States in designing their higher education systems to serve the unique needs and interests of their jurisdiction.

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[17] Even if the Court were to find that the Fifth Circuit was overly deferential, the proper course would be to remand, so that the district court could determine, in the first instance, whether Texas had nonetheless satisfied its burden of demonstrating that its admissions program was sufficiently narrowly tailored.

2. Petitioner does not challenge *Grutter's* strong endorsement of the principle, first set forth in *Bakke*, 438 U.S. 265, that "student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U.S. at 325. The question presented by petitioner, in fact, assumes *Grutter's* correctness, asking only whether the University of Texas's policies are permissible under this Court's existing precedent, including *Grutter*. *See* Pet. at i. This Court, therefore, has no occasion to revisit *Grutter's* central holding. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

Considerations of stare decisis provide further reason for leaving *Grutter*—and States' faithful application of that decision in their education programs—untouched. This deep-rooted rule of standing by prior resolutions "promotes the evenhanded, predictable, and consistent development of [the law]" and "fosters reliance on judicial decisions." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Although stare decisis is not an inflexible command, it carries "such persuasive force" that the Court requires a "special justification" to depart from it. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal quotations omitted). Moreover, the "policies [at the heart of] the doctrine—stability and predictability—are at their strongest when the Court is asked to change its mind, though nothing else of significance has changed." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting); *see also CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (principles of stare decisis "demand respect for precedent" even when judicial methods of interpretation change, because otherwise "those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends").

This case presents no special justification to depart from *Grutter's* essential holding affirming the constitutionality of State officials' consideration of race as part of individualized, holistic university admissions practices intended to promote a diverse learning environment at institutions of higher education. "Nothing else of significance" related to race-based admission policies has occurred in the years since *Grutter* was decided. Furthermore, *Grutter's* holding (a) has proved workable in practice, *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004); (b) has engendered significant reliance interests by States, who have configured important governmental programs around it, *see Dickerson*, 530 U.S. at 443;

(c) remains consistent with current legal doctrine, *see Neal v. United States*, 516 U.S. 284, 295 (1996) and (d) has not been deprived of its force by changed factual circumstances, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 534 (2009) (Thomas, J. concurring).

a. *Grutter* has not proved unworkable, or "incapable of principled application." *Vieth*, 541 U.S. at 306. To the contrary, just as law enforcement agencies were able to adjust their practices based on *Miranda's* guidance, *Dickerson*, 530 U.S. at 443, state university officials have been able to adjust their admissions policies to follow *Grutter's* directive.

Nor has *Grutter* proven difficult for courts to apply. This is hardly surprising because *Grutter's* standards are judicially manageable and involve familiar constitutional principles. Application of strict scrutiny to assess whether a compelling governmental interest has been served by an appropriately narrowly tailored means is a test employed in a wide range of contexts. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (providing a systematic empirical study of strict scrutiny in the federal courts, at all levels, between 1990 and 2003, noting its use not only in suspect class analyses, but also in the areas of free speech, religious liberty, fundamental rights, and freedom of association).

b. *Grutter*'s guidance has become "embedded" in the education and admissions policies of the Nation's universities. *Dickerson*, 530 U.S. at 443. And supplanting that guidance with new directives now would only throw those policies into disarray. *See id.*; *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1319 (2012) (citing concern over "upsetting reliance interests protected by *stare decisis* principles"). For more than three decades, under *Grutter* and its forerunner, Justice Powell's opinion in *Bakke*, States have invested extensive resources in complying with this Court's constitutional judgment and relied on its guidance in fashioning constitutionally permissible race-conscious admissions programs.

Indeed, as this Court noted in *Grutter*, "Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." *Grutter*, 539 U.S. at 323; *see also* Brief from American Council on Education and 19 Other Higher Education Organizations in Support of Respondents, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 2006 WL 2882689, at *3 ("Relying on the [Court's] constitutional analysis * * * the nation's colleges and universities have included race and ethnicity among the traditional range of diversity-enhancing factors used in their admissions policies."). *Grutter's* endorsement of this approach assured them they were on the right track. In a constitutional system of federalism, a necessary counterpart of *Cooper v. Aaron*, 358 U.S. 1 (1958), is a firm recognition by the federal judicial system of the heavy reliance States place on court decisions in organizing their programs, investing taxpayer resources, and developing policies. A profound incursion on comity principles, disruption to governance, unsettling of state governmental programs, and loss of scarce resources can result whenever the constitutional rules are changed.

This reliance interest is well demonstrated by the history of Texas's efforts to comply with federal court decisions about its admissions practices. Texas was already forced to reverse course once, jettisoning its previous race-conscious admissions practice following the Fifth Circuit's 1996 decision in *Hopwood v. University of Texas*, 78 F.3d 932 (1996). *See* Pet. App. 17a-18a. Eight years later, in response to *Grutter*, Texas devoted more than a year to studying and analyzing the decision and formulating an admissions policy that complied with it by "adopt[ing] a policy to include race as one of many factors considered in admissions." *Id.* at 23a. Respondents were not alone in this regard. Countless institutions of higher education nationwide revised their admissions policies to meet *Grutter's* standards. *See, e.g.*, Peter Lehmuller & Dennis E. Gregory, *Affirmative Action: From Before* Bakke *to After* Grutter, 42 J. OF STUDENT AFF. RES. AND PRAC. 430, 451-456 (2004) (describing universities' efforts to stay true to *Grutter's* teachings).

Stare decisis concerns, moreover, are at their apex when publicly accountable state actors, such as respondents here, have shaped policies and invested significant public resources in reliance on this Court's precedents. An abrupt shift in the law or reformulation of *Grutter* less than a decade after it was decided would require Texas and other States to again switch gears, to again wipe the higher education admissions slate clean, and to again spend scarce resources reconfiguring vital state policies and programs. Such whipsawing of sovereign States and constant revision of rules in a context like education for which stability and long-term planning is particularly vital is deeply disruptive to State governments and their citizens. And in the context of public universities in particular, it raises concerns about undue federal interference in educational policymaking, a sphere traditionally ceded to the States. *See Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 87 (1907).

While this Court, of course, has the constitutional duty to enforce the Constitution's commands, federalism principles are equally grounded in the Constitution and demand that stare decisis principles apply with particular force when States across the Nation have invested so much time and resources in complying with this Court's directives. *See* Wendy Parker, *Connecting the Dots:* Grutter, *School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691 (2004) (arguing that principles of federalism and a recognition of the limits of judicial competency justify *Grutter's* idea of deference). Nothing in either *Marbury* principles or federalism principles should countenance a scheme in which the States find themselves subject to litigation and liability under 42 U.S.C. § 1983 for taking the steps prescribed by this Court and availing themselves of the programmatic opportunities authorized by this Court. In short, abandonment of *Grutter* would place universities in an untenable dilemma: risk budget-straining and resource-diverting litigation or abandon the diversity goals that are vital to enriching campus dialogue and improving the quality of higher education—goals that this Court expressly licensed States to pursue.

Businesses, too, have built up strong reliance interests based on *Grutter*, long recognizing that race-conscious admissions policies intended to promote a diverse learning environment in higher education yield a workforce that is better trained and equipped to thrive in a multicultural, globalized economy. *Grutter*, 539 U.S. at 330-331 ("[M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."); *see also generally Br. for Amici Curiae General Electric Co. and other Fortune-100 and Leading American Businesses in support of Respondents.*

In short, businesses and governments—both of which amicus Minority Media and Telecommunications Council works with and supports in its efforts to improve diversity in the media—are counting on institutions of higher learning being able to admit and train students from all walks of life and backgrounds to thrive in a society where ethnic, racial, and cultural boundaries are increasingly and necessarily blurred. Thus trained, a diverse pool of graduates will be better able to "compet[e] on an equal footing in [their] quest" to contribute to the Country. *Northeastern Fla. Chapter of Assoc'd. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 667 (1993).

Whether competing for government contracts, political office, scarce spectrum resources, venture capital, or employment, those with higher education will be better positioned to achieve their goals. Retrenchment in or reversal of *Grutter* will indisputably limit access to the Nation's top universities to many qualified students who, if admitted, would make important contributions to the learning environment. *See* Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. OF LABOR ECON. 1, 133-166 (2010) (using economic model to predict 10% decrease in minority representation at "most selective four-year institutions" if affirmative action is eliminated). Those educational opportunities, in turn, provide a pathway into corporate boardrooms and political office, and they plant the seeds for more volunteering and voting, higher earnings and job satisfaction, better parenting, lower social costs, and a host of other economic and social benefits. *See* Elizabeth Fuller, *Top 10 Benefits of a College Degree*, THE CHRISTIAN SCIENCE MONITOR, Oct. 28, 2010.[18]

c. Nor has legal doctrine changed so much since 2003 so as to render *Grutter* "irreconcilable" with current law. *Neal*, 516 U.S. at 295. The continued legal vitality of *Grutter* is underscored by this Court's most recent case involving race-conscious action, *Parents Involved in Community Schools. v. Seattle School. Dist. No. I*, 551 U.S. 701 (2007). There, the Court did not cast doubt on *Grutter's* essential holding that the promotion of diversity in higher education was a compelling governmental interest. *Id.* at 722-725. Rather, ruling on narrow grounds, the Court in *Parents Involved* held only that the K-12 student assignment plans at issue were unconstitutional because they often made race "determinative standing alone." *Id.* at 723.

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[18] *Available at* http://www.csmonitor.com/Business/2010/1028/Top-10-benefits-of-a-college-degree/Better-prepared-kids.

As the Court emphasized, "race [in those plans was] not simply one factor weighed with others in reaching a decision, * * * it [was] *the* factor." *Parents Involved*, 551 U.S. at 723. The Court thus concluded that the challenged K-12 plans functioned like unconstitutional quotas, *id.* (citing *Gratz*, 539 U.S. at 275 (2003)), rather than like the individualized, holistic admissions policies approved in *Grutter*. *Id.* at 722-23. The Court in *Parents Involved* also stressed that considerations unique to the higher education setting do not apply to K-12 education. *Id.* at 724-725. In short, *Parents Involved* confirmed, rather than "removed or weakened [*Grutter's*] conceptual underpinnings," *Neal*, 516 U.S. at 295 (internal quotation marks and citation omitted).

Because strict scrutiny demands a highly particularized analysis, "context matters." *Parents Involved*, 551 U.S. at 725. Just as *Parents Involved*, while striking down the specific program at issue, nonetheless reaffirmed *Grutter*, here, any determination regarding the constitutionality of Texas's policies under *Grutter* would not implicate the central holding of that case, much less be applicable to wholly different arenas, including race-conscious action in the administration of the mass media. In applying *Grutter*, as the petitioner requests, the Court's holding should be limited to the "unique context of higher education." *Parents Involved*, 551 U.S. at 725.

d. Finally, the facts of American life have not so drastically changed in the nine years since *Grutter* was decided to warrant its reexamination. *See Fox Television Stations*, 556 U.S. at 534. While Justice O'Connor in 2003 predicted the Nation would no longer need race-conscious affirmative action in 25 years, *Grutter*, 539 U.S. at 343, that ideal of equality remains elusive. A recent survey of Forbes's 500 list companies conducted by Sen. Robert Menendez's office, for example, found that only one out of seven corporate board members identifies as a racial minority, and among those companies' executive management teams, only 10.4% of team members identified as racial minorities. Sen. Robert Menendez, *Corporate Diversity Report*, 10, 19 (2010).[19] For the media companies surveyed, 18.6% of board members identified as a racial minority, but racial minorities were only 5.1% of executive management teams. *Id.* at 16, 25.

Such skewed ownership and management structures undermine the ability of media companies to best serve the interests of an increasingly diverse populace. Continued fostering of diversity in higher education is needed to increase the diverse pool of talent available to compete, on an equal footing, for ownership licenses and to occupy positions of leadership within the media industry. Greater diversity in higher education will also help to build the next generation of future media owners, programmers, broadcasters, and journalists—of all races and ethnicities—and to ensure that this next generation is equipped with the skills and training they need to communicate across racial divides and encourage civic engagement.

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[19] *Available at* http://www.menendez.senate.gov/imo/media/doc/CorporateDiversityReport2.pdf.

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Stated simply, the need for the "path to leadership [to] be visibly open to talented and qualified individuals of every race and ethnicity" applies with as much force today as it did a short time ago in *Grutter* "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry." *Grutter*, 539 U.S. at 332. Such a diverse set of leaders, in turn, will be best-positioned to contribute to an "uninhibited marketplace of ideas," *Red Lion Broadcasting Co.*, 395 U.S. at 388-390, in which broadcasters, serving as "fiduciaries for the public," provide "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press*, 326 U.S. at 20.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

AUG 13 2012

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF FOR *AMICI CURIAE* FORMER STUDENT BODY PRESIDENTS OF UNIVERSITY OF TEXAS AT AUSTIN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are a group of fourteen graduates of the University of Texas at Austin ("UT") who served as its student body Presidents during the academic years 1992 through 2012.[1] *Amici* urge the Court to affirm the Fifth Circuit's holding that UT's holistic admission plan is consistent with constitutional mandates.

As former UT student body Presidents[2] who have gone on to leadership positions in their professional lives, *amici* are uniquely positioned to comment on the important benefits stemming from diversity in higher education, as well as the detriments created by insufficient diversity.[3] They are also uniquely positioned to provide their perspectives on the degree to which student body diversity existed and did not exist during their attendance at UT.

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[1] This brief is submitted with the consent of the parties, who have filed with the Clerk of the Court blanket consents to the submission of *amicus curiae* briefs. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel have made monetary contributions to the preparation and submission of this brief.

[2] The University of Texas at Austin Student Government serves as the official student voice for the entire undergraduate and graduate student body to the UT administration, the Board of Regents, and the Texas Legislature. Pursuant to Section 3.33c of the Constitution of the Student Government of the University of Texas at Austin, "the [student body] President shall represent students before the administration of The University of Texas at Austin, the Board of Regents of The University of Texas System, the City of Austin, and the Texas Legislature."

Members of this group of *amici* attended UT during periods in which three different admissions policies were in place. They have gone on, within the state of Texas and other states, to serve in leadership positions in various professions, including law, finance, government, politics, architecture, education, college sports, and public interest. .

Amici who attended UT and experienced the effects of the admissions policy in place prior to 1996, when race was considered and was frequently outcome-determinative, include:

- Howard Nirken, who attended UT as an undergraduate student from 1989 to 1993, and served as UT's student body President from 1992 to 1993. Nirken later obtained his law degree and a master's degree in public affairs from UT. He currently practices corporate law and is a partner in an Austin, Texas law firm. He has also held various leadership positions in the Austin community.
- Eric Bradley, who attended UT as an undergraduate student from 1990 to 1994, and served as UT's student body President from

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[3] The information regarding and quotes of *amici* set forth in this brief are based on first-hand input gathered individually from each *amicus* and each *amicus* has approved the content of this brief.

1993 to 1994. Bradley was the first person in his family to attend college. After graduating from UT, he went on to obtain a law degree from the University of Virginia Law School. Bradley practices law in-house and resides in California.

- John Black, who attended UT as an undergraduate student from 1991 to 1995, and served as UT's student body President from 1994 to 1995. Black later obtained his law degree and a master's degree in public affairs from UT. He currently practices law in Houston, Texas, where he is a partner at his own law firm and holds various leadership positions in the Houston community.

- Marlen Whitley, who was a UT undergraduate student from 1993 to 1998, and a UT law student from 1998 to 2001. He served as UT's student body President from 1997 to 1998. He is a partner in a Houston, Texas law firm and practices corporate and securities law. Whitley has also served on a number of non-profit boards and has been actively involved in promoting diversity and economic empowerment in his community.

- Anna Lisa Holand Miller, who was an undergraduate student at UT from 1995 to 1999, and served as UT's student body President from 1998 to 1999. Miller went on to obtain a law degree from UT, after which she worked at the White House. Since 2006 she has been the Business and Operations manager of an investment partnership in her home town of McAllen, Texas, a city near the Mexican border.

Amici also include those who attended UT over the period 1997 through 2004. These *amici* experienced the educational environment after UT ceased considering race in admissions in the wake of *Hopwood v. Texas,* 78 F.3d 932 (5th Cir. 1996), and instead relied solely on the top 10% law enacted in 1997. In addition to *amici* Whitley and Miller, whose UT enrollment continued into this period, *amici* attending UT during this period include:

- Parisa Fatehi, who was an undergraduate student at UT from 1996 to May 2001, and served as the UT student body President from 1999 to 2000. After her undergraduate years, Fatehi worked for the federal government in Washington, D.C., and then went on to obtain a law degree and a master's degree in public affairs from UT. She has served on two municipal commissions and is currently an attorney for a nonprofit civil rights law firm and advocacy organization in California.
- Daron Roberts, who attended UT as an undergraduate from 1997 to 2001, and served as UT student body President from 2000 to 2001. After attending UT, Roberts went on to graduate from Harvard Law School and the Harvard Kennedy School of Government. Roberts' professional experience has included government work, including serving as an aide to a U.S. Senator. More recently, he has worked in coaching positions for NFL teams, and currently serves as an adjunct professor

and university football coach. He is also the founder of a non-profit providing SAT preparation, football skills training and life skills development to high school students.

- Von Matthew Hammond, who attended UT as an undergraduate from 1997 to 2003, and served as UT student body President from 2001 to 2002. Hammond became a lawyer and practiced transactional law for two years, after which he spent three years in Indiana state politics, working on political campaigns and as a lobbyist. He currently serves as the vice president and general counsel for the largest private high school in Indianapolis, Indiana.

- Danielle Rugoff, who attended the UT as an undergraduate from 2003 to 2007, and served as UT student body President from 2006 to 2007. She currently works as a director for a prominent foreign policy lobby.

- Andrew Solomon, who attended UT as an undergraduate from 2004 to 2008, and served as UT student body President from 2007 to 2008. He attended UT Law School from 2008 through 2011. He practices corporate law at an Austin, Texas law firm.

Finally, *amici* include more recent student body Presidents who attended UT in the years since 2005, when UT instituted and followed a holistic admissions approach in which race is but one factor among numerous others considered in certain admissions decisions. In addition to *amici* Rugoff and Solomon, whose enrollment continued into this period, these *amici* include:

- Keshav Rajagopalan, who attended UT from 2005 through 2010, and served as UT student body President from 2008 through 2009. He currently works as an associate for a major management consulting company.
- William O'Rourke, who attended UT as an undergraduate from 2005 through 2010, and served as student body President from 2009 to 2010. After graduation, he worked for an Austin City Councilmember as a policy intern. Mr. O'Rourke will enter Northwestern Law School this fall.
- Scott Parks, who attended UT from 2006 through 2011, and served as UT student body President from 2010 to 2011. He currently works as a designer in an architecture firm in Connecticut.
- Natalie Butler, who attended UT from 2007 through 2012. She served as the UT student body President from 2011 to 2012. In September, she will commence employment as a consultant for a major consulting firm.

No matter when they attended UT, all *amici* agree that diversity efforts at UT are a work in progress and that "critical mass" has not yet been achieved. At the same time, they are unanimous in their belief – based on their own experiences – that a racially diverse educational experience provides invaluable educational benefits that prepare students to be effective and successful in their careers and leadership positions. *Amici* believe that their perspectives, based on their experiences as UT students and student leaders, can be useful to the Court. These experiences confirm that student body diversity in higher education is a compelling state interest and further demonstrate that UT's current admissions policy has been and continues to be necessary to advancing that goal.

Amici organized for the sole purpose of conveying to the Court their experiences at UT and the educational benefits derived from learning among and from students of varied ethnic and racial backgrounds.

SUMMARY OF ARGUMENT

Amici submit this brief to provide the Court with the perspectives of past UT student body Presidents on their experiences with diversity at UT and the important impact of those experiences on their education and professional lives.

Amici's experiences over a period of 20 years verify UT's determination that minorities remain underrepresented in the student body. The consistent experience of *amici*, no matter when they attended UT, was that the student body was largely white, particularly in the classroom. Fortunately, *amici* were able to seek out and find experiences and interactions with students of diverse races and backgrounds, particularly through student government where diversity was significantly greater than in the student body at large. *Amici* cannot overstate the educational benefits that flowed from their experiences of working and interacting with students of diverse backgrounds. Diversity was not only of critical importance to their educational experiences but has also been highly beneficial to their post-graduate and professional lives.

Based on their experiences as former representatives of the UT student body, *amici* believe that UT, the flagship public university of the state of Texas, has a compelling state interest in seeking the educational benefits derived from a racially diverse student body. *Amici* concur with Justice Powell in *Bakke* and the majority in *Grutter* that "[n]othing less than the 'nation's future depends upon leaders trained through wide exposure' to ideas and mores of students as diverse as this Nation of many Peoples." *Grutter v. Bollinger,* 539 U.S. 306, 324 (2003) quoting *Regents of the University of California v. Bakke,* 438 U.S. 265, 313 (1978). *Amici* also believe that UT's minimal consideration of race as part of a holistic admissions process is assisting in achieving this compelling interest and is narrowly tailored to that end.

ARGUMENT

I. DIVERSITY IS A WORK IN PROGRESS AT UT

The collective experiences of *amici* student leaders who attended UT over the last 20 years demonstrate that although UT had made progress toward a more diverse student body, it has not yet achieved "critical mass" – the level necessary to realize the full educational benefits of diversity.

A. Affirmative Action Before *Hopwood*: 1992-1996.

Before the Fifth Circuit's *Hopwood* decision in 1996, UT was engaged in affirmative efforts to improve diversity in order to overcome the effects of its segregated history.[4] These efforts included an admissions process that selected students using both an Academic Index ("AI") and race. (App. 15a.)[5] UT had separate admissions committees that reviewed minority and nonminority applicants, and race was considered directly and was often a controlling factor in admission. (App. 16a and n.46.) UT's Fall 1996 freshman class – the last class selected under this methodology before it was invalidated by the *Hopwood* decision – included only 266 African-American students (4.1% of the overall class) and 932 Hispanic students (14.5% of the class). (J.A. 108a.)

These numbers represented progress in addressing historically low diversity, but UT still had few African-American and Hispanic students in the 1990's. In the sea of over 50,000 undergraduate and graduate students at UT, the number of minority faces visible in the crowd and available for diverse interactions was small. UT had not achieved sufficient diversity to provide the full educational benefits of a diverse student body that this Court has recognized is a compelling state interest. *Grutter v. Bollinger*, 539 U.S. 306; *Regents of the University of California v. Bakke*, 438 U.S. 265.

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[4] UT had been segregated pursuant to Texas law for 70 years, from its 1883 founding until 1950. The vestiges of *de jure* segregation lasted for decades beyond this, resulting in a lingering public perception that UT does not welcome nonwhite students. SJA 14a.

[5] References to "App." and "J.App." refer to the appendices submitted to the Court by Petitioner and the Respondents.

Indeed, *amici's* unanimous experience in the years leading up to the 1996 *Hopwood* decision was that diversity was minimal. *Amici* entering UT during these years were disappointed by the racial homogeneity of the largely white student body. One, who had attended a fairly diverse high school, was "shocked" by the lack of diversity. Minorities remained isolated and often did not speak up in class, and minorities and whites engaged in largely segregated activities outside the classroom.

The lack of diversity was particularly pronounced in classrooms at UT. Classes, particularly smaller classes, were made up of white students for the most part. It was the exception, rather than the rule, to have minorities in a class.

The homogenous nature of many UT classes equated to missed educational opportunities. *Amici* recall that, even when a class included minorities, minorities often did not participate actively in class discussion. A number of minority *amici* recall that, when they felt different from others in a classroom setting, they felt isolated, inhibited, and were sometimes reluctant to speak up in class. These experiences are consistent with this Court's recognition that one important educational benefit of diversity is lessening the isolation of minorities and encouraging their participation and sharing of diverse views in the educational setting. *Grutter,* 539 at 336; *Bakke,* 438 at 323.

In addition to insufficient diversity in the classroom, *amici* recall that minorities and Caucasian students led mostly separate lives outside the classroom, rarely engaging in multicultural activities together. This further limited students' opportunity to fully experience the educational benefits that stem from diversity.[6]

UT's efforts to provide students the educational benefits of diversity were also hampered in the 1990's by unfortunate and well-publicized racial incidents on campus. In the late 1980's and early 1990's, racial tensions arose over apartheid policies in South Africa and two well-publicized racial incidents on campus: one involving "Sambo"[7] themed activities by an all-white fraternity and another involving a racial epithet depicted on a float in UT's annual Round-Up parade. These incidents led to racial protests on campus and perpetuated a public perception that UT was not open or welcoming to minorities. *Amici* of color recall that they attended UT despite these racial incidents for the educational opportunities available to them at UT, but that others questioned their choice to attend the university.

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[6] An undergraduate's educational experience and preparation for success in post-graduate jobs and leadership roles is not limited to the classroom, and a great deal of learning in universities occurs outside the classroom in social and extracurricular settings. *See Bakke,* 438 U.S. at 313; *Christian Legal Society v. Martinez,* 130 S.Ct. U.S. 2971, 2989 (2010).

[7] "After the annual parade on April 6, 1990, a fraternity decorated one of the floats with inflammatory racial slurs. Another fraternity sold T-shirts for a basketball tournament with an image of Michael Jordan's body and a Sambo character's head. ... The Sambo character portrayed African-Americans as lazy and with ape-like facial features. The incidents took place three days after the student body elected Toni Luckett to be its first black president..."

Despite disappointment with UT's level of diversity in the years before the *Hopwood* decision, *amici* from those years were able to and did actively seek out opportunities for interaction with students of different backgrounds. Student government was one such arena that offered these opportunities. *Amici* were also keenly aware of and actively assisted UT in its efforts to make UT more diverse and a welcoming place for students of different races and backgrounds. For example, members of the *amici* group were involved in efforts to establish a multicultural information center at UT and initial efforts that eventually led to UT establishing a Vice President position to oversee diversity efforts.

B. Diversity After *Hopwood* and Under the Top 10% Law: 1997-2004

In 1996, the U.S Court of Appeals for the Fifth Circuit invalidated UT's practice of considering race in admissions in *Hopwood v. Texas*, 78 F.3d 932. For

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(http://www.dailytexanonline.com/news/2011/04/13/racial-conflicts-tarnish-history-roundup) (Last visited 8/8/12.)

UT, which had sought to improve diversity to overcome not only the lingering effects of its segregated history but also to recover from the effects of recent racial incidents on its campus, *Hopwood* added to the public perception that UT was not a welcoming place for minorities. Minority enrollments declined, and although *amici* from this era took advantage of and benefited from the opportunities that existed for encounters with students of diverse backgrounds, they lamented the nearly immediate setback to UT's diversity efforts.

As the years went on, the impact of the *Hopwood* decision continued to hamper UT's ability to attract and enroll a racially diverse undergraduate student body. In 1997, Texas enacted the top 10% law, under which minority admissions eventually recovered, but only to the relatively sparse concentrations that UT had managed to achieve pre-*Hopwood*. *See* JA 127a, SJA 25a, SJA43a.

Amici attending UT during this period, like their predecessors, were disappointed that the student body remained largely white and frustrated with the lack of diversity. The lack of diversity was especially obvious to *amici* who had attended high schools with significant numbers of minority students. Their experiences are consistent with the student feedback that UT received in its 2003-2004 assessment that diversity was wanting at UT. JA 22a, 267-68a, 432a. They are also consistent with UT's 2004 conclusion after performing this assessment that it had not obtained critical mass under the top 10% law. SJA 23a-24a.

Like their predecessors, *amici* who were students during this period attended classes that were mostly homogenous. One *amicus* recalls that most of his courses had 20 to 30 students, with very few minorities. Another noted that her classes decreased in diversity as she progressed from entry level lectures to advanced discussion groups. This decreased the benefits of group discussions, and to this *amicus'* mind, "resulted in a failure to train students to be 'citizens of the world' and 'future thinkers.'"[8]

Whites and nonwhites continued to have limited social interactions outside the classroom. One notable exception was student government, which was significantly more diverse than the student body as a whole. It was here in student government that *amici* experienced the most pronounced benefits from interactions with students from different racial and cultural backgrounds. One *amicus,* whose predecessor as student body President was African American, recalls that his predecessor engaged and inspired the UT African-American community as well as others to become more involved in student life and student government. Another, observing the impact of a predecessor who was Hispanic, similarly recalls the significant positive impact this President had on the UT campus in general and on the Hispanic student population in particular.

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[8] These reports are consistent with UT's 2004 diversity assessment, which found that in 2002, 90% of undergraduate classes with 10-24 students had zero to one African-American students, and 40% had zero to one Hispanic students. In larger classes of 25-49 students, 70% had zero to one African-American students. SJA 140a.

Some *amici*, however, note that "lingering racial ignorance" persisted at UT. One *amicus* noted that UT has had a "difficult and often hurtful" racial history, whose legacy is an environment that can be perceived to be unwelcoming or uncomfortable for minority students. *Amici* of color felt a special obligation due to their race to respond to racial incidents and to help steer UT's diversity efforts to make UT more welcoming for minorities. This was both a blessing and a burden, as noted by *amicus* Marlen Whitley:

> Part of the blessing of the entire experience of being a student at UT was the ability to fight for and lead certain causes and to work collaboratively with others to help usher in change. Conversely, part of the burden for many students of color was the same thing that helped us lead these charges – we were often relied upon to address the problems and create solutions, which meant that students of color were part-time students and part-time administrators.

C. The Holistic Admissions Era: 2005 to the Present

In 2003, this Court issued its decision in *Grutter*. After completing a comprehensive assessment of its diversity goals and statistics, beginning with the 2005 admissions cycle, UT engaged in a holistic review of applicants who were not eligible for admission under the top 10% law. One factor that was permissibly considered in this review, pursuant to *Grutter*, was race. *See* JA397a, SJA 23a-33a, 432a.

Amici who served as UT student body Presidents in this period experienced and benefitted from the improvement in the racial composition of the student body after UT changed its admissions policy. At the same time, most believe that UT's overall campus diversity was still insufficient for an optimal learning environment. There is still progress to be made.

One recounts being frustrated by an "overall lack of depth of diversity." Although there were many student organizations with a specific cultural or ethnic focus, this *amicus* found that the surface appearance of diversity did not reflect the reality that there were few faces from other racial and ethnic backgrounds in the classroom.

Another notes the "incredible importance" of diversity in the classroom, because students seeing minority faces become "visually aware" of diversity. That visual awareness makes the classroom stimulating and creates an environment in which students are comfortable to share ideas. In classes with few or no minorities, "people did not speak up" because they looked around and saw similar faces and assumed the existence of similar beliefs. This led more than one *amicus* to feel insufficiently challenged to understand and learn about different belief systems. *Amici* from this period note that although more diversity in the classroom had been achieved, many classrooms remained entirely white or only minimally diverse. There were exceptions, such as classes involving cultural topics, in which minority representation notably increased. But many liberal arts, upper level classes, and honors classes remained largely homogeneous.

Amici in this most recent group also perceived that the student body remained largely segregated outside the classroom, with the low level of minority participation in student clubs and extracurricular activities. As student leaders, they were frustrated by this lack of diversity in extracurricular activities. Several *amici* point to the reality that some racial and cultural groups on campus have remained isolated, with limited interaction with other groups in the student body outside of the classroom, preventing these groups from learning from one another. Because of this current reality, the need for diversity in the classroom is even greater.

Several *amici* experienced the persistence of racial tensions on campus, but were gratified that these tensions were addressed openly and that positive results followed. One recounts an incident when white students attended a fraternity party in blackface, and African-American students and student groups became upset. The incident, however, led to a constructive dialogue, in which white fraternity members and black students came together to discuss the issue, learn from each other, and try to understand each other. This "was a truly powerful moment – something everyone learned from" that had an "impact on many who witnessed and participated in it" in understanding the point of view of those from different backgrounds.

Another *amicus* describes his experience that UT's past history as an elite white institution is embodied in its campus architecture and memorials and hence the specter of this history remains present.[9] In a sign of progress, UT decided to change the name of a residence hall originally named after a man described by the *amicus* as a "known racist,"[10] an action that sparked a valuable dialogue about creating an inclusive environment on campus and presenting an inclusive and diverse UT student body to the outside world. *Amici* credit the increased diversity on campus with the positive outcomes that resulted from these incidents – outcomes that could not have occurred in a student body in which minorities were less represented.

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[9] To this day, UT has "various tributes to the Confederacy on the South Mall....The mall includes bronze statues of four leaders of the Southern cause, including Jefferson Davis, president of the Confederate States, and Robert E. Lee, the chief general. The Littlefield Fountain, which anchors the mall and at first blush appears to be a generic war memorial, also glorifies the Confederacy, as an inscription on a stone wall makes clear without actually mentioning slavery: 'To the men and women of the Confederacy who fought with valor and suffered with fortitude that states' rights be maintained.'" (http://www.statesman.com/news/local/questions-linger-regarding-confederate-statues-at-ut-711436.html.) (Last visited 8/9/12.)

[10] "The University of Texas System Board of Regents [voted] to change the name of Simkins Residence Hall on Thursday...the dormitory, named for a UT law professor who also was a Florida Ku Klux Klan leader..." (http://www.statesman.com/news/local/ut-system-regents-vote-to-rename-simkins-hall-805569.html.) (Last visited 8/9/12.)

The theme from the experience of these *amici* is that there have been real improvements in the creation of a more diverse student body. Those improvements have made it possible for UT to grow from even difficult racial incidents. The progress that has been made post-*Grutter* stems from UT's ability to use a flexible, individualized holistic admissions process. Yet *amici* also agree that while progress has been made, efforts must continue so that the educational benefits of diversity can be fully realized.

This Court has recognized that context matters in connection with the consideration of race under the Equal Protection Clause. *Grutter*, 539 US at 327. UT's consideration of race in the admissions process must be viewed in the context of its First Amendment interest in composing a student body in furtherance of its mission. *Bakke*, 438 US at 312-313. That mission is affected, in part, by UT's history of *de jure* racial segregation and recent incidents on campus that demonstrate the need for continued dialogue about racial issues. The historical backdrop to UT's holistic admissions program is not ancient history, but, as reflected in the experience of *amici*, involves racial incidents that extended into the 1990s and even 2000s. UT has not yet attained the critical mass of students needed to fully attain the educational benefits of diversity, and its continued efforts to nurture diversity through its holistic admissions process continues to serve this compelling state purpose.

II. *AMICI'S* EXPERIENCES CONFIRM THAT STUDENT BODY DIVERSITY IS A COMPELLING STATE INTEREST.

This Court's precedent recognizes that student body diversity is a compelling state interest that can justify the use of race in admissions due to the "substantial, important, and laudable educational benefits" that flow from diversity. *Grutter,* 539 U.S. at 328. These educational benefits include, among other things, creating an environment in which a "robust exchange of ideas" can occur by promoting cross-racial understanding, breaking down racial stereotypes, reducing isolation that can result in a lack of participation by minorities, better learning outcomes, and better preparation of students to enter a diverse workforce and society in today's increasingly global marketplace. *Grutter,* 539 U.S. at 324, *citing Bakke,* 438 U.S. at 318. *Amici's* universal experience confirms the significant benefits flowing from diversity.

A. *Amici* Had Rich Experiences of Diversity Through Student Government

Although *amici* generally experienced the UT student body as insufficiently diverse, *amici* nonetheless had numerous highly beneficial experiences with those from different racial and cultural backgrounds. Regardless of when they attended UT, *amici* actively sought out exposure to students from other racial and ethnic backgrounds, particularly through participation in student government. For most, it was this student government experience that provided the greatest opportunity for interaction with students from diverse backgrounds.

Over the past 20 years, UT student government has included a more diverse mix of students than other extracurricular activities at UT. Participating in student government allowed *amici*, far more than the average UT student, to interact with diverse students of different races, ethnicities, religions, and socioeconomic backgrounds. These interactions exposed *amici* to different viewpoints and enhanced *amici's* ability to be comfortable around people from different walks of life, a critical learning experience for future leaders.

For those who had not previously been exposed to peers from different backgrounds – who before attending UT had lived in a homogenous "bubble" – their UT experience was life changing. A white *amicus*, who had grown up in a small, rural, racially homogeneous Texas town, noted that in student government, he worked with minorities he had not encountered in his hometown, and his overall educational experience benefitted as a result. Their student government experiences taught *amici* the importance of seeking out different perspectives in analyzing, weighing and making decisions.

Many note that individuals not involved in student government did not have the same opportunity for interaction with students of diverse backgrounds and as a result did not reap diversity's educational benefits. Indeed, one *amicus* considers the exposure he had to diversity as UT Student Body President a "gift."

Outside of student government and some classes, however, opportunities for significant exposure to and interactions with those from different racial and ethnic backgrounds were not abundant. This led a number of *amici* to independently express concern with how easy it was at UT for white students to remain in a "bubble" of their own race. This was unfortunate because an important purpose of a college education is exposure to and learning about the larger world. In the words of one *amicus*, "college is the place you go to learn to take the next step out into the world."

B. *Amici's* Experiences of Diversity in the Classroom Were a Key Component of Their UT Education

Amici view their exposure to different races and cultures as being among the most valuable of their educational experiences. They often learned the most hearing the perspectives of peers with backgrounds different than their own. In the words of one *amicus*, diversity, including diversity of race, socioeconomic class, and national origin, translated into a broad range of opinions that made classes "worth attending." He learned that "we are all just human" from this experience and firmly believes that there is "no other way to learn this than having conversations with people from different backgrounds." Many *amici* recall classroom discussions that literally opened their eyes to other points of view. These expressions challenged *amici* with new ideas and experiences.

For example, an *amicus*, who is a recent UT graduate and a government major, valued hearing the perspectives of students of different racial backgrounds about political issues and campaign tactics. One classroom discussion, for example, addressed President Obama's campaign tactics and how he communicated differently to different racial constituencies. Without diversity, that discussion would not have been as effective or enlightening.

An *amicus* of Hispanic descent gives the example of a discussion in which he and a white student exchanged differing perspectives about Texas state history. The *amicus*, who had spent some time living in Mexico, shared that in the view of some Mexicans, Texas was formerly Mexican land wrongly taken from Mexico. This viewpoint had been unknown to the white student, who had been taught that Sam Houston victoriously fought off the Mexicans to form the state of Texas. This sharing of perspectives led to an interesting conversation and benefitted both students.

Many of the *amici* of color also found profound recognition and acknowledgement when they felt free – sometimes for the first time in their lives – to express their perspectives to their non-minority peers. One *amicus* recalls taking an African-American studies course with a significant number of white students in it. As a younger student in a predominately Caucasian school, this *amicus* had often felt isolated, uncomfortable, and afraid to speak out during certain discussions of literature and history. In his African-American Studies course at UT, however, the presence of interested white students made him feel like a weight had been lifted from him and made him eager to share with them his heritage and culture.

The discussions given as examples above are exactly the kind of discussions that promote cross-cultural understanding and result in the kind of important educational benefits that have been recognized by this Court. *Grutter*, 539 U.S. at 334.

The critical importance of diversity in education is clear to all *amici*. As *amicus* Marlen Whitley observes:

> If you think of all of the great artists throughout the history of mankind, not one has painted a masterpiece using only one color. Similarly, no campus community can reach its potential without the inclusion and participation of an array of students from all backgrounds. [T]his particular notion holds true for public universities.
>
> [D]iverse environments provide for more meaningful discussion, problem solving and ultimately better service.

Another *amicus* sums it up this way: interacting with others from different racial, ethnic and religious backgrounds is essential for training "world citizens."

C. Their Experiences with Diversity at UT Have Enhanced *Amici's* Post-Graduate and Professional Lives

Amici's experiences with diversity have proven immensely valuable after graduation from UT, including in their careers and leadership positions, where they must effectively interact with diverse colleagues and clients in an increasingly global marketplace. As one *amicus* describes it, "the U.S. is a melting pot, and especially as younger generations enter the diversifying workforce, we have to learn how to work with one another, understand one another, and appreciate backgrounds and identities different than our own."

Amici who went on to graduate and professional school found that their experiences with diversity at UT were important to their success. One *amicus* found that his experiences working with and getting to know individuals with different racial backgrounds while an undergraduate was "crucial in law school" as it enabled him to see and understand different perspectives. He also credits his undergraduate UT experience with enabling him to write better exams in law school because he could consider and offer different perspectives in crafting his response.

Amici have used these diverse experiences to be more effective and successful in their professional endeavors. One *amicus* reports that her UT experiences were particularly valuable in her work at the White House on domestic policy matters. She credits her exposure at UT to different people, ideas, and situations with helping her better understand and analyze various domestic policy issues, including issues of education, transportation, healthcare and immigration.

Another *amicus* who worked for a Texas State Senator after law school, focusing on higher education issues, similarly found that learning and working with racially diverse individuals in undergraduate classes and student government gave him perspective and background that allowed him to participate and contribute in policy discussions concerning admissions and budget issues. He continues to benefit from these experiences in his current role as a corporate lawyer, where they have facilitated his ability to work with others in his firm and in his practice.

An *amicus* who now serves as an executive and in-house counsel at a large urban high school echoes these perspectives. He credits his exposure to diversity at UT with his effectiveness in that role. That experience has enabled him to better understand and even anticipate concerns specific to certain constituent groups and to work in and support racially diverse communities in both political and educational contexts. He feels strongly that one "cannot fake" an understanding and comfort with diverse races, and that promoting racial diversity is a basic "human interest."

Several *amici* have found their UT diversity experiences essential in their management consulting careers. Management consultants work daily with clients in the public and private sectors, many of whom are minorities and others with diverse backgrounds. They note that at UT they learned the interpersonal skills and understanding needed to relate and understand these clients. Specifically, learning from UT peers who identify as Black or Hispanic taught them how to interact and operate in different situations. They use what they learned at UT daily.

Not surprisingly, those *amici* whose professional work involves work in diverse communities also find that their experiences at UT interacting with students of diverse backgrounds have provided an essential foundation for their work. One, for example, is involved in a community program tutoring and mentoring underprivileged students from Chicago's South Side, many of whom are African American. Because of his experiences at UT, he is able to connect with these students and believes that, were it not for what he learned at UT, he would not understand the importance of this work or have the ability to truly connect, which is necessary to be effective in this work.

Amicus John Black sees building and benefitting from diversity in the educational setting as a challenge similar to making a quilt:

> An award winning quilt is not made of just one color. You want to have different colors, fabrics, and textures to build a truly amazing quilt. If too much of your quilt looks the same, you will not have a robust, colorful, unique quilt.

His strong belief that effective leadership requires exposure to diverse viewpoints is consistent with this Court's precedent. As this *amicus* states:

> "You can't be effective in a leadership role without being willing and able to step out of your square on the quilt. You can't be an effective leader by telling others that their square on the quilt has to look like your square."

In short, it is *amici*'s strongly held conviction based on personal experience that important educational benefits arise from meaningful diverse interactions on campus and in the classroom.

CONCLUSION

The educational benefits of diversity are clear to these *amici*. Attaining the educational benefits of a diverse learning environment is not easy – there are many challenges that UT and other institutions face in trying to provide these educational benefits to their students. A holistic admissions review policy consistent with the *Grutter* framework is an important part of this work. *Amici* strongly support UT's efforts to make UT a more welcoming and inclusive institution to people of all backgrounds and to provide the framework for greater diversity and more enriching learning environment, both in and out of the classroom.

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Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* FORTUNE-100 AND OTHER LEADING AMERICAN BUSINESSES IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are several of America's largest companies.[1] A similar group of significant businesses filed a brief in this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which this Court cited and relied upon in its decision, *see id.* at 330.[2]

Amici recruit employees who are graduates of the University of Texas at Austin ("UT") or similar leading institutions of higher education. Indeed, *amici* – who collectively have revenues in the trillions of dollars – hire thousands of graduates of UT and other major public universities every year.

As a result, *amici* have a vital interest in this case. *Amici* are directly affected by the admissions policies at UT and similar colleges and universities, and they care deeply about what kind of education and training those institutions offer their students.

Amici file this brief to reaffirm the significance of diversity in higher education to America's largest businesses. In addition, although *amici* do not take a position on the constitutionality of the specific practices at issue here, *amici* do address certain troubling aspects of Petitioner's strict-scrutiny analysis that, if accepted, could render illusory the Court's affirmation of diversity as a compelling state interest.

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[1] All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amici* signing this brief or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The companies participating in this *amicus* brief came together through an informal, ad hoc process. The strongly held views set forth in this brief, approved at senior levels of each participant, likely are shared by many additional companies as well.

SUMMARY OF ARGUMENT

1. This Court should reaffirm its holding in *Grutter* that the conscious pursuit of diversity in the admissions decisions of institutions of higher education – including diversity based upon race, religion, culture, economic background, and other factors – is a compelling state interest. The principles established in *Grutter* are more important today than ever. For *amici* to succeed in their businesses, they must be able to hire highly trained employees of all races, religions, cultures and economic backgrounds. It also is critical to *amici* that *all* of their university-trained employees have the opportunity to share ideas, experiences, viewpoints and approaches with a broadly diverse student body. To *amici*, this is a business and economic imperative.

Today even more than when *Grutter* was decided, *amici* operate in a country and world economy that are increasingly diverse. *Amici* have found through practical experience that a workforce trained in a diverse environment is critical to their business success. *Amici* are dedicated to promoting diversity as an integral part of their business, culture, and planning. But *amici* cannot reach that goal on their own. The only means of obtaining a properly qualified group of employees is through diversity in institutions of higher education, which are allowed to recruit and instruct the best qualified minority candidates and create an environment in which *all* students can meaningfully expand their horizons.

2. *Amici* recognize that strict scrutiny must be applied in assessing the constitutionality of the specific practices employed at UT. *Amici* are not in a position to know or evaluate the legality of specific admissions procedures of UT or any other particular university. But two principles are important to *amici* as the Court evaluates the specific issues in this case.

First, the strict-scrutiny test must not be applied by this Court in such a way as to be inevitably "fatal in fact" in the context of the pursuit of diversity in higher education. Within the confines of a rigorous constitutional analysis, there must be room for a university to decide that a particular approach to admissions is necessary to achieve important educational goals. For instance, a university should be able to evaluate whether students enrolled in particular subsets of the university are realizing the educational benefits of diversity. A university may have a business college or engineering department – both particularly important to *amici* – lacking a "critical mass" of underrepresented minorities and needing an admissions plan that considers race along with applicants' other personal characteristics. Without such a critical mass, none of the business or engineering students, whether they are minorities or not, are likely to have the kinds of diversity-related academic experiences that *amici* believe will help prepare them for success in the corporate world.

Second, higher-education diversity must not be treated as a simplistic numbers game. Focusing solely on percentages of minorities in an entering class, and determining that a certain percentage is necessarily "sufficient" as a matter of law – as Petitioner suggests here – harkens back to the very quota systems that *Bakke* and *Grutter* expressly rejected.

Rather than treating diversity in purely numerical terms, *amici* urge the Court to find an analogy in *amici's* own hiring decisions. Those decisions take into account the many different ways that a particular candidate may be able to contribute to the organization. *Amici* are not attempting to reach some numerical quota of minority employees; they would not be satisfied, for instance, by simply hiring a certain *number* of "diverse" employees. Rather, *amici* seek to hire the most qualified group of employees, while taking into account all of the characteristics of those employees that will enrich the *amici's* workplaces and strengthen their businesses.

ARGUMENT

I. The Pursuit of Diversity in Higher Education Remains a Compelling State Interest – Even More So Than When the Court Decided *Grutter*.

In *Grutter v. Bollinger*, 539 U.S. 306, this Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325; *see also id.* at 328. In so doing, the Court relied in part on the views of "major American businesses," which filed a brief making clear "that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330 (citing Brief for 3M et al. as *Amici Curiae*).

In the case at hand, Petitioner and a number of her *amici* ask the Court to overrule *Grutter*, pointing specifically to the holding on the importance of diversity. *See, e.g.*, Pet'r Br. at 53; Asian Am. Legal Found. Br. at 36; Pacific Legal Found. Br. at 24. The major American businesses that are signatories to this brief urge the Court to reject this argument and to reaffirm that diversity in university admissions is a compelling state interest.

1. As many of the *amici* here explained in the brief they filed in *Grutter* ten years ago, people who have been educated in a diverse setting make valuable contributions to the workforce in several important ways. Such graduates have an increased ability to facilitate unique and creative approaches to problem-solving by integrating different perspectives and moving beyond linear, conventional thinking; they are better equipped to understand a wider variety of consumer needs, including needs specific to particular groups, and thus to develop products and services that appeal to a variety of consumers and to market those offerings in appealing ways; they are better able to work productively with business partners, employees, and clients in the United States

and around the world; and they are likely to generate a more positive work environment by decreasing incidents of discrimination and stereotyping. Brief for 3M et al. as *Amici Curiae* at 7 (*Grutter*, No. 02-241); *see also, e.g.*, General Motors *Amicus* Br. at 2 (*Grutter*, No. 02-241).

In light of these advantages, the *Grutter* Court concluded that the only way to develop "the skills needed in today's increasingly global marketplace" is "through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330; *cf. Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The Court therefore endorsed Justice Powell's statement in *Bakke* that "nothing less than the '[N]ation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter*, 539 U.S. at 324 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (quoting *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967))).

2. *Amici*'s interest in and need for diversity – and, by extension, the state's interest in diversity in higher education – has become even more compelling as time has passed. American corporations must address the needs of an increasingly diverse U.S. population and a growing global market, and they need a workforce trained in a diverse environment in order to succeed in these arenas. *Amici* have also found over time that the benefits of diversity are particularly important to their business success in a challenging economic environment.

First, the U.S. population is increasingly diverse, and it is important to *amici* to be able to hire the best educated and trained students of all backgrounds. Since *Grutter* was decided, minority populations have grown at a significantly faster rate than the non-minority population. The population of those who reported their race as "white" grew only 1% between 2000 and 2010.[3] In that same period, the Hispanic population grew by 43 percent, increasing from 35.3 million people to 50.5 million people; the African-American population grew by 12 percent, increasing from 34.7 million people to 38.9 million people.[4] This trend is particularly pronounced in Texas, where growth in the Hispanic and African-American communities drove rapid population growth over the last decade. *See, e.g.*, Ross Ramsey et al., *Minorities Drove Texas Growth, Census Figures Show*, TEX. TRIB., Feb. 18, 2011.

Given these changes in the population as a whole, it is not surprising that the U.S. workforce has also grown more diverse in recent years. In 2000, 72% of the workforce in the United States was "White non-Hispanic"; by 2010, that percentage had decreased to

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[3] *See* U.S. Census Bureau, *Overview of Race and Hispanic Origin: 2010*, 2010 Census Briefs, at 3 (March 2011), *available at* http://www.census.gov/prod/cen2010/ briefs/c2010br-02.pdf.

[4] *See id.* at 4; *see also* U.S. Census Bureau, *The Black Population: 2010*, 2010 Census Briefs, at 3 (Sept. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010 br-06.pdf.

67.5%.[5] The Bureau of Labor Statistics projects that in 2020 that percentage will have further decreased to 62.3%.[6]

Now more than ever, then, *amici's* employees need to be able to work successfully with a diverse group of co-workers, supervisors, subordinates, counterparts at other U.S. businesses (including distributors, suppliers, and competitors), and U.S. customers. The rich variety of ideas, perspectives, and experiences to which both minority and non-minority students are exposed in a diverse university setting, and the cross-cultural interactions that they experience, are essential to the students' ability to function in and contribute to the increasingly diverse community in the United States. *See, e.g.*, William J. Holstein, *Diversity Is Even More Important in Hard Times*, N.Y. TIMES, Feb. 14, 2009, at B2 (stating that "[i]n the United States, the multi-cultural consumer today is over a third of the population, and 80 percent of the population growth").

Second, in the years since *Grutter* was decided American businesses have continued their rapid expansion into the global marketplace. U.S. companies increasingly sell their goods and services abroad and manage extensive operations in foreign countries. Indeed, "[i]n 2009, worldwide American companies in the Standard & Poor's 500 (S&P 500) had more than 55 percent of total income earned outside the United States." Business Roundtable, *Taxation of American Companies in the Global Marketplace: A Primer*, at 4 (April 2011), *available at* http://businessroundtable.org/uploads/studies-reports/downloads/Taxation_of_American_Companies.pdf.[7]

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[5] Bureau of Legal Statistics, U.S. Dep't of Labor, Employment Projections – Civilian Labor force by age, sex, race, and ethnicity, Table 3.4, *available at* http://www.bls.gov/emp/ep_table_304.htm (last visited July 23, 2012).

[6] *See id.*

For example, *amicus* Procter & Gamble has employees located in and serving customers in 75 different countries. Hundreds of American-trained employees are working for Procter & Gamble in those countries. More and more, *amici* operate and compete in a global environment, and therefore need employees who can effectively serve and work together with people from many different cultures.

Finally, *amici* have found that the benefits they realize from a workforce educated in a diverse university setting are particularly critical in difficult economic times. In that kind of economic environment, competition becomes more intense, and there is a greater need to think creatively and come up with innovative approaches. Those are exactly the skills that are developed in a diverse and vibrant university environment. *See Grutter*, 539 U.S. at 330; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-14 (1978) (opinion of Powell, J.). Particularly when economic times are tight, "[i]t's difficult, if not impossible, for homogenous" groups "to challenge and offer different perspectives, unique experiences, and the broad-based wisdom" that makes all levels of a company "as effective as they can be." Holstein, *supra*, at B2.

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[7] *See also, e.g.*, Prepared for the Joint Economic Committee by the Council of Economic Advisers, 112th Cong., 2d Sess., Economic Indicators, at 35 (May 2012) (value of U.S. exports has grown from $1023.5 billion in 2003 to $2105.1 billion in 2011), *available at* http:// www.gpo.gov/fdsys/pkg/ECONI-2012-05/pdf/ECONI-2012-05.pdf; *see also* Press Release, U.S. Dep't of Commerce, U.S. Census Bureau News, *A Profile of U.S. Importing and Exporting Companies 2009-2010* at 1-2 (2012), *available at* http://www.census.gov/foreign-trade/Press-Release/edb/2010/ edbrel.pdf.

All of this is not just a matter of abstract ideas, but of dollars and cents as well. *Amici* seek to strengthen their businesses and to grow; they seek to increase their revenue and the return to their shareholders. *Amici* support the findings of extensive research that indicates that a commitment to diversity, with all of its attendant benefits, is "associated with increased sales revenue, more customers, greater market share, and greater relative profits." Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIOLOGICAL REV. 208, 219 (2009).[8]

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[8] *See also, e.g.*, Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (2007) (collecting studies demonstrating that diversity leads to more productive and innovative solutions); Stanley F. Slater et al., *The Business Case for Commitment to Diversity*, 51 BUSINESS HORIZONS 201 (2008) (concluding that a true commitment to diversity throughout an organization fosters better board decisions, increases connections with customers,

Thus, it continues to be true that – as the Court observed in *Grutter* – the benefits of diversity in the university setting are "not theoretical but real." 539 U.S. at 330-31. *Amici* have found, through practical experience, that a workforce trained in a diverse environment is important to their business success – and that a critical means of obtaining a properly qualified group of employees is through diversity in institutions of higher education, which recruit and instruct the best qualified minority candidates and create an environment in which students of all backgrounds can meaningfully expand their horizons.

3. *Amici*'s own actions attest to the importance they place on a workforce trained in a diverse environment. *Amici* have devoted substantial financial and human resources to create and maintain a diverse workforce – efforts that have only

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and leads to innovation); Lisa H. Nishii & David M. Mayer, Ctr. for Advanced Human Res. Studies, Cornell Univ., *Paving the Path to Performance: Inclusive Leadership Reduces Turnover in Diverse Work Groups*, Feb. 2010 (emphasizing the importance of managers who are adept at leveraging the benefits of diversity); Marcus Robinson et al., *Business Case for Diversity with Inclusion*, WetWare, Inc., 2003 (explaining the importance of diversity in business to respond to increasingly diverse customer bases); Carol Hymowitz, *The New Diversity*, WALL ST. J., Nov. 14, 2005, at R1 (describing how PepsiCo, IBM, and Harley-Davidson are leveraging diverse workforces to come up with new ideas to attract a more diverse customer base); Jill Dutt, *Taking an Engineer's Approach at Lockheed Martin*, WASH. POST, May 1, 2006, at D1 (describing how Lockheed Martin has created a "diversity maturity model" to foster diversity in order to compete better).

intensified in the years since this Court decided *Grutter.* These extensive efforts are part of *amici's* core values, are implemented and overseen by senior managers, and are supported at the very highest levels of each company participating in this brief.

Amici are hiring an increasingly diverse group of employees. *Amici* have also intensified their own internal diversity programs and their efforts to enhance the success of minority students and employees. Each *amicus* has an internal diversity program and works to support minority employees. *Amici* also partner with universities like UT to reach out to aid minority students.

For example, *amicus* Merck drew on the diversity of its employees in order to broaden access to Gardasil, a vaccine that protects against the virus that causes cervical cancer. Recognizing that some populations might not use the vaccine for religious reasons, Merck sought the assistance of its Muslim employees in obtaining Halal certification in order to improve its acceptability and use under Islamic guidelines. Merck has formed and supported many groups of employees who bring their specific cultural, ethnic, religious, gender and other demographic knowledge and understanding to bear on business challenges and opportunities.

In short, *amici* are dedicated to promoting diversity as an integral part of their business, culture, and planning. *Amici* need the talent, creativity, and flexibility of a workforce that is as diverse as the world around them.

But *amici* cannot reach that goal on their own. University admission decisions, and the education and training to which a student gains access when admitted to UT and similar institutions, play a crucial role in determining who will ultimately be qualified for the positions *amici* need to fill. When *amici* make decisions about hiring and promotion, it is critical that they be able to draw from a superior pool of candidates – both minority and non-minority – who have realized the many benefits of diversity in higher education. There can be no question that "[t]he Nation's future" does indeed continue to "depend[] upon leaders" – including business leaders – "trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J. (internal quotation marks omitted)).

II. Petitioner's Application of Strict Scrutiny Would Hamper Educational Institutions' Legitimate Efforts to Pursue Meaningful Diversity Consistent with Their Educational Missions and the Needs of the Business Community.

Determining whether sufficient diversity has been achieved on campus to create the kind of educational environment that is so critical to graduates' – and *amici*'s – success is not an exact science. *Amici* recognize that strict scrutiny must be applied in assessing the constitutionality of the specific practices employed at UT. That is a detailed assessment that *amici* here are not in a position to make. However, *amici* do feel compelled to comment on certain troubling aspects of Petitioner's argument that, if accepted by the Court, could generally render the strict-scrutiny test "fatal in fact" in the context of the pursuit of diversity in higher education.

The main problems with Petitioner's analysis, from *amici*'s point of view, flow from the fact that Petitioner places heavy reliance on the proposition that there is no need for any admissions policy addressing diversity when a "substantial" percentage of minority applicants have been admitted in the recent past. Pet'r Br. at 35. It is important to *amici* that diversity in educational institutions is not treated purely as a one-dimensional, top-level numbers game. Focusing solely on the percentages of minorities in an entering class, and determining that a certain percentage is necessarily "enough" as a matter of law, smacks of the kind of quota system that this Court so roundly rejected in *Bakke* and *Grutter*.

Moreover, numbers alone do not indicate whether students on campus are receiving the benefits that make diversity such a compelling interest. *See Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 246 (5th Cir. 2011). Indeed, the numbers required to reach a "critical mass" may well be different at different institutions. *Amici* are concerned with the suggestion that there is some numerical benchmark that is automatically sufficient and permanently bars any consideration of race (along with applicants' other personal characteristics) in admissions decisions – an approach that *amici* believe would undercut the compelling diversity-related advantages discussed above. *See Grutter*, 539 U.S.

at 330 (explaining that "the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce").

For instance, overall numbers do not reveal whether students enrolled in particular subsets of the university are realizing the educational benefits of diversity. A university may have a college of business or a school of engineering from which some of the *amici's* recruiting efforts are particularly likely to draw, *see, e.g.*, IBM Amicus Br. at 9 (*Grutter*, No. 02-241) – and it may be that there will be no "critical mass" of underrepresented minorities within those areas of study unless administrators deploy an admissions plan that considers race along with applicants' other personal characteristics. Without such a critical mass, none of the business or engineering students – whether they are minorities or not – are likely to have the kinds of diversity-related academic experiences that *amici* believe will help prepare them for success in the corporate world. The Court should for these reasons reject the argument that the only "proper base" for assessing diversity "is the 'student body.'" Pet'r Br. at 19.

In addition, there must be some room for a university to decide that a particular approach to admissions is no longer workable for educational reasons and to take a different tack. It cannot be, as Petitioner argues, *see, e.g.*, Pet'r Br. 35-38, 56, that a university that has achieved certain numerical benchmarks of minority attendance under one approach is thereby foreclosed from ever approaching admissions in a different way – even a way that the university legitimately believes will better serve its educational goals and is equally or more likely to create a truly diverse student body.

Finally, a focus solely on numbers is problematic when the numbers in question treat *all* underrepresented minorities as one undifferentiated group, rather than distinct individuals with different experiences and perspectives. That runs counter to this Court's rejection of such reductionist views of race. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (plurality op.) (rejecting "a limited notion of diversity" where race is viewed as a dichotomy between "white/nonwhite" or "black/'other'" in evaluating plans to increase diversity in schools); *Gratz v. Bollinger*, 539 U.S. 244, 277 (2003) (O'Connor, J., concurring) (stating that "the type of individualized consideration the Court's opinion in *Grutter* . . . requires" includes "the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups"). And those kinds of statistics simply may not tell the whole story of how students actually experience their university environment, and how that environment prepares them for the varied demands of their future careers.

For all of these reasons, it is *amici*'s considered view that Petitioner's rigid, quota-like approach to strict-scrutiny analysis will prevent universities from pursuing narrowly tailored admissions policies that ensure their graduates actually emerge with the experiences and training that *amici* value. *Amici* find an analogy in their own hiring decisions. Those decisions are not based solely on a student's academic achievement relative to others at his or her particular educational institution, but take into account the broader applicant pool and the many different ways that a particular candidate might be able to contribute to the organization. *Amici* are not attempting to reach some "quota" of minority employees; they would not be satisfied, for instance, by simply hiring the top ten percent of the graduating class from a range of diverse colleges, even if they could thereby capture a certain *number* of "diverse" employees. Rather, *amici* seek to hire the most qualified group of employees, while taking into account all of the characteristics of those employees that will enrich the *amici*'s workplaces and strengthen their businesses.

In short, *amici*'s approach to their own hiring is not driven by a desire to reach some absolute number of minority employees. Similarly, a measure of flexibility at the point of university admissions (if permitted under state law) is important to ensure that universities achieve true and meaningful diversity, not simply some threshold overall number of minority students – and do so in a way consistent with their overarching educational objectives.

In the course of applying strict scrutiny, this Court has previously emphasized the need for such flexibility, and *amici* respectfully suggest that the Court should reaffirm that principle in this case. As

Justice Powell explained, the admissions process must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Bakke*, 438 U.S. at 317 (opinion of Powell, J.). The *Grutter* Court agreed: "truly individualized consideration demands that race be used in a flexible, nonmechanical way." 539 U.S. at 334; *see also id.* at 336-37 (stating that "a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application"); *id.* at 392-93 (Kennedy, J., dissenting) ("individual assessment" must be "safeguarded through the entire process"); *Parents Involved*, 551 U.S. at 722 (plurality op.).

The *Grutter* Court also emphasized that, while strict scrutiny requires a rigorous examination of a university's admissions practices, such scrutiny cannot be "fatal in fact." *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)). In order to ensure that the government achieves its compelling interest in enrolling a diverse group of university students, there must be circumstances in which admissions plans that involve individualized consideration of all of an applicant's many dimensions – including race – pass constitutional muster. Rather than a "classification that tells each student he or she is to be defined by race," *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment), such individualized review treats race as one of many factors that may provide a fuller understanding of an individual applicant and what he or she can bring to the table to enhance a university's educational environment – and, ultimately, contribute to businesses like the *amici* and to society as a whole. *See Grutter*, 539 U.S. at 337.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court reaffirm that diversity in higher education is a compelling state interest, and resist calls to adopt a form of strict scrutiny that would make meaningful pursuit of that interest impossible in fact.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

In The
Supreme Court of the United States

◆

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

◆

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

◆

BRIEF OF *AMICUS CURIAE* HARVARD GRADUATE SCHOOL OF EDUCATION STUDENTS FOR DIVERSITY IN SUPPORT OF RESPONDENTS

◆

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Harvard Graduate School of Education ("HGSE") Students for Diversity is an official student organization at HGSE, located in Cambridge, Massachusetts. HGSE Students for Diversity strives to provide student-centered education and advocacy that focuses on issues relating to diversity, law, and educational access. This case is vitally important to *amicus curiae* because its members, including aspiring and former teachers, school administrators, and higher education professionals, are graduate students at a leading education school, who understand, and indeed experience every day, the educational benefits of diversity in higher education.

HGSE Students for Diversity submits a brief that brings to the attention of the Court relevant matter the parties have not already brought to its attention and which may be of considerable help to the Court. Specifically, *amicus curiae* addresses: 1) why the University of Texas at Austin's ("UT") admissions policy is different than the admissions policies that were implemented by a number of universities to exclude Jewish students and African American students until the 1960s; 2) why UT's policy is modeled after the inclusive, holistic model that was implemented in the 1960s to increase representation of underrepresented minorities from historically excluded groups; 3) why Petitioner fails to prove that she suffered any harm by UT's admissions policy, a policy that was implemented pursuant to UT's best educational judgment; and 4) why leading educational science supports maintaining diversity in higher education as a compelling state interest.

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[1] No counsel to a party wrote this brief in whole or in part, and no counsel to a party or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* made a monetary contribution to this brief's preparation or submission. This brief is submitted pursuant to the blanket consent letters from all parties, on file with the Court.

◆

SUMMARY OF ARGUMENT

Access to higher education has increased over time for racial and ethnic minorities due to evolving admissions practices. The current holistic admissions model analyzes various soft factors, including character, background, and experience, as well as hard factors, including grades and standardized test scores. This model was created in the 1960s to *include* more students from various backgrounds, including members of groups historically excluded from higher education. Thus, the current admissions model differs profoundly from earlier admissions strategies that elite institutions developed before the 1960s to *exclude* and limit certain "undesirable" minorities.

This brief will analyze the development of the current holistic admissions model beginning with a detailed discussion of early twentieth century exclusionary admissions models and practices. It will then explore how the current race-conscious admissions model at UT differs from the anti-Jewish exclusionary model created in the 1920s at elite colleges and the anti-African American admissions practices of the early twentieth century, but instead mirrors the holistic admissions policy developed in the 1960s that was implemented to include members of historically excluded groups. This brief will then discuss how the basic premise of Petitioner's brief – that she would have been admitted to the Class of 2012 but for race-conscious admissions policies – is purely speculative. This brief will conclude by analyzing a few leading empirical social science studies that supports UT's position – as well as this Court's binding precedent in *Grutter v. Bollinger*, 539 U.S. 306 (2003) – that diversity in higher education remains a compelling state interest.

◆

ARGUMENT

I. The Modern Inclusive Admissions Model is not the Same Exclusionary Model that Limited Jewish Students from Attending Elite Colleges Starting in the 1920s, or the Same Exclusionary Model that Categorically Denied African American Students from Attending State Universities Formerly Designated for Whites Only, like the University of Texas.

Petitioner challenges UT's policy of including an applicant's race among a number of factors that admissions officers may consider when making discrete, individual admissions decisions.[2] This policy evaluates individual applicants on the basis of both an Achievement Index (AI) for hard factors (i.e., standardized test scores and high school class rank) as well as a Personal Achievement Index (PAI) for soft factors (i.e., content and quality of required essays, leadership, awards and honors, work experience, extracurricular activities, and "special circumstances" including socioeconomic, family, and racial backgrounds). *Fisher v. University of Texas*, 631 F.3d 213, 227-28 (5th Cir. 2011). This admissions model has its foundation in the inclusive practices that commenced in the 1960s. It does not discriminate against students of any race or ethnicity in the same way that the admissions practices of the 1920s-1950s discriminated against Jewish and other students deemed "undesirable." Nor does it categorically deny students of any race or ethnicity either admission or a fair application review in the same way that segregationist practices discriminated against African American students who sought to attend formerly all-white state colleges and universities, like the University of Texas. To understand the context of this modern inclusionary model, we provide a brief historical overview of higher education admissions.

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[2] Petitioner does not challenge the race-neutral Top Ten Percent Law, in which Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university. 56 TEX. EDUC. CODE § 51.803 (1997). She failed to gain admittance under this law because she was not in the top ten percent of her high school class.

Before the 1900s, admissions practices at elite colleges (e.g., Harvard, Yale, and Princeton) entailed oral examinations on limited subjects such as Greek and Latin. *See* JEROME KARABEL, THE CHOSEN 22-23 (2005); FREDERICK RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY 25 (1962). These colleges drew from local school networks – particularly private boarding schools – to supply their students so college enrollment typically consisted of white male Protestants from wealthy families and elite preparatory schools. *See* KARABEL, at 23; JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 172 (2004). This composition would slowly change over the next few decades.

Written entrance exams were introduced at reform-minded institutions in the 1890s. *See* RUDOLPH, at 436-38. And during the 1920s, elite colleges started to move away from oral Greek and Latin tests and began to rely more on a national exam created by the College Entrance Examination Board in the early 1900s. *See* NICHOLAS LEMANN, THE BIG TEST 28-41 (2000). Jewish students, as a group, generally performed well on these tests so they were admitted in disproportionate numbers. *See* KARABEL, at 110-36.

Increasing numbers of Jewish students on college campuses created a "Jewish problem" for many schools. *Id.* In response, colleges sought to preserve the Protestant-dominated student bodies of their institutions by instituting strict Jewish quotas. For example, Columbia created the nation's first admissions office in 1919 with the purpose of instituting policies that would curb Jewish enrollment. KARABEL, at 129. Jerome Karabel explains how such policies worked at Columbia:

> Headed by Adam Leroy Jones, [Columbia Admissions] used subjective criteria in evaluating candidates as it attempted to create a favorable "mix" in the student body. Through an emphasis on qualities such as "character" and "leadership," which could not be quantified, as well as the strategic deployment of discretion in determining which candidates had not passed all the exams might still be admitted, Jones was able to report that the student who enrolled under his tutelage were "very much more desirable" than the ones accepted in previous years.

Id. Harvard, Yale, and Princeton soon followed suit. Similar anti-Jewish sentiment also led to limited enrollment at northern state universities such as the University of Syracuse. *See* Harvey Strum, *Discrimination at Syracuse University*, 4 HIST. OF HIGHER EDUC. ANN. 110 (1984).

A more extreme form of exclusionary admissions practices applied to African Americans during the late 1800s to mid-1900s. Instead of being limited by quotas, African American applicants were categorically not allowed to attend schools designated for whites in many schools across the country by the enforcement of state segregation laws – which were deemed constitutional by the U.S. Supreme Court's approval of the separate-but-equal doctrine in *Plessy v. Ferguson*, 163 U.S. 537 (1896).[3] For example, in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), African American applicant Lloyd Gaines could not attend the University of Missouri Law School because state law prohibited integrated higher education. When he applied to the law school, he was summarily rejected based on his race and referred to an out-of-state law school funding program for African American state residents. Gaines brought a successful challenge to the state's refusal to provide in-state legal education for African Americans. Later, in *Sweatt v. Painter*, 339 U.S. 629 (1950), African American student Heman Sweatt was not permitted to attend the University of Texas Law School because of state laws that banned integrated higher education. He brought a successful challenge to the gross disparity in resources of the black law school he was forced to attend and the whites only law school. Like Lloyd Gaines, when Heman Sweatt applied to law school, he was summarily denied solely because of his race. While both litigants benefited from their cases in the separate-but-equal context, this doctrine would not be overturned by this Court until *Brown v. Board of Education*, 347 U.S. 483 (1954).

Even after *Brown*, a number of courts had to repeatedly affirm African American students' rights to not be categorically denied admission because of their race, and for fair treatment in admissions. In *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala. 1955), *aff'd*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956), the University of Alabama refused to admit Autherine Lucy and Polly Anne Myers *solely* because they were African American. The district court enjoined the University from refusing their admissions. Despite the Fifth Circuit's affirming the district court ruling, the University of Alabama suspended Lucy, who had enrolled as a graduate student in library science, after a mob prevented her from attending classes, allegedly because it could not secure her safety. *See* GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT 128-38 (2006). This pattern repeated itself throughout the 1950s and early 1960s, with some institutions of higher education attempting to avoid fair admissions review by refusing even to review applications from African American students. *See, e.g.*, *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961) (finding that the University of Georgia categorically denied Hamilton Holmes admission solely because of his race and refused to review Charlayne Hunter's application solely because of her race, and requiring their admissions).

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[3] Women were also categorically excluded from admission from many higher educational institutions that rejected coeducation. *See* THELIN, at 173.

These obstructionist efforts reached their apogee in the case of James Meredith, an African American student who first sought admission to the University of Mississippi in January 1961. The University of Mississippi registrar summarily rejected James Meredith's application alleging that he did not seek admission in good faith because he did not submit the required certificates of good character from University alumni and his credits from Jackson State College, then an all-African American state college in Mississippi, were insufficient because Jackson State was not a member of the then all-white Southern Association of Colleges and Secondary Schools. *Meredith v. Fair*, 305 F.2d 343, 346-48 (5th Cir. 1962).

Meredith, not knowing any (white) University alumni in heavily-segregated 1960's Mississippi, submitted good character affidavits from people who knew him. He repeatedly wrote the registrar, seeking re-application and information as to why the University would not accept him for admission. *Id.* After ignoring his numerous letters for a period of time, the registrar again responded that his application was insufficient and again denied him admission. *Id.* Similar to the University of Georgia's treatment of Holmes and Hunter, the Fifth Circuit concluded that "from the moment the [University of Mississippi] discovered Meredith was a Negro they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity" on his rights to fair review of his application. *Id.* at 344.

Unlike many of the Jewish applicants of the 1920s-1950s, and unlike Lloyd Gaines, Heman Sweatt, Autherine Lucy, Hamilton Holmes, Charlayne Hunter, James Meredith, and many other African American students during this time, Petitioner in this case was not categorically denied admission because she was a member of an "undesirable" group of people. Instead, Petitioner did not qualify for admission under the Top Ten Percent Law – which accounted for the overwhelming majority of the 2008 admits for the Class of 2012 – and only after *full, holistic consideration on the merits of her application*, was she not admitted to UT.

II. The Modern Inclusive Admissions Model, as Implemented by the University of Texas, Embodies Holistic Review Articulated by the Harvard Plan Cited by Justice Powell in *Bakke* (1978), and Endorsed by this Court in *Grutter* (2003).

As college enrollment rapidly increased during the 1920s, many colleges started moving toward a national standardized exam, but retained discretion to make evaluations of character and leadership. In the 1940s and 1950s, colleges started using a single standardized exam (i.e., the Scholastic Aptitude Test or SAT) as a way of sorting the applicants for admissions purposes. *See* LEMANN, at 85. By the 1960s, the SAT was widely used by colleges nationwide. *Id.* In the new admissions era dominated by the SAT, colleges still maintained their discretion to evaluate the soft factors of their students. For example, in 1961, Wilbur Bender, Dean of Admissions at Harvard from 1952 to 1960, argued that instead of taking just the top one-percent of students based on academic qualifications, Harvard should also consider "a variety of personalities, talents, backgrounds, and career goals." Wilbur Bender, *The Top-One-Percent Policy: A Hard*

Look at the Dangers of an Academically Elite Harvard, HARV. ALUMNI BULL., September 30, 1961, at 21. Harvard would adopt an admissions policy that tried to balance academic criteria with more subjective factors including motivations, backgrounds, and experiences.

The mid- to late-1960s were a time of great social upheaval. College students – from moderates to radicals – were demanding more rights and opportunities to be heard on the issues of the day. *See, e.g.*, Robert Cohen, *This was Their Fight and They Had to Fight It: The FSM's Nonradical Rank and File*, *in* FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S 222 (Wilson Smith & Reginald E. Zelnick, eds., 2002). During this time, the Civil Rights Movement and other challenges to the status quo created pressure on colleges to admit more students from historically underrepresented groups. After the assassination of Dr. Martin Luther King, Jr. on April 4, 1968, mass campus demonstrations for racial justice, and even rioting in the streets, became more and more commonplace. *See* Julie A. Reuben, *Merit, Mission, and Minority Students*, *in* THE FAITHFUL MIRROR 211 (Michael C. Johanek, ed., 2001).

Colleges could not ignore what was happening. Some colleges experimented with creating alternative educational institutions or instituting open enrollment policies to increase minority enrollment. Reuben, at 220-29. Other colleges remained selective and faced the significant challenge of increasing minority enrollment. Jerome Karabel observes: "The growing social disorder – embodied . . . by racial disturbances in [20] cities, the assassination of Malcolm X in January 1965, and growing antiwar and student movements – provided important backdrop . . . [to the realization] that a change in the definition of merit was required if black enrollment was to increase substantially . . . ." KARABEL, at 384. These selective colleges, thus, started incorporating the educational benefits of having a class with diverse backgrounds and experiences into their definition of "merit." In this way, universities viewed diversity and educational excellence, not in contradiction, but as complementary. The inclusive holistic admissions formula that arose during this time was institutionalized as follows: "1) need-blind admissions; 2) no discrimination against women or Jews; and 3) special consideration for historically underrepresented minorities as well as athletes and legacies." *Id.* at 484.

In the 1978 Supreme Court case, *Regents of the University of California v. Bakke,* 438 U.S. 265, 291 (1978), Alan Bakke, a white male, challenged the special consideration for racial minorities at the University of California at Davis' Medical School. UC-Davis Medical School had two admissions pools – a general pool and a special pool for disadvantaged groups – typically, but not exclusively, from minority backgrounds. Sixteen out of 100 of the total places in the class were reserved for applicants from the special pool. The admitted students from the special pool generally had lower academic credentials than those admitted in the general pool. Bakke argued that racial minorities, with much lower grades and Medical College Admissions Test scores, being admitted through the special pool, while he was denied admission to the school was a violation of his Equal Protection rights. The U.S. Supreme Court, in a plurality decision authored by Justice Powell, held that race-conscious policies could be used in admissions at public higher education institutions.

Under strict scrutiny, Justice Powell held that the compelling state interest at stake was the benefits of educational diversity because it creates a condition conducive to a "robust exchange of ideas." *Bakke*, 438 U.S. at 312. He observed, "The atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body." *Id.* Powell further recognized that academic freedom gives universities the discretion to determine whom to admit[4] – based on constitutionally permissible grounds such as the educational benefits of diversity.

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[4] Powell wrote, "Mr. Justice Frankfurter summarized the 'four essential freedoms' that constitute academic freedom: 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail *'the four essential freedoms'* of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and *who may be admitted to study.' Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (concurring in result)." *Bakke*, 438 U.S. at 312 (emphasis added).

However, he found that UC-Davis' two-tiered admissions model was not narrowly tailored to survive strict scrutiny review. Justice Powell cited the Harvard Plan as an example of an individualized, holistic model of review that would survive strict scrutiny. Harvard College used race as just one of many factors when it conducted its holistic admissions review for each applicant. The appendix Powell attached to his majority opinion containing the Harvard Plan cites to Dean of Admissions Wilbur Bender's 1960 report as encapsulating the ideal of holistic review:

> [I]f scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer. *Bakke*, 321-322, *citing* Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq*. (Cambridge, 1960).

Id. at 321-22. The Plan continues:

> In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students.

* * *

> When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

Id. at 322-23. The Harvard Plan's description of holistic review, as cited in *Bakke*, effectively articulates the foundation of the inclusionary model that remains in place today at most selective institutions, including the policy at the UT being challenged in this case. Simply put, diversity enhances the educational experience for all students; therefore, individualized review using race as one of many factors of admissions is allowed. This constitutionally permissible use of race was affirmed by this Court in both *Grutter v. Bollinger,* 539 U.S. 306 (2003), and *Gratz v. Bollinger,* 539 U.S. 244 (2003).

In fact, *Grutter* recognized two other dimensions of the educational benefits of diversity in addition to the increased perspectives articulated by *Bakke*. Justice O'Connor, writing for the majority in *Grutter*, wrote that "student body diversity . . . better prepares [students] as professionals" . . . by "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] [students] to better understand persons of different races." *Grutter*, 539 U.S. at 330 (internal citations and quotation marks omitted). The Fifth Circuit in this case categorized this dimension of the benefits of diversity as "professionalism." *Fisher*, 631 F.3d at 219. O'Connor also wrote that "[e]ffective participation by members of all racial and ethnic groups in the civic life of this nation is essential if the dream of one Nation, indivisible, is to be realized" and "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332. The Fifth Circuit referred to this aspect of the benefits of diversity as "civic engagement." *Fisher*, 631 F.3d at 220.

The modern race-conscious inclusionary model at most selective institutions, including UT, aims to craft a diverse class, recognizing that the multitude of benefits stemming from educational diversity (i.e., increased perspectives, professionalism, and civil engagement) serve a compelling state interest. It is different from an exclusionary model because it does not target groups of people to exclude based on race. *Cf.* KARABEL, *supra* (exclusion of Jewish students); Strum, 4 HIST. OF HIGHER EDUC. ANN. 110, *supra* (same); *Gaines*, 305 U.S. 337 (exclusion of African

American students); *Sweatt*, 339 U.S. 629 (same); *Lucy*, 134 F. Supp. 235 (same); *Holmes*, 191 F. Supp. 394 (same); *Meredith*, 305 F.2d 343 (same). Instead, each applicant gets a flexible, individualized review before a decision is made.

III. Petitioner's Application Received a Fair and Equal Holistic Review Under an Admissions Policy that UT Instituted in its Best Educational Judgment; It Is Merely Speculative that Petitioner Suffered Any Harm by the Policy.

Institutions of higher education maintain the discretion, borne out of constitutionally protected notions of academic freedom, to manage their admissions processes as they see fit as long as their processes are fair and do not infringe upon candidates' constitutional rights. This Court has held that:

> We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. . . . Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

Grutter, 539 U.S. at 329 (internal citations omitted). *See also Bakke*, 438 U.S. at 312 ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."). Based on its best educational judgment and in its exercise of academic freedom, UT has decided that a diverse student body is at the center of its institutional mission. *See* Respondent's Brief, at 5-6. It has, thus, taken a number of steps to achieve a diverse class – including recruitment initiatives, scholarship programs targeting students from lower socioeconomic status backgrounds and students who are the first in their families to attend college, admissions of in-state students at the top 10% of their high school classes, and race-conscious holistic admissions review. *See* Respondent's Brief, at 6-15.

The undeniable truth, however, is that most applicants are denied admission to highly selective colleges because there are many more qualified high school students than available spots at these institutions. In UT's case, the number of available spaces for holistic review is greatly reduced by operation of the Top Ten Percent Law.[5] For example, in 2008, 81% of

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[5] The Texas Top Ten Percent Law is consistent with the constitutionally acceptable means to achieve diversity in the K-12 pupil assignment context articulated by Justice Kennedy's concurring opinion in *Parents Involved in Community Schools v.*

(Continued on following page)

the entering class was admitted under this law. *See Fisher*, 631 F.3d at 227. For the remaining seats, a relatively small number of the most competitive students is admitted based on a holistic evaluation of both hard (test scores, GPAs, and class ranks) and soft (motivations, backgrounds, experiences, etc.) factors. No applicant in the holistic review process is guaranteed admission; she is guaranteed only a fair, holistic review.

There is no genuine dispute that Petitioner's application received the same holistic review as all other in-state applicants outside of the Top Ten Percent category. The basic premise of Petitioner's argument – that she would have been admitted to UT but for the University's evaluation of race as one of many soft factors – is speculative at best. Goodwin Liu observes, "In a highly selective competition where white applicants greatly outnumber minority applicants, and where multiple objective and nonobjective criteria are relevant, the average white applicant will not fare significantly worse under a selection process that is race-conscious than under a process that is race-neutral." Goodwin Liu, *The Causation Fallacy:*

Seattle School District No. 1, 551 U.S. 701, 789 (2007) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.").

Bakke and the Basic Arithmetic of Selective Admissions, 100 MICH. L. REV. 1045, 1078 (2002). *See also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 33 (1998). Indeed, there is no evidence – direct or inferable – that demonstrates that Petitioner was excluded because of her race.

Moreover, Petitioner's rejection from UT was not due any unfairness in UT's review or to a constitutional flaw in the admissions process. It was, instead, due entirely to UT's finding that Petitioner's application was not amongst the most competitive for one of a few select places in the Class of 2012 – a finding legitimately within UT's constitutional exercise of academic freedom in its admissions policy.

IV. Leading Empirical Social Science Supports UT's Position that Diversity in Higher Education Remains a Compelling State Interest.

Less than ten years ago, the *Grutter* court affirmed Justice Powell's position in *Bakke* that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. Race is one of many factors of diversity that a state university may consider in its holistic review of an applicant provided it has a compelling reason for doing so. *Id.* In addition to the compelling reasons UT states in its brief, *see* Respondent's Brief, at 38-46, leading empirical social science affirms that diversity, particularly interactional diversity, enhances the higher educational environment, and is associated with greater civic, learning, and social outcomes for all students. This brief highlights a few of these studies.

In their groundbreaking study of diversity's impact on higher educational outcomes, Patricia Gurin et al. analyzed a demographically representative sample of first-year students from a national survey conducted by the Higher Educational Research Institute at the University of California – Los Angeles. *See* Patricia Gurin, Eric L. Dey, Sylvia Hurtado & Gerald Gurin, *Diversity and Higher Education Theory and Impact on Educational Outcomes*, 72(3) HARV. EDUC. REV. 330 (2002). Gurin et al. were interested in the educational and democracy outcomes associated with both interactional diversity – the spontaneous engagements that students have with each other in the campus setting – and classroom diversity. They found that informal interactional diversity has a statistically significant positive impact on intellectual engagement and academic skills for students of all racial backgrounds. The impact of classroom diversity on intellectual engagement and academic skills was also statistically significant and positive for white and Latino/a students. Furthermore, the researchers found that informal interactional diversity was significantly related to both citizenship engagement and racial/cultural engagement for all racial groups.

In the same study, Gurin et al. reviewed original data collected from a cohort of University of Michigan students in their freshman and senior years of college and 13 years after graduation. In the Michigan component of the study, the researchers were able to examine the educational benefits associated with: 1) classroom diversity; 2) the amount and quality of interaction each student had with diverse peers; and 3) the extent to which a student participated in multicultural events and intergroup dialogues. *Id.* Each of these diversity experiences was statistically significant and related to higher levels of active thinking for white students in their senior year. *See also* Uma Jamakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society?: Campus Diversity and Cross-Cultural Workforce Competencies*, 78(2) HARV. EDUC. REV. 615 (2008) (discussing how white students specifically benefit from diverse higher educational settings). Classroom diversity and multicultural events that featured interaction among an equal number of diverse peers were significantly related to even higher levels of intellectual engagement among these students. Classroom diversity also showed a smaller, but still statistically significant effect on learning outcomes for Asian and African American students. The researchers further found that all three types of diversity experiences had significant positive effects on the compatibility of difference and the racial/cultural engagement of white students.

In a study of over 50,000 students, Shouping Hu and George D. Kuh delved deeper into the impact of interactional diversity on students from all racial groups across multiple types of higher educational institutions, including doctoral research institutions, liberal arts colleges, and general colleges. Shouping Hu & George D. Kuh, *Diversity Experiences and College Student Learning and Personal Development*, 44(3) J. OF C. STUDENT DEV. 320 (2003). Hu and Kuh found that students from different types of institutions made statistically significant gains from interactional diversity experiences, with white students making greater gains due to diversity than students of color in technology preparation, diversity competence, and general educational outcomes. *Id.* Students of color, on average, gained more from diversity than white students in vocational preparation and intellectual development. Thus, empirical evidence demonstrates that experiences with interactional diversity have positive effects for virtually all students in all types of higher education settings.

Social science, therefore, supports UT's best educational judgment that diversity both inside and outside the classroom benefits the institution as a whole.

◆

CONCLUSION

College admissions in this country began as an open admissions system for sons of wealthy white families that attended certain elite preparatory schools. It developed into a system in which standardized examinations were becoming the norm for elite schools. When students from certain “undesirable” groups excelled on these tests, the admissions system was transformed into one that used the subjective qualities to filter many of these students out without further review. This was the system in place at most selective colleges when the Civil Rights Movement and other rights advocacy gained ground. However, since the 1960s, this same discretion is now being used to include historically excluded groups. The University of Texas’ admissions policy is based on the inclusionary model. It aims to craft a diverse class using individualized, holistic review, fully recognizing the educational benefits of diversity for the entire institution. And recent social science supports the university’s judgment regarding the educational benefits of diversity. Petitioner fails to prove any individual harm based on this policy. Indeed, her application received the same fair and equal holistic review afforded those from all students outside of the Top Ten Percent.

The Fifth Circuit’s holding should, therefore, be affirmed.

Respectfully submitted,

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In the
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF GAIL HERIOT, PETER KIRSANOW & TODD GAZIANO, MEMBERS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

1. Did the Fifth Circuit err in upholding Respondents' race-preferential admissions policy against a Fourteenth Amendment challenge?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici[1] Gail Heriot, Peter Kirsanow, and Todd Gaziano (collectively "the Commissioner Amici") are three members of the eight-member United States Commission on Civil Rights. Commission members are part-time appointees of the President and Congress. This up-dated brief is being filed in the Commissioner Amici's individual capacities.[2]

The Commission was established pursuant to the Civil Rights Act of 1957, P.L. 85-315, 71 Stat. 634 (1957)—the first civil rights law passed by Congress since Reconstruction. One of the Commission's core duties is to gather evidence on civil rights issues and make recommendations to Congress, the President and the American people. As then-Senate Majority Leader Lyndon Johnson put it, the Commission's task is to "gather facts instead of charges." "It can sift out the truth from the fancies; and it can return with recommendations which will be of assistance to reasonable men."[3]

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief by filing blanket consents with the clerk. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or their counsel made a monetary contribution to its preparation or submission.

[2] An earlier version of this amicus brief was submitted in support of the Petition for a Writ of Certiorari. This up-dated amicus brief differs from the original brief primarily in Parts III.B (additional paragraphs added at the end), III.F (new section), and IV (additional material in Conclusion).

In 2010, the Commission, with the support of the Commissioner Amici, released a report entitled *Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers.* This report examined the extensive empirical research indicating that students who attend schools where their entering academic credentials put them in the bottom of the class are less likely to follow through with an ambition to major in science or engineering than similarly-credentialed students who attend schools where their credentials put them in the middle or top of the class. Affirmative action thus works to the detriment of its supposed beneficiaries, who are seldom informed of this risk. Three years earlier, the Commission, with the support of the two Commissioner Amici then on the Commission, released a report entitled *Affirmative Action in American Law Schools*, in which it examined similar evidence in the legal education context. The research examined in that Report indicates that students, regardless of race, are less likely to graduate from law school and pass the bar if they are the beneficiaries of preferential treatment in admissions than if they attend a law school at which their entering academic credentials are like the average student's. The Commissioner Amici believe that they are in a special position to inform the Court about this research. They believe that on account of this research there is a strong public interest in preventing the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), from being expanded.

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[3] 103 CONG. RECORD 13,897 (1957) (statement of Sen. Lyndon Johnson).

SUMMARY OF ARGUMENT[4]

This Court's ruling in *Grutter v. Bollinger* was unusual. Racial discrimination, when practiced by a State, is almost always a violation of the Fourteenth Amendment's Equal Protection Clause. But in *Grutter*, the Court ruled that an exception could be made when a state university gives preferential treatment to certain racial minority applicants for admission.

That limited exception, however, applied only to efforts to admit a "critical mass" of minority students when those efforts are aimed at capturing any educational benefits that a diverse student body might bring. While the Court did not specifically define "critical mass" in its opinion, it was clear that the concept was a crucial limiting factor to a state university's authority to discriminate.

In this case, the Fifth Circuit has given the concept of "critical mass" an expansive reading—one that is inconsistent with the letter and spirit of *Grutter* and with the Equal Protection Clause. Even if it could be said that *Grutter* left ambiguous the meaning of "critical mass," it is an important question of Constitutional law that should be settled by this Court and not various lower courts. The evidence discussed in this brief underlines that question's crucial importance. If *Grutter* is allowed to expand, the results will be unfortunate for the very persons that affirmative action was originally designed to benefit.

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[4] The argument in this brief is based on the writings of Professor Gail Heriot, one of the amici herein.

ARGUMENT

THE UNIVERSITY OF TEXAS'S RACE PREFERENCE PLAN SHOULD BE INVALIDATED IN ORDER TO PREVENT THIS COURT'S DECISION IN *GRUTTER v. BOLLINGER* FROM BEING EXPANDED BEYOND ITS INTENDED LIMITS

A. Race-Preferential Admissions Were Intended to Facilitate the Entry of Minorities Into Higher Education and Eventually into High-Prestige Careers. There Is Considerable Evidence, However, That They Have the Opposite Effect.

Over forty years ago, universities with selective admissions policies began to adopt affirmative action policies. By lowering admissions standards for African-American and Hispanic students, well-meaning administrators hoped to increase the number of minority students on campus and ultimately to promote their integration into high-prestige careers and mainstream society.

While nearly all Americans saw those goals as laudable, reasonable minds differed on the wisdom of this approach. No less a liberal icon than Justice Stanley Mosk warned of the risks associated with such temporary compromises with the principle of color-blindness, when, writing for the California Supreme Court many decades ago in *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 62-63 (1976), *aff'd in part, rev'd in part*, 438 U.S. 265

(1978), he held racially discriminatory admissions to be unconstitutional:

> To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality.

For good or ill, Mosk's vision of civil rights did not prevail. His opinion in *Bakke* was superseded by this Court's decisions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*. Race-preferential policies mushroomed, and thriving diversity bureaucracies were established to administer them.

If Mosk was right, it will take effort to correct the mistake at this late date. It isn't just the iron rule of bureaucracy at work today—that first and foremost, bureaucracies work to preserve themselves. Many distinguished citizens—university presidents, philanthropists, and legislators—have built their reputations on their support for race-preferential admissions. Their jobs are not at stake, but their sense of accomplishment may be. Overcoming that is not easy.

But if anything should cause thoughtful supporters of race-preferential admissions policies to reverse course—or at least refrain from proceeding further—it is the mounting empirical evidence showing these policies are doing more harm than good for their intended beneficiaries. If this research is right, we now have fewer minority science and engineering graduates than we would have under race neutral admissions policies. See *infra* Part B. We have fewer minority college professors, see *infra* Part C, and fewer minority lawyers too, see *infra* Part D. Preferential treatment has made it more difficult for talented minority students to enter high-prestige careers.[5]

How can it be that affirmative action reduces the number of minority professionals? One of the consequences of widespread race-preferential policies is that minority students end up distributed among colleges and universities in very different patterns from their white and Asian counterparts. When the highest schools on the academic ladder relax their admissions policies in order to admit more under-represented minority students, schools one rung down must do likewise if they are to have the desired number of minority students, too. The problem is thus passed on to the schools another rung down, which respond similarly. As a result, under-represented minority students are overwhelmingly at the bottom of the distribution of entering academic credentials at most selective schools.

The problem is not that there are no academically gifted minority students. But there are simply not enough at the very top tiers to satisfy the demand, and efforts to change that have created a credentials gap up and down the academic pecking order.

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[5] After *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), colleges often purported to engage in preferences to confer the benefits of diversity on all students, since that was the only purpose approved in that case. The notion that affirmative action benefits minority students in particular was downplayed rhetorically. But it is doubtful any school willing to acknowledge that minority students were thereby made worse off would continue the practice. Minority students are not public utilities.

Entering credentials matter. Students whose academic credentials are well below those of the average student in a particular school usually earn grades to match. While some students will outperform their academic credentials, just as some students will under-perform theirs, most students perform in the range that their entering credentials suggest. Anyone who thinks differently is engaging in wishful thinking at student expense.[6]

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[6] Many African-American students do not seem to be aware that their relatively low entering credentials mean that they are likely to get relatively low grades once on campus. In another study, several of the same Duke researchers found that both black and white entering Duke freshmen are overly optimistic about the grades that they will receive as freshmen. But black students are more overly optimistic than whites. Despite very serious differences in entering credentials, black and white students have similar expectations as to what their first-year GPAs will be (3.51 and 3.44 respectively.) But blacks receive an average GPA of 2.90 as freshmen, whereas the comparable figure for whites is 3.33.

These findings suggest that black students are not in fact aware of the risk that they will be mismatched at Duke due to low entering credentials. Peter Arcidiacono, Esteban M. Aucejo, Hamming Fang, and Kenneth Spenner, *Does Affirmative Action Lead to Mismatch? A New Test and Evidence*, Economic Research Initiatives at Duke, Working Paper No. 27 at 14, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1384022.

The Commission has repeatedly called on universities to disclose voluntarily more information to all entering students about their likelihood of success in a given program with the

No serious supporter of race-preferential admissions denies this. For example, former Ivy League university presidents William G. Bowen and Derek Bok, leading affirmative action advocates, candidly admit that the problem is serious: "College grades [for affirmative action beneficiaries] present a ... sobering picture," they wrote. "The grades earned by African-American students at the [elite schools we studied] often reflect their struggles to succeed academically in highly competitive academic settings." William G. Bowen & Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 72 (1998) ("*Shape of the River*").

These so-called affirmative action beneficiaries are not bad students. Many would be honor students elsewhere. But they are subtly being made to feel as if they are less talented than they really are. Many may actually be learning less. Everyone knows that a good student can get in over his head if placed in a classroom with more academically prepared students. (The Commissioner Amici, who are all lawyers, have little doubt, for example, that they would learn less in a physics class at Cal Tech, which specializes in training the best-prepared science

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goal of protecting more students from the ill effects of mismatch. See, e.g., *Affirmative Action in American Law Schools* at 140; *Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers* at 4. To our knowledge, no university has actually followed these recommendations —although, as the Duke example indicates, many may be much better equipped to predict what grades an incoming student will receive than incoming students are themselves.

students, than they would at a university with less formidable competition.)

Divorced from the affirmative action context, this phenomenon—that less well-credentialed students usually do less well relative to their better-credentialed peers at a given school—would seem ordinary and unobjectionable.[7] It is only when it becomes associated with this politically-charged issue that it becomes controversial.

B. Extensive Research Indicates that Race-Preferential Admissions Have the Effect of Discouraging Preference Beneficiaries from Pursuing Science and Engineering Careers.

Majoring in science and engineering can be difficult. Many students who start out doing so switch to something easier. Others drop out or even flunk out. It should surprise no one that those who fail to attain their goal of a science or engineering degree are disproportionately students whose entering academic credentials put them in the bottom of their college class. Not all stereotypes about science and engineering students are accurate. But the notion that they tend to be highly-credentialed and hardworking is largely on target.

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[7] *See* James Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 Am. J. Socio. 17 (1966). Writing outside the affirmative action context, Davis found that college grades were more strongly correlated with the decision to enter a high-prestige career than was the selectivity of the institution. In some cases at least, the added self-confidence one enjoys as a result of being the big frog in the small frog pond appeared to outweigh whatever advantages an elite education in a larger, more glamorous frog pond can offer. Davis therefore offered the following advice: "Counselors and parents might well consider the drawbacks as well as the advantages of sending a boy to a 'fine' college, if, when doing so, it is fairly certain he will end up in the bottom ranks of his graduating class." *Id.* at 30-31. As a result of race-preferential admissions policies, two generations of under-represented minority students have now disproportionately had the experience of being the small frog in a highly competitive pond.

What some do find surprising is this: Three impressive empirical studies have now demonstrated that *part of the effect is relative.* An aspiring science or engineering major who attends a school where her entering academic credentials put her in the middle or the top of her class is more likely to persevere and ultimately succeed than an otherwise identical student attending a more elite school where those same credentials place her in the bottom of the class. Put differently, an aspiring science or engineering major increases her chance of success not just if her entering credentials are high, but also if those credentials compare favorably with her classmates'. *See* Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier & Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681 (1996) ("*Elliott*"); Frederick Smyth & John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 Res. Higher Ed. 353 (2004) ("*Smyth-McArdle*"); Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?*, Working Paper (Draft July 2009) available at http://www.seaphe.org/pdf/sciencemismatch.pdf ("*Sander-Bolus*").

Part of the reason may be that science and engineering are ruthlessly cumulative. A student who has difficulty with the calculus textbook's first chapter is apt to have difficulty with later chapters and subsequent courses. Since switching majors is easy, the attrition rate is very high.

In the first of these studies—the article by Dartmouth psychologist Rogers Elliott and his co-authors—the single most important cause for minority attrition from science at the eleven selective institutions they studied was the "*relatively* low preparation of black aspirants to science in these schools." *Elliott* at 700. The authors were careful to put the emphasis on "relatively." It wasn't just entering credentials demonstrating highly developed ability at science that mattered, but comparatively high credentials. A student who attended a school at which his Math SAT score was in the top third of his class was more likely to follow through with an ambition to earn a degree in science or engineering than was a student with the same score who attended a school at which his score was in the bottom third.

According to *Elliott*, a student with an SAT Math score of 580 "who wants to be in science will be three or four times more likely to persist at [the two least competitive schools of the eleven prestigious schools studied] ... than at [the two most competitive schools]...." *Id.* at 702. [8]

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[8] Numerous studies have found that there is no problem with minority students' initial interest in science and engineering, which tends to exceed whites'. *E.g.*, Alexander Astin & Helen Astin, *Undergraduate Science Education: The Impact of Different College Environments on the Educational Pipeline in*

The extraordinary record of Historically Black Colleges and Universities was a second source of evidence cited in *Elliott*. With only 20% of total black enrollment, these schools were producing 40% of the black students graduating with natural science degrees, according to the National Science Foundation. Those same students were frequently going on to earn Ph.D.s from non-HBCUs. The National Science Foundation reported, for example, that 36% of the blacks who earned an engineering doctorate between 1986 and 1988 received their undergraduate degree from an HBCU. *Id.* at 700. *See also* Elizabeth Culotta, *Black Colleges Cultivate Scientists*, 258 Science 1216 (Nov. 13, 1992) ("*Culotta*").

Why have HBCUs been so successful? The Elliott team believed that unlike at mainstream institutions, African-American students at HBCUs are not grouped at the bottom of the class. Roughly half of black students will be in the top half of the class. Academic mismatch is not an issue at these colleges.

At least one HBCU faculty member—North Carolina Central University's Dr. Walter Patillo, Jr.—reached the same conclusion four years before Elliott was published. He vented his frustrations in 1992: "The way we see it, the majority schools are wasting large numbers of good students. They have black students with admissions statistics [that are] very high, tops. But these students wind up

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the Sciences 3-9, Table 3.5 (1993) available at http://www.seaphe.org/pdf/astin.pdf.

majoring in sociology or recreation or get wiped out altogether." *Culotta* at 1218.

Eight years after *Elliott*, University of Virginia psychologists Frederick Smyth and John McArdle used a different methodology and database. But they reported findings consistent with *Elliott*'s conclusion that "race-sensitive admission, while increasing access to elite colleges, was inadvertently causing disproportionate loss of talented underrepresented minority students from science majors." *Smyth-McArdle* at 373.

Smyth-McArdle developed a model that attempts to measure how many more minority students would have succeeded in their goal of a science or engineering degree if colleges had employed race-neutral admissions criteria. It states:

> According to our model ..., if all the [Science-Mathematics-Engineering]-intending underrepresented minority students had enrolled in similarly functioning colleges where their high school grades and math test scores averaged at the institutional means among [Science-Mathematics-Engineering] intenders, 72 more of the women and 62 more of the men would be predicted to persist in [Science-Mathematics-Engineering] (45% and 35% increases, respectively).

Id.

Smyth and McArdle's recommendation was clear: "Admission officials are advised to carefully consider the relative academic preparedness of science-interested students, and such students choosing among colleges are advised to compare their academic qualifications to those of successful science students at each institution." *Id.* at 353.

The latest contribution to this literature is from UCLA law professor Richard Sander and UCLA senior statistician Roger Bolus. Using data from the nine-campus University of California, they conclude, "Minority attrition in science is a very real problem, and the evidence in this paper suggests that 'negative mismatch' probably plays a role in it." The multiple approaches to their data yielded consistent results: "[S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers." *Sander-Bolus* at 23-24.

The Commissioner Amici are aware of no empirical research that challenges these findings. Nevertheless, as far as they are aware, the Commission's recommendations that students be made aware of these risks have been ignored.[9]

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[9] Perhaps part of the reason that institutions have ignored these findings is that in the aftermath of *Grutter*, some federally-designated accrediting agencies and state regulators have ramped up their pressure on schools to diversify. *See* Brief of Amici Curiae California Association of Scholars and Center for Constitutional Jurisprudence in Support of Petitioner (filed October 19, 2011)(discussing accrediting agencies and other outside pressure groups that push colleges and universities into ever more racially discriminatory admissions policies). Even the most resolute faculties crumble in the face of threats to their accreditation and funding and hence fail to exercise their best academic judgment. The Commissioner Amici regard this as contrary to *Grutter*, which

The decision below bemoans the concentration of minorities in soft subjects. Its solution, however, is more preferential treatment, which will likely worsen the problem.

Most recently, Duke University economists Peter Arcidiacono and Esteban Aucejo and Duke sociologist Ken Spenner found evidence supporting the mismatch thesis when researching the major choices of undergraduates enrolling at Duke in fall 2001 and 2002.[10] Peter Arcidiacono, Esteban Aucejo & Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice* (June 2, 2011) available at http://public.econ.duke.edu/~psarcidi/grades_4.0.pdf "*Arcidiacono*". As in *Elliott*, they found black undergraduates were much less likely to persist with an initial ambition of majoring in engineering, the natural sciences or economics than white students.

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defers only to the *independent, academic* judgment of college faculties, not to policies that are products of non-academic factors. *See, e.g.*, David Bernstein, *Affirmative Blackmail*, Wall St. J. (Feb. 11, 2006); Gail Heriot, *The ABA's "Diversity" Diktat*, Wall St. J. (April 28, 2008). *See also* Susan Welch & John Gruhl, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS 80 (1998) (empirical study reporting that many schools admit being pressured by accreditors, state government and other groups to engage in race preferences).

[10] This study differs slightly from *Elliott* in grouping economics with engineering and the natural sciences as a major in which mismatch appears to best explain low minority persistence rates. Because of its subject matter, economics is often classified elsewhere as a social science. But it is a more quantitative discipline than many other social sciences. *Arcidiacono* notes that treating economics as a social science does not significantly alter the study's results. *Arcidiacono* at 24 n. 31.

54% of black males switched out of these majors, whereas only 6% of white males did. Once again, blacks' weaker academic credentials relative to whites upon matriculation at Duke seemed to explain this disparity best. Courses in these fields were more difficult, associated with higher study times, and had lower grades than courses in other fields. As with the students studied in *Elliott*, lack of interest in these academic fields among African-Americans does not appear to explain lower rates of persistence. Indeed, before starting at Duke, more black students than whites indicated an initial interest in majoring in engineering, economics, or natural science. *Id.* at 16.

As *Arcidiacono* concluded: "Attempts to increase representation at elite universities through the use of affirmative action may come at a cost of perpetuating under-representation of blacks in the natural sciences and engineering. Namely, the difference in course difficulty and grading standards between the natural sciences, engineering, and economics and their humanities and social sciences counterparts naturally leads the least prepared students away from the sciences." *Id.* at 5.

Arcidiacono demonstrates that the common belief that affirmative action beneficiaries "catch up" after their freshman years with their better-credentialed fellow students is illusory. What happens instead is that many transfer to majors where the academic competition is less intense and where students are graded on a more lenient curve. *Id.* at 18.

Unlike *Elliott*, *Arcidiacono* also looked at patterns of major switching among a group of disproportionately white and well-off Duke students who tend to have relatively low academic credentials: legacies, or students eligible to receive preferential treatment in admissions because they have a relative who attended Duke. *Arcidiacono* found that legacies also earned lower grades than white non-legacies at the end of their first year. The gap narrowed over time, but only because legacy students also shifted away from the natural sciences, engineering, and economics toward the humanities and social sciences. It is much harder to argue that bias, racism, lack of faculty role models who look like them, or other such explanations often advanced to explain racial disparities in science best explain legacies' collective drift toward humanities and social science majors. Rather, as *Arcidiacono* puts it, "These cross-race differences in switching patterns can be fully explained by differences in academic background." *Arcidiacono* at 4.

Sadly, some Duke students, alumni, and faculty members have misunderstood this point and instead taken *Arcidiacono* as a personal affront and an affront to minority students generally. Even more sadly, Duke University administrators have done nothing to correct those misunderstandings or to take the mismatch research in the area of science and engineering seriously. In an open letter to the campus responding to demands that the university condemn the study, Provost Peter Lange and other Duke administrators stated that they "understand how the conclusions of the research paper can be interpreted in ways that reinforce negative stereotypes," assured students that there are no easy fields of study at Duke (an apparent effort to respond to student-alumni demands that Duke declare all majors equally rigorous), and took the position that, insofar as the mammoth problem identified in *Arcidiacono* exists, a few minor tweaks to Duke's student counseling and its science curriculum could take care of it or have already done so. *Duke Academic Leaders Respond to Concerns on Minorities in the Sciences*, Duke Chron. (January 18, 2012). Despite the inconvenient findings of the *Arcidiacono* study, business will remain as usual at Duke.

C. Race-Preferential Admissions Appear to Have the Effect of Discouraging Minority Students from Becoming College Professors.

In 2003, Drs. Stephen Cole and Elinor Barber published *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students*–a project funded in part by the Mellon Foundation, an institution that is generally considered a strong supporter of affirmative action. The authors' mission was to determine why more minority members are not attracted to academic careers. Their conclusions, reached after extensively questioning 7,612 high-achieving undergraduates at 34 colleges and universities, pointed to mismatch as the culprit:

> The best-prepared African Americans, those with the highest SAT scores, are most likely to attend elite schools .... Because of affirmative action, these African Americans ... are admitted to schools where, on average, white students' scores are substantially higher, exceeding those of African Americans by about 200 points or more. Not surprisingly, in this kind of competitive

> situation, African Americans get relatively low grades. It is a fact that in virtually all selective schools ... where racial preferences in admission is practiced, the majority of African American students end up in the lower quarter of their class.
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> ...
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> African American students at the elite schools ... get lower grades than students with similar levels of academic preparation (as measured by SAT scores) than African American students at the nonelite schools .... Lower grades lead to lower levels of academic self-confidence, which in turn influence the extent to which African American students will persist with a freshman interest in academia as a career. African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools.

Stephen Cole and Elinor Barber, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 124, 212 (2003)(citations omitted). *See also Arcidiacono* at 19, chart 10 (showing substantial gaps in GPAs at Duke between African American and white students among the humanities and social sciences as well as the natural sciences).

Soon after publication, the *Chronicle of Higher Education* reported that the Mellon Foundation was "trying to distance itself" from the book's findings. Unlike similar projects with Mellon funding, this one did not receive a publicity push from the foundation. Dr. Cole told the *Chronicle* that there was "no chance" that he would receive money again from Mellon. "And I don't care," he said. "I was trained at a time before social science became so politicized." "I believe that social science should be objective and value-free, and you should design a study to answer a question and whatever the answer is, that's what it is." Robin Wilson, *The Unintended Consequences of Affirmative Action*, The Chron. of Higher Educ. 10 (Jan. 31, 2003).

D. Race-Preferential Admissions Appear to Have the Effect of Decreasing the Number of Minority Law Students Who Graduate and Pass the Bar.

UCLA law professor Richard Sander published his attempt to gauge academic mismatch in law schools in 2003. He found that when elite law schools lower their academic standards in order to admit a more racially diverse class, the ultimate result is a gap in academic credentials between minority and non-minority law students at law schools generally. Up and down the law school hierarchy, the average black student has an academic index that is more than two standard deviations below that of his average white classmate. Only HBCUs are immune to this effect. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367, 416 (2004) ("*Sander*").[11]

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[11] Large credential gaps also were found in *Gratz v. Bollinger*, 539 U.S. 244 (2003), where the University of Michigan's undergraduate college added 20 points to the academic index of all African-American applicants for admission–the equivalent of an entire letter grade in the applicant's high school GPA. *See*

This affects student performance. Sander's research demonstrated that in elite law schools, 51.6% of African-American law students had first-year GPAs in the bottom 10% of their class as opposed to only 5.6% of white students. Nearly identical performance gaps existed at law schools at all levels. At mid-range public schools, the median African-American student's first-year grades corresponded to the 5th percentile among white students. For mid-range private schools, the corresponding percentile was 8th, and for lower-range private schools it was 7th. With disappointingly few exceptions, African-American students were grouped towards the bottom of their class. Moreover, the performance gap widened as students continued through law school. *Sander* at 427-36.[12]

The Commissioner Amici are not aware of anyone who disputes these figures. Even Sander's most passionate critics—and there are some—have to concede that the relative performance of African-American law students is very discouraging. *See, e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L.

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also Althea Nagai, *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity (October 17, 2006), available at http://www.ceousa.org/content/blogcategory/78/100(finding that the University of Michigan actually increased the average preference level for African Americans after *Gratz*).

[12] The "low black performance is not the result of test anxiety (the gap is similar or greater in legal writing classes) or some special difficulty that blacks in general have with law school." *Sander* at 427.

Rev. 1807, 1807 (2005) ("Richard Sander's study of affirmative action at U.S. law schools highlights a real and serious problem: the average black law student's grades are startlingly low.").

Only slightly more controversial is Sander's finding that all this was almost entirely the result of affirmative action. When African-American and white law students with similar entering credentials competed against each other, they performed very close to the same. *Sander* at 428. Race-based admissions were creating the illusion that African-American law students are somehow destined to do poorly. The real problem is less daunting. There are fewer African-American students than anyone would prefer with the entering credentials necessary for admission on a color-blind basis to the most elite law schools. But there are many more who would do well at mid-tier schools—if they were only attending those schools.

Sander demonstrated that law students at the bottom of their class were worse off than students with the same credentials who attend less competitive law schools. It did so by noting two important effects of race-based admissions policies. First, African-American students attending law schools failed or dropped out at much higher rates than white students (19.3% vs. 8.2%). *Sander* at 437. Overwhelmingly, this phenomenon was associated with poor performance and not financial hardship, which mattered only very slightly. *Id.* at 439. Since many of these students who left law school would likely have performed better at a less competitive law school, they appear to have been, in a very real sense, victims of affirmative action.

Second, among African Americans who graduated and took the bar, the proportion who passed on their first attempt was not just lower than that for whites, it was lower even when one controls for academic index (LSAT and college GPA). For example, 71% of African Americans with a 400-460 index failed the bar on their first effort, while only 52% of whites did. Similarly, 26% of African Americans with an index between 640 and 700 failed their first time, while only 13% of whites did. *Id.* at 446.

Ultimately, only 45% of African Americans who entered law school passed the bar on their first attempt as opposed to over 78% of whites. Even after multiple attempts, only 57% of African Americans succeeded. The gap was thus never closed. *Id.* at 454.

Something was clearly wrong. When African-American and white law students with similar credentials competed against each other at the same school, they earned about the same grades. And when African-American and white students with the same grades from the same tier school took the bar examination, they passed at the same rate. Yet African-American students as a group had dramatically lower bar passage rates than white students with similar credentials.

As Sander pointed out, the most plausible explanation is that on the whole they were not attending the same law schools. The black and Hispanic students were more likely to be attending an elite school that spends little time on subjects covered on the bar exam and delves instead into more abstract and esoteric legal issues. *Id.* at 449.

Affirmative action beneficiaries were struggling while their similarly-credentialed white and Asian peers were learning at a more appropriate pace at less elite schools.

Sander estimated that if law schools were to use race-neutral admissions policies, fewer African-American law students would be admitted to law schools. But since those who were admitted would be attending schools where they had a substantial likelihood of doing well, fewer would fail or drop out. In the end, more would pass the bar on their first try (1859 vs. 1567) and more would eventually pass the bar (2150 vs. 1981) than under current admissions practices. *Id.* at 473.

In response to this research, the Commission urged grant-making agencies to fund research into this issue and requested state bar associations to "cooperate with this research."[13] Unfortunately, something closer to the opposite has happened. When Dr. Sander and his ideologically-diverse team of investigators attempted to obtain the data necessary to verify his initial findings, they were met with strong resistance from affirmative-action partisans and have had to institute litigation to obtain public data. *See Sander v. State Bar of California*, Civil Action A128647 (Cal. App. June 10, 2011), *rev. granted* (August 25, 2011) (holding that defendant's records are subject to disclosure under the common-law presumption of access to public documents).

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[13] U.S. Comm'n on Civil Rights, *Affirmative Action in American Law Schools* 143 (2007).

E. *Shape of the River*'s Conclusion that Affirmative Action Benefits Minority Students Is Flawed; If Anything, that Book's Data More Closely Support the Opposite Conclusion.

Race-preferential admissions supporters sometimes assert that, despite the likelihood of poor grades, minority students are better off accepting a preference from a prestigious school. When an effort is made to support this argument, the citation is inevitably to *Shape of the River*. In that book, the authors calculate that the mean earnings of black men with SAT scores of less than 1000 who attend a Tier-1 school (e.g. Princeton) are higher than their counterparts at a Tier-2 (e.g. Vanderbilt) or Tier-3 school (e.g. Pennsylvania State). On this basis, they conclude:

> Black students admitted to the most selective of [the schools we studied] did not pay a penalty in life ... for having attended such competitive institutions. On the contrary, the black ... matriculants with academic credentials that were modest by the standards of these schools appear to have been well-advised to go to the most selective schools in which they were admitted.

Shape of the River at 144. If that was what the authors intended to show, however, their methodology was seriously flawed.

For example, they took account only of SAT scores and not of other academic credentials—like high school rank. One cannot assume that a student with a combined SAT score of 1200 at Princeton is the equivalent of a student with the same score at Pennsylvania State. There is an excellent chance that the first student has a substantially better high school GPA or other distinctions in his favor. That is why he is at Princeton, not Pennsylvania State. Comparing students with the same SAT scores and finding that the student at the more elite school has higher post-graduation earnings, even though he appears to be mismatched at the more elite school, is a false comparison. It is overwhelmingly likely that the student attending the more elite school has a more elite high school record too.[14]

Given that and other methodological flaws, one would have to expect the data to come out as it did.[15] But even given these flaws, evidence of mismatch comes peeking out coyly from behind the charts. Their own figures show that black men with SAT scores between 1000 and 1099 earn more if they avoid Tier-1 schools. Similarly, black women with SAT scores between 1100 and 1199 earned more if they stayed away from Tier-1.

Meanwhile, buried in Appendices D.5.4 and D.5.5 is a more sophisticated analysis that is barely mentioned in the text. It attempts to tease out how various factors influence the subsequent earnings of blacks who attended one of the 28 colleges or universities. Included among the factors considered are several pre-college considerations: the student's family's socio-economic status, SAT scores, and whether the student was in the top 10% of his high school class. Also included are several factors from his college experience: the selectivity of his college or university; his major; whether his grades put him in the top, middle or bottom third of the class; and whether he went on to earn an advanced degree. Each such factor's effect was measured.

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[14] This is not the kind of error that former Ivy League presidents should make. Much of their schools' publicity is built around the theme that they routinely reject applicants with perfect SATs who do not otherwise measure up to their standards. *See* Sam Dillon, *A Great Year for Ivy League Schools, But Not So Good For Applicants to Them*, The New York Times, April 4, 2007.

[15] The study compares students within broad bands of SAT scores, rather than students with identical SAT scores. Since Tier-1 schools will tend to have more students towards the top of each band and Tier-3 schools have more towards the bottom, the comparison is biased against mismatch.

The authors purport to show that attending a Tier-1 school rather than a Tier-3 school on average contributes to the income of both black men and women. They appear oblivious, however, to the bombshell contained in the figures just a few rows down: *College grades generally contribute more.* Again and again through the different permutations of their analysis, their own figures show it.

Imagine two black males with identical SAT scores; both were in the top 10% of their high school class and both come from middle-class families. Only their colleges are different. The authors convincingly demonstrate that if the two have the same college major and similar grades, the one who attended a Tier-1 school will earn about $17,365 more than the one who attended a Tier-3 school.

But what if they don't have similar grades? The authors also show that if one student is in the top third of his college class and the other is in the bottom third of his, the former will earn an average of $34,089 more. By the authors' own calculations, therefore it is better to be a black male at Pennsylvania State in the top third of the class than in the bottom third at Princeton. The increased earnings he gets from high grades are worth almost twice the increased earnings from attending a Tier-1 school. And the boost in earnings he would get for majoring in natural science rather than the humanities would be $49,537.

If one's class rank and major were unrelated to the selectivity level of one's college, then it would be perfectly sensible for the authors to celebrate the finding that, on average, black males get an earnings boost from attending a Tier-1 school over a Tier-3 school. But they are not unrelated. For students who would not have been admitted but for racial preferences, the chances of earning grades in the top third of the class are exceedingly remote.

The only question is whether a black student who attends a Tier-1 school and winds up in the bottom third of the class would have likely been in the top third of a Tier-3 school. And the answer to that question, at least in many cases, is yes. Consider, for example, a black male with SAT scores of 1300 who just missed being in the top 10% of his high school class. If he attends Pennsylvania State, his SAT scores will put him exactly at the 75th percentile in the entering class of 2011. That would give him an excellent shot at earning grades in the top third and/or graduating with a natural science degree. If he enrolls at Princeton instead, his SAT scores would put him ninety points *below* the 25th percentile for that school, making it much more likely his grades will be in the bottom third.[16]

Shape of the River was cited by this Court in *Grutter* as supporting the argument for race-preferential admissions policies. *Grutter*, 539 U.S. at 333. Its actual data supports their opposition.

F. The Academic Literature on "Stereotype Threat" Does Not Justify Race-Preferential Admissions Policies.

News reports indicate that some of Respondents' supporters may file an amicus brief arguing that the experimental psychology literature on "stereotype threat" justifies race-preferential admissions.[17] This literature began with an experiment in which a group of African-American students at Stanford and control group of Stanford students were told that a certain difficult exam could evaluate their verbal ability. The African-American students did less well on the exam than the control students *with the same SAT Verbal score*. On the other hand, when similar groups of Stanford students were told that the purpose of the same exam was "to better understand the 'psychological factors involved in solving verbal problems," the

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[16] *See* US News College Rankings (2011) available at http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities(reporting the 25th and 75th percentile SAT score for various schools, including Pennsylvania State and Princeton).

[17] *See* Brooke Donald, *Affirmative Action is Needed to Get the Best Candidates, Psychologist Says*, Phys.Org (April 27, 2012) available at http://phys.org/news/2012-04-affirmative-action-candidates-psychologist.html.

African-American students performed almost identically to the controls with the same verbal SAT scores (though part of the reason was that the control students who were told the second test was non-diagnostic did less well). *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. Person. & Soc. Psych. 797 (1995). Steele and Aronson dubbed this phenomenon "stereotype threat" and have attempted to explain it this way:

> [W]henever African American students perform an explicitly scholastic or intellectual task, they face the threat of confirming or being judged by a negative societal stereotype—a suspicion—about their group's intellectual ability and competence. . . . . And the self-threat it causes—through a variety of mechanisms—may interfere with the intellectual functioning of these students, particularly during standardized tests.

Id. at 797. Note that contrary to some early misinterpretations of this experiment, these authors did not find that African-American students performed just as well as non-black students on the less threatening test. Differences in academic credentials were controlled for. *See* Paul R. Sackett, et al., *On Interpreting Stereotype Threat as Accounting for African American—White Differences on Cognitive Tests*, 59 Am. Psych. 7 (Jan. 2004) (documenting these widespread misinterpretations).

Since that initial experiment, a number of similar experiments have produced similar results.

The settings have varied. Some of these experiments have focused on women and girls, some involved African Americans and Latinos. Turkish residents of Germany and others have also been examined for stereotype threat. There is, however, a concern that the seeming similarity of results is an artifact of publication bias—i.e. that experiments that arguably show stereotype threat get published while those that do not are not. *See* Jelte M. Wicherts & Cor de Haan, *A Meta-Analysis of the Effects of Stereotype Threat on the Cognitive Test Performance of African Americans* (University of Amsterdam Scholarly Paper) (2011)(manuscript under review)(expressing serious concerns over the publication bias issue).

Until recently, not many who have examined this literature have thought stereotype threat to be an argument for race-preferential admissions. Indeed, one important question is whether race-preferential admissions are in substantial part the *cause* of "stereotype threat" rather than its *solution*. The effect noted by Steele & Aronson has been found to exist from a very early age for African-American children (thus casting some doubt on the theory that "stereotype threat" causes it). But it has also been noted that the effect is greater at highly competitive universities like Stanford than it is at earlier stages in education and that it does not appear to be a factor at Historically Black Colleges and Universities. *See* Gregory M. Walton & Geoffrey L. Cohen, *A Question of Belonging: Race, Social Fit, and Achievement*, 92 J. Person. & Soc. Psych. 82 (2007); Arlana Dodson-Sims, *Examining Stereotype Threat, Academic Self Concept, and College Class Status Among African Americans at Historically Black Universities and Predominantly White*

Universities, (2005) (University of North Carolina at Charlotte dissertation) available at http://gradworks.umi.com/31/62/3162076.html.

It seems unlikely that systematically putting bright African-American college students at schools at which their academic credentials are all but certain to put them at a severe academic disadvantage will do anything but aggravate anxieties over stereotyping. Indeed, if the Commission Amici did not know better, they would suspect that race-preferential admissions policies were a diabolical plot designed to increase minority student anxiety.

Nevertheless, some scholars now argue that race-preferential admissions can be justified as a response to stereotype threat. *See* Gregory M. Walton, Steven J. Spencer & Sam Erman, *Affirmative Meritocracy*, __ Soc. Issues & Pol'y Rev. ___ (2012)(forthcoming). They argue that they have evidence that stereotype threat kicks in early and masks African Americans' true academic aptitude, such as by depressing their SAT scores even before they enter college, and that African Americans actually outperform non-blacks with the same academic credentials in non-threatening situations. *See* Christine R. Logel, Gregory M. Walton, Steven J. Spencer, Jennifer Peach & Zanna P. Mark, *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, ___Educ. Psychologist ___ (2012)(forthcoming).

There are many things wrong with this argument. For one, the level of preferential treatment that is currently typical at highly competitive schools is greater than the effect that these scholars purport to have detected, even assuming their analysis is otherwise correct. For another, their findings depend on a meta-analysis of a motley body of stereotype threat literature that includes many kinds of "stereotyped" groups other than racial minorities in this country, in many kinds of settings, with many kinds of methodological problems and a significant publication bias. Their meta-analysis excludes the seminal study by Steele & Aronson, which conspicuously did not find that African-American students outperform non-black counterparts with the same SAT Verbal score when they are told the test they were taking was non-diagnostic.

Walton *et al.* take the view that if only higher education could become less threatening by refraining from conducting tests designed to measure individual students' aptitude or achievement, African-American beneficiaries of preferences would slightly outperform other students whose academic credentials (like theirs) are below the institution's norm. But it is naïve to believe that colleges could drop their reliance on grades and other performance indicators without profoundly altering the incentive of students of all races and ethnicities to apply themselves to their studies. The Commissioner Amici continue to believe that the best way to create environments where minority students can learn and flourish is through race-neutral admissions policies. Students of all races and ethnicities learn best where they have a fighting chance to excel. That is what the mismatch literature is finding, and that literature is based not on experiments, but only actual student experience.

The irony is that Walton *et al.* are themselves engaged in stereotyping. None of the stereotype threat literature claims that all or almost all African Americans are affected by anxiety over stereotype threat. Yet all African Americans would benefit from preferential admissions. The Commissioner Amici do not believe that negative stereotypes are less harmful when they come from scholars who mean well.

CONCLUSION

Almost two generations ago, Justice Mosk opposed deviating from the usual strict prohibition on race discrimination for the sake of a "dubious expediency." 18 Cal. 3d at 62. The expediency has turned out to be dubious indeed. Taken together, the evidence is quite devastating.

Nevertheless, race-based admissions policies have become entrenched. Evidence of their failure is ignored and covered up. Rather than pull back, advocates argue for the policies' expansion. In an interview with Columbia University president Lee Bollinger, Attorney General Eric Holder recently stated, "'The question is not when does [affirmative action] end, but when does it begin . . . When do people of color truly get the benefits to which they are entitled?'" Yasmin Gagne, *Holder Talks Financial Crime, Affirmative Action at Low*, Colum. Spectator (Feb. 24, 2012).

Holder's comments are sobering. The federal government's top lawyer urges the nation to double down on affirmative action—all in the face of evidence that race-preferential admissions policies have gone badly awry for its supposed beneficiaries.

At some point, it becomes necessary for the courts as guardian of individual rights to act to end this dubious deviation from the prohibition on race discrimination. The Commissioner Amici request that the Court invalidate the University of Texas's expansive race-preferential admissions policy.

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Respectfully submitted,

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In the Supreme Court of the United States

ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RUBEN HINOJOSA, MEMBER OF CONGRESS; CHARLES A. GONZALEZ, MEMBER OF CONGRESS; AND 64 OTHER MEMBERS OF CONGRESS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This brief is filed on behalf of United States Representatives Ruben Hinojosa, Charles Gonzalez, Emanuel Cleaver, Henry "Hank" Johnson, Charles Rangel, Lucille Roybal-Allard, Joe Baca, Marcia Fudge, Bobby Rush, Silvestre Reyes, Jan Schakowsky, Laura Richardson, Gene Green, Edolphus Towns, Barbara Lee, Luis Gutierrez, Grace Napolitano, Nancy Pelosi, Earl Blumenauer, Andre Carson, Keith Ellison, Judy Chu, Lloyd Doggett, James Clyburn, Michael Honda, Madeleine Bordallo, Steve Cohen, George Miller, Ed Pastor, Jared Polis, Jerrold Nadler, Bob Filner, Pedro Pierluisi, Danny Davis, Al Green, Robert C. "Bobby" Scott, Raul Grijalva, Jose Serrano, Xavier Becerra, Rosa DeLauro, Eleanor Holmes Norton, Joseph Crowley, Albio Sires, Donna Edwards, Elijah Cummings, Janice Hahn, Eddie Bernice Johnson, Gregorio Sablan, Dennis Kucinich, Lynn Woolsey, James P. McGovern, John Tierney, Sam Farr, John B. Larson, Sheila Jackson Lee, Karen Bass, John

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[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Blanket letters from the parties consenting to the filing of this brief are on file with the Clerk pursuant to Rule 37.3.

Olver, John Lewis, Yvette Clarke, Steny Hoyer, Marcy Kaptur, Hansen Clarke, Linda Sanchez, Brad Miller, John Conyers, and Mazie Hirono.

As elected representatives, *amici* have first hand knowledge of the compelling interest that the federal, state and local governments have in promoting diversity in their programs and through their laws, regulations, policies and practices. Ours is a very diverse society that is becoming more so. It is vital for all the diverse elements of our society to participate fully in the processes of government and in government programs of interest to them. It is also vital for them to be able to work together for the common good in public and private settings. A considerable part of *amici's* time and effort as legislators and representatives is devoted to promoting these interests.

One important component of the diversity that *amici* seek to promote is racial and ethnic diversity. A number of *amici* are Hispanic, African-American, Asian-American or Pacific Islanders and/or represent large numbers of constituents who are Hispanic, African-American, Asian-American or Pacific Islanders or Native American. *Amici* are keenly aware that ours is a society "in which race unfortunately still matters." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). At the same time, *amici* are deeply committed to the constitutional guarantee of equal protection of the laws for all persons.

Accordingly, *amici* have a profound interest in how this case is resolved because the Court's decision will affect the legislative and policy options available to *amici* to address the needs and concerns of their constituents.

SUMMARY OF ARGUMENT

The University of Texas at Austin ("UT") has a compelling interest in attaining a diverse student body that justifies the consideration of race in its admissions. *See Grutter*, 539 U.S. at 325. Indeed, diversity is a compelling government interest in a number of other contexts as well, including the selection of our future military leadership, the selection of leaders of Executive Branch agencies, and the selection of federal and state judges. Accordingly, the Court's resolution of this case should be informed by these broader concerns and the need for clear guidance from this Court about how race, ethnicity, and gender can be taken into account in government programs in a manner that is consistent with the Constitution.

The Court, in *Grutter*, formulated a sound method for taking account of an applicant's race as part of a lawful effort to achieve diversity. This method forbids the use of quotas but permits diversity goals based on a good-faith effort to come within a range demarcated by the goal itself. It requires each applicant to be evaluated as an individual and compared with all other candidates for the position(s). The method allows race to be considered as a "plus" factor as part of a holistic review of each applicant's file that does not make race determinative or give it a predetermined weight, and which gives substantial weight to other diversity factors as well. *See* 539 U.S. at 335-38. This methodology is logical, straightforward and readily enforceable.

UT considered appropriate benchmarks in formulating its admissions program. While eschewing any numerical goals for the admission of minority students, UT concluded that African-Americans and Hispanics are underrepresented in its student-body in comparison to state demographics. Thus, they are eligible to have their race considered as a diversity "plus" factor when their applications are reviewed. "First Amendment interests give universities particular latitude in defining diversity." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring). This Court has approved diversity goals that constitute "reasonable aspirations" for correcting underrepresentation. *See Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 635 (1987). UT's use of state demographics as a benchmark is clearly reasonable for a state university. Furthermore, UT's effort to increase diversity at the classroom level, as well as the student body level, is also reasonable. The Court has recognized that multiple benchmarks may be appropriate to measure underrepresentation in a refined manner, such as by job categories rather than by reference to the overall workforce. *See id.*

UT concluded that its existing practice of admitting the top 10% of graduates from every Texas high school was not producing sufficient diversity in its incoming class. Under *Grutter*, UT could have scrapped this race-neutral "percentage plan" and implemented a race-conscious methodology for all of its admissions without violating the Equal Protection Clause. Instead, it chose to retain the percentage plan for most of its admissions and implement a race-conscious process for only 20-30% of its admissions. UT not only gave good faith consideration to a race-neutral method but adopted that approach to the maximum extent that it deemed workable as part of an overall plan to achieve its various admissions goals.

Petitioner asks the Court to second-guess the judgment of UT and the Texas legislature and rule, in essence, that the top 10% approach produces "enough diversity" so that it precludes UT from using any race-conscious component to help fulfill its diversity goals. This argument contravenes this Court's tradition of giving a degree of deference to a university's academic decisions, including the selection of its student body. *See Grutter*, 539 U.S. at 328-29. Accepting this argument would undermine the "narrow tailoring" of race-conscious admissions programs and experimentation with race-neutral alternatives. The lesson drawn by other universities would be to employ an entirely race-conscious methodology if they want to preserve some leeway to conduct individualized assessments to assemble a well-rounded, diverse student body. Universities would be discouraged from developing and using race-neutral admissions approaches in combination with race-conscious approaches.

ARGUMENT

I. ATTAINING DIVERSITY IS A COMPELLING GOVERNMENT INTEREST IN A NUMBER OF CONTEXTS

This Court has ruled that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. A college or university "has a compelling interest in attaining a diverse student body." *Id.* at 328. Accordingly, the Court upheld an admissions program that used race as a "plus" factor in "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment," *id.* at 337, and which gave "substantial weight to diversity factors besides race." *Id.* at 338.

Diversity is a compelling government interest in a number of other contexts as well. This Court, in *Grutter*, noted that a "highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security." 539 U.S. at 331 (quoting Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5). This compelling interest requires the service academies and the ROTC to use limited race-conscious recruiting and admissions policies to achieve an officer corps that is both highly qualified and racially diverse. *Id.*

Grutter also recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." 539 U.S. at 332. Moreover, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

Both the legislative and executive branches of the federal government share these views. Both branches have taken a series of steps in recent years to increase diversity in the public sector. In 2010 the House of Representatives launched a bipartisan initiative to increase racial diversity among congressional staff after an internal assessment revealed that only 13 percent of House chiefs of staff were minorities versus 35 percent of the United States population. *See* Jordy Yager, "House Leaders launch program aimed at increasing racial diversity of staffers," The Hill (2010), *http://thehill.com/homenews/house/91921-house-leaders-launch-racial-diversity-program*.

Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010) created 20 Offices of Minority and Women Inclusion at the various financial regulatory agencies, including the Treasury, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the 12 Federal Reserve banks and the newly created Consumer Financial Protection Bureau. These offices are charged with monitoring the diversity at the agencies as well as at any contractors or subcontractors.

Other federal agencies independently have undertaken the promotion of diversity in their ranks to increase their effectiveness. For example, the Central Intelligence Agency states that "[i]n order for the CIA to meet our mission of protecting our national security interests, we need to employ a workforce as diverse as America itself--the most diverse nation on earth." Central Intelligence Agency's Mission Statement Regarding Diversity, https://www.cia.gov /careers/diversity/index.html. Toward that end, the CIA "review[s] the Agency's diversity achievements in light of benchmarks that are meaningful to meeting mission requirements." *Id.*

In 2011, the President issued an Executive Order establishing a coordinated government-wide initiative to promote diversity and inclusion throughout the federal workforce. Exec. Order No. 13583, 76 Fed. Reg. 52847 (Aug. 23, 2011).

The importance of diversity is evident in the staffing of the most senior level of the Executive Branch -- the presidential Cabinet. Presidents of both parties have recognized the need to have a diverse Cabinet that includes members of major racial and ethnic groups to head the federal agencies that comprise the Executive Branch. And Presidents of both parties have consciously taken diversity into account in choosing the members of their Cabinets. *See, e.g.*, Susan Page, "Bush is opening doors with a diverse Cabinet," *USA Today*, Dec. 9, 2004, available at http://www.usatoday.com/news/washington/2004-12-09-diverse-usat_x.htm.[2]

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[2] Similarly, diversity in the leadership of private corporations has become increasingly important. In December 2009, the Securities and Exchange Commission approved new disclosure rules requiring public companies, for the first time, to provide disclosure regarding the diversity of their boards of directors. Item 407(c)(2)(vi) of Regulation S-K, 17 C.F.R. § 229.407(c)(2)(vi).

Still another example of the need for diversity is furnished by the federal and state judiciary. There is no question that diversity, including race, ethnicity and gender, has been a factor in selecting nominees for federal judgeships. "The president wants the federal courts to look like America," according to the White House counsel. John Schwartz, "For Obama, a Record on Diversity but Delays on Judicial Confirmations," The New York Times (2011), http://www.nytimes.com/2011/08/07/us/politics/ 07courts.html. Conservatives agree that diversity is desirable and that ethnic diversity is one factor that should be weighed with other factors in judicial selections. *See id.* President George W. Bush appointed a record number of Hispanic judges and a review of his appointments led one academic to comment in 2007 that "the second variable that comes through in the data is that clearly diversity is a big thing in this administration." Ken Herman, "Bush hold the Record on Hispanic Federal Judges Latino Advocacy Groups are Pleased; DNC Stays Mum," Chron.com (2007), http://www.chron.com/news/nation-world /article/Bush-holds-the-record-on-Hispanic-federal-judges-1541185.php.

Diversity is an explicit consideration in the appointment of state judges. Arizona has a constitutional provision requiring its judicial nominating commission to "consider the diversity of the state's population, however the primary consideration shall be merit." Ariz. Const. art. VI, § 36. Maryland has an Executive Order which provides that the nominating commission "shall consider ... the importance of having a diverse judiciary." Md. Exec. Order No. 01.01.2007.08. In Missouri, the governing Supreme Court Rules direct that "the Commission shall further take into consideration the desirability of the bench reflecting the racial and gender composition of the community." Mo.Sup.Ct.R. 10.32(f) (2008).

Several other states have laws that mandate diversity in the composition of the judicial nominating commission. Florida, for example, requires that "the Governor shall seek to ensure that, to the extent possible, the membership of the Commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered." Fla. Stat. Ann. § 43.291(4) (2008). Tennessee law requires the appointment of "persons who approximate the population of the state with respect to race, including the dominant ethnic minority population, and gender." Tenn. Code Ann. § 17-4-102(b)(3) (2008). And Rhode Island provides that "[t]he governor and the nominating authorities hereunder shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the Commission." R.I. Gen. Laws § 8-16.1-2(a)(3) (2006).

The weight placed on diversity in the judicial nomination process is illustrated by a high profile case in which Florida Governor Charlie Crist refused to make an appointment from an all-white list of nominees developed by a nominating commission. He noted that the court at issue had no black judges and that he wanted to make an appointment that would make the judiciary more diverse. The Florida Supreme Court ultimately ruled that the state constitution did not permit the governor to reject all of the candidates, while applauding his "well-intentioned" interest in promoting diversity. *See Pleus v. Crist*, 14 So.3d 941, 946 (Fla. 2009).

In all of these contexts, diversity is being pursued to help promote "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation," including "a set of leaders with legitimacy in the eyes of the citizenry," *Grutter*, 539 U.S. at 332, and/or because diversity in the ranks of government agencies and programs increases their effectiveness.

II. GRUTTER ESTABLISHED A SOUND METHOD FOR TAKING ACCOUNT OF RACE, ETHNICITY, OR GENDER TO ACHIEVE DIVERSITY

Given the widespread importance of diversity to federal, state, and local governments, it is vital for them to have clear guidance from this Court about how race, ethnicity, and gender can be taken into account in their programs in a manner that is consistent with the federal Constitution. As Justice Kennedy noted, "[e]xecutive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).

In his *Parents Involved* concurrence, Justice Kennedy enumerated a series of race-conscious, but facially race-neutral means for bringing together students of diverse backgrounds and races that pass constitutional muster. These include "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.* This sort of guidance is invaluable to legislators and administrators who must formulate laws and policies.

But such race-neutral measures are not always adequate to ensure that diversity is considered in selecting individuals who will participate in a government program. These measures do not enable one to decide which candidate to choose as the new Secretary of Labor, or which candidate to nominate for a judgeship, or which applicants should be accepted to UT. If diversity -- racial, ethnic or gender -- is to be factored into such decisions, it must be done on an individualized basis in a candid manner.

This Court, in *Grutter*, formulated a sound method for taking account of an applicant's race (or ethnicity or gender) as part of a lawful effort to achieve diversity. This method forbids the use of quotas but permits diversity goals based on "a good-faith effort ... to come within a range demarcated by the goal itself." 539 U.S. at 335 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part). It requires each applicant to be evaluated as an individual and compared with all other candidates for the position(s). The method allows race to be considered as a "plus" factor as part of a holistic review of each applicant's file that does not make race determinative or give it a predetermined weight, and which gives substantial weight to other diversity factors as well. *See id.* at 335-38. In other words, "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking." *Id.* at 392-93 (Kennedy, J., dissenting).

The *Grutter* methodology is straightforward and readily understood. It establishes constraints that are capable of judicial review and enforcement. This method can be applied to other situations in which there is a need to consider diversity along lines of race, ethnicity or gender in selecting among a group of candidates.

Moreover, there often is not a workable race-neutral alternative to the *Grutter* approach. Where only one candidate or a small group of candidates is to be chosen, there seldom will be a race-neutral selection method that will foster diversity. When larger groups are to be selected, it sometimes may be possible to devise a race-neutral methodology that will produce a diverse result, but such methodologies may create problems of their own by giving short shrift to other factors that the decision-maker properly wishes to take into account.

III. THE UT ADMISSIONS PROGRAM COMPLIES WITH *GRUTTER*

A. UT Has Chosen Appropriate Diversity Benchmarks And Used Them In A Limited Manner

Establishing an appropriate benchmark or benchmarks is integral to any government effort to achieve (greater) diversity that includes consideration of applicants' race, ethnicity, or gender. A benchmark is essential to determining whether a particular group is underrepresented and to what extent, and whether progress is being made toward reducing its underrepresentation.

The use of a benchmark presents two distinct issues to a court reviewing a diversity program. One is whether the chosen benchmark is appropriate under the circumstances of the case. The second is whether the benchmark is being used properly. Is it an impermissible quota that must be met or, instead, a "reasonable aspiration" (either long-term or short-term) for correcting the existing underrepresentation? *See Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 635 (1987).

In *Grutter*, the University of Michigan Law School sought to enroll a "critical mass" of underrepresented minority students to ensure their ability to make unique contributions to the character of the Law School. 539 U.S. at 316. The Law School did not quantify critical mass in terms of numbers or percentages, but instead described it as "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 319. But it was unclear how this goal was developed or measured. The Law School tied critical mass to avoiding isolation of minority students or turning them into "spokespersons for their race," but this is not illuminating. The avoidance of tokenism does not provide a useful benchmark for measuring and achieving diversity.

In practice, the Law School apparently benchmarked diversity with reference to its overall pool of applicants, as the *Grutter* dissenters argued.[3] The majority and dissents diverged on whether the critical mass concept, as utilized by the Law School, operated as an appropriate goal or an unlawful quota. But they did not discuss whether the pool of applicants furnished the correct (or one correct) reference point for measuring diversity.

The overall applicant pool may well be an appropriate reference point for measuring diversity in some cases, but it is not the only possibility. The Court discussed the establishment of diversity benchmarks in *Johnson v. Transportation Agency*. It approved benchmarks that distinguished between long-term and short-term goals for measuring progress in eliminating underrepresentation of women. The long-term goal was a work force that reflected in its major job classifications the percentage of women in the area labor market. But, for positions requiring specialized training and experience, less ambitious annual short-term goals were formulated based on the available labor force with the requisite qualifications. These goals were not quotas that must be met, but "reasonable aspirations" for correcting the existing underrepresentation. *See* 480 U.S. at 635.

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[3] The dissent of Chief Justice Rehnquist demonstrated a close correlation between the percentage of the Law School's pool of applicants who were members of the minority groups at issue and the corresponding percentage of the admitted applicants. 539 U.S. at 383-85. Both the Chief Justice and Justice Kennedy found this correlation to be evidence of forbidden racial balancing. *Id.* at 385-86, 390-91.

In this case, UT has not established any specific target or other quantitative objective for the admission of minority students. UT compared its student-body demographics to state demographics and concluded that African-Americans and Hispanics are underrepresented in its student body. Accordingly, students in those groups may have their race considered as a diversity "plus" factor when their applications are evaluated.[4] But admissions officers do not monitor the racial composition of the class.

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[4] The diversity plus factor is not restricted to candidates who are members of underrepresented groups. As the Fifth Circuit noted, a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may obtain a greater score than a similarly situated Hispanic student from the same school. App. 46a.

Petitioner challenges UT's use of state demographics in formulating its admissions methodology. The logic of this benchmark seems self-evident for a state university that serves the entire state; it clearly constitutes a "reasonable aspiration." *Johnson*, 480 U.S. at 635. In comparison, the U.S. Military Academy sets goals for minorities based upon their representation in the national population and in the national pool of college bound people, and their representation in the Army. *Military Academy: Gender and Race Disparities* 13 (Mar. 17, 1994). Moreover, "First Amendment interests give universities particular latitude in defining diversity." *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring).

Petitioner also challenges UT's assertion of a need for greater classroom diversity, arguing that diversity must be measured against the student body as a whole, not on a more granular level. But the Court has previously recognized the need to develop "refined measures" of underrepresentation, such as on a job category by job category basis rather than with reference to the overall workforce. *See Johnson*, 480 U.S. at 635. In *Grutter*, for example, the Court was advised that the service academies measure diversity within the officer corps separately from diversity within the service as a whole, and that they consider both measures in establishing their race-conscious recruiting and admissions policies to increase minority representation. *See*

Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5-7.

In sum, "context matters" when selecting a diversity benchmark(s). *See Grutter*, 539 U.S. at 327. There is no single benchmark that is always appropriate. And there may be more than one benchmark that might reasonably be chosen in a given case. While a court should satisfy itself that the benchmark(s) used in a diversity program is reasonable, the more searching inquiry should focus on how the benchmark is employed, whether it is treated as an appropriate goal or as a forbidden quota.

B. UT's Use Of Race-Neutral Selection Criteria That Produce Some Diversity Should Not Preclude It From Also Making Use Of A Race-Conscious Method

In the wake of the *Grutter* decision, UT and the Texas legislature made the judgment to modify the admissions process so that it was not governed entirely by the Top Ten Percent Law ("Top 10% Law"), which required the admission of all Texas high school seniors ranking in the top 10% of their classes. UT decided to admit approximately 70% to 80% of its in-state students pursuant to the race-neutral Top 10% Law and implement a race-conscious methodology with respect to selecting the final 20-30% of the incoming class. (The race-conscious methodology is also used with respect to placement of all incoming students into particular programs of study). Several years after petitioner applied for admission in 2008, the legislature ultimately amended the Top 10% Law so that it covers 75% of the freshman class.

Petitioner asks the Court to second-guess the judgment of UT and the Texas legislature and rule, in essence, that the Top 10% Law produces "enough diversity" so that it precludes UT from using any race-conscious component as part of its admissions process. This argument contravenes this Court's tradition of giving a degree of deference to a university's academic decisions, including the selection of its student body. *See Grutter*, 539 U.S. at 328-29. Furthermore, acceptance of this argument would undercut the "narrow tailoring" of race-conscious admissions approaches.

Grutter ruled that, before implementing a race-conscious admissions program, a university must give serious, good faith consideration to workable race-neutral alternatives that will achieve the diversity it seeks. 539 U.S. at 339. But the Court rejected the argument that a race-neutral "percentage plan," if feasible, must be used to achieve diversity instead of race-conscious plan. The Court explained that such percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 340.

Thus, UT (with the concurrence of the Texas legislature) could have scrapped the Top 10% approach altogether and utilized a race-conscious methodology for all of its admissions without violating the Equal Protection Clause. Instead, it chose to limit its use of a race-conscious process to only 20-30% of its admissions. Petitioner contends that this far more limited approach violates equal protection (although a full-fledged race-conscious method would not) because it is "gratuitous" and allegedly has a minimal effect on promoting diversity. But acceptance of this argument would discourage other universities from developing and using race-neutral admissions approaches in combination with race-conscious approaches -- a result at odds with the "narrow tailoring" of race-conscious programs.

UT faithfully followed *Grutter* by not only considering a race-neutral admissions approach, but adopting that approach to the maximum extent that it deemed workable as part of a process to achieve its various admissions goals, including but not limited to diversity. *See* 539 U.S. at 342 ("Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop."). UT combined this race-neutral approach with a limited, race-conscious policy component that operates in accordance with *Grutter*. It would be perverse if UT's effort to maximize the use of race-neutral criteria in its admissions process were held to preclude any use of race-conscious criteria, thereby invalidating the carefully measured approach that UT developed. The lesson drawn by other universities would be to employ an entirely race-conscious methodology if they want to preserve some leeway to conduct individualized assessments to assemble a well-rounded, diverse student body.

CONCLUSION

Diversity has become even more important in the years since *Grutter* was decided. This Court, in *Grutter*, formulated a sound method for taking account of an applicant's race (or ethnicity or gender) as part of a lawful effort to achieve diversity. There is no reason for the Court to revisit its decision in *Grutter*. Nor is there any reason to conclude that UT has violated the standards established by *Grutter* for lawfully considering diversity as part of the university admissions process. Accordingly, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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No. 11-345

In the Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF HOUSTON COMMUNITY COLLEGE SYSTEM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is Houston Community College System ("HCC").[1] With an enrollment of more than 70,000 students per semester, HCC is one of the largest community college systems in the United States.[2] HCC provides students with an educational foundation, often in order to prepare them for success at Texas public universities. HCC's students reflect the Houston area's rich racial diversity. In 2011, for example, the HCC student body was 31% African-American, 34% Hispanic, 18% white, 14% Asian-American, and 3% from other backgrounds.[3]

HCC has a direct interest in the outcome of this case. Petitioner and her *amici* have asked the Court to end its recognition of the freedom of academic institutions to select their students by considering race as one factor in a holistic review of the individual applicant. Such a reversal would not only impact freshman admissions to four-year colleges, but would also harm transfer applicants, including those students who transfer from HCC to UT. UT's personal achievement rubric for freshman admissions, which includes race as a factor, is the same for transfers. Because the vast majority of transfer applicants to UT are admitted under a race-conscious admissions program, a wholesale reversal of *Bakke* and *Grutter* would diminish UT's opportunity to capture the educational benefits of diversity made possible through the admission of these students.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters consenting to the filing of *amici curiae* briefs have been filed by the parties with the Clerk.

[2] Houston Community College, *HCC At a Glance*, http://www.hccs.edu/portal/site/hccs/menuitem.3a486331336fe02f3227a2ced07401ca/?vgnextoid=298f4cc6a366f110VgnVCM2000001b4710acRCRD&appInstanceName=default (last visited Aug. 8, 2012).

[3] Office of Institutional Research, Houston Community College, *Houston Community College 2011-2012 Fact Book* 10, http://www.hccs.edu/hcc/System%20Home/Departments/OIR/Publications/2010-2011%20Fact%20Book.pdf.

HCC recognizes that "[i]n the near future, Texas will have no majority race; tomorrow's leaders must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate." Supp. J.A. 24a. Even so, we have not yet reached the day when educational opportunities are equally available to persons of all socio-economic, racial and ethnic backgrounds. HCC believes it is helping to educate many of Texas's future leaders today; but it does not do so alone. HCC joins with UT in its recognition that there are educational benefits that flow from a diverse student body, and asks that the Court continue to permit universities to offer educational opportunities to students from diverse backgrounds.

BACKGROUND

Transfer admissions have received scant attention in this and other race-conscious admissions cases. Yet students who transfer to UT from HCC and elsewhere make a significant contribution to UT's educational efforts by broadening campus diversity. Indeed, the addition of racially diverse transfer students brings UT closer to the goal of providing students with the educational benefits that flow from a diverse campus.

As the record demonstrates, UT currently uses two metrics to determine freshman admissions for students not admitted under the Top Ten Percent Law: an Academic Index ("AI") and a Personal Achievement Index ("PAI"). J.A. 139a. The AI is calculated on the basis of a student's high school class rank, standardized test scores, and the extent to which the student exceeded the high school curriculum required by UT. Supp. J.A. 27a. UT created the PAI to identify candidates whose merits (e.g., leadership qualities, work experience, community service) may not be reflected in the AI score. Supp. J.A. 28a. The PAI is the result of three scores. Applicants receive a score for each of two required essays, and a "personal achievement score" for the applicant's file as a whole. Supp. J.A. 153a. A candidate's race may contribute to the personal achievement score when considered in the context of the rest of the student's file. Significantly, in conducting this holistic review, an applicant's particular racial background does not determine whether race will be a 'plus' for his or her candidacy. As UT's Director of Admissions explained: "race, within the context of the rest of the application, can be beneficial to any applicant, to Whites as well as minority applicants." J.A. 206a. Because this review is highly individualized, "it's one of those criteria factors that may benefit some students, may not benefit other students, but it's not based on their race, it's based on the context of their file." J.A. 209a.

UT conducts a modest consideration of race for transfer applicants in nearly the exact same way as it does for freshman applicants. Transfer applicants who are not automatically admitted through UT's Coordinated Admission Program ("CAP"),[4] may benefit from a holistic review of his or her application that includes a consideration of the applicant's race. Just as is the case for non-Top Ten Percent freshman admissions, UT considers the transfer applicant's race as part of the "special circumstances" factor of the "transfer admissions index" ("TAI")—the transfer admissions counterpart to the PAI.[5]

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[4] UT treats those students automatically admitted under CAP as transfer students. *See* J.A. 391a, 393a. Under CAP, Texas residents who are not admitted as freshmen to UT may later be automatically admitted as transfers after meeting specific academic requirements at another UT System university. *See id.* Also, as of 2009, the Top Ten Percent Law qualified certain transfer applicants for admission based on their high school academic record. Tex. Educ. Code § 51.8035 (requiring, for instance, that a transfer student first "complete[] the core curriculum at a public junior college or other public or private lower-division institution of higher education with a cumulative grade point average of at least 2.5 . . . ."). To date, no transfer student has been admitted under the Top Ten Percent law. Telephone Interview with Michael Washington, Associate Director of Admissions, University of Texas—Austin (July 26, 2012).

[5] An applicant's TAI is evaluated in combination with his or her academic index ("AI"), which includes consideration of undergraduate GPA, SAT or ACT score, and the applicant's

Transfer students significantly increase the diversity of the UT campus. In the years 2007 through 2011, 11,740 transfer students enrolled at UT, including 2,297 African-Americans and Hispanics.[6] UT admitted the vast majority of these students, approximately two-thirds, under the AI/TAI rubric where race is a potential factor.[7]

Transfer students from HCC play a significant role in expanding diversity at UT and other four-year institutions. Of the 110,295 students who transferred from HCC to four-year institutions between 2001 and 2011, 29,986 were African-American and 20,495 were Hispanic.[8] HCC also has a strong record of sending transfer students, including minority students, to UT, including 532 African-American students and 824 Hispanic students during this same time period. *Id.* Transfer students from HCC and elsewhere have a

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"academic trend"—i.e., whether the candidate has demonstrated consistent academic improvement (or decline) semester over semester. Telephone Interview with Michael Washington, Associate Director of Admissions, University of Texas--Austin (July 13, 2012).

[6] Office of Information Management and Analysis, University of Texas, *Statistical Handbook 2011-2012*, Table S17, http://www.utexas.edu/academic/ima/sites/default/files/SHB11-12Complete.pdf.

[7] Each year, approximately one-third of enrolled transfer students are admitted under CAP and approximately two-thirds are admitted under the AI/TAI rubric. Telephone Interview with Michael Washington, Associate Director of Admissions, University of Texas—Austin (July 13, 2012).

[8] Office of Institutional Research, Houston Community College System, Transfers to 4 Year Institutions by Academic Year and by Ethnicity (Jul. 31, 2012) (on file with author).

significant, positive impact on diversity at UT. Their contributions should not be ignored.

SUMMARY OF ARGUMENT

UT's limited consideration of race for students not automatically admitted to UT is consistent with this Court's prior decisions and withstands strict scrutiny. For both freshman and transfer applicants, UT makes admissions decisions based on a holistic, individualized review of each applicant's file. Petitioner's accusations that UT engages in racial balancing completely ignore the way UT conducts its admissions program. In addition to individualized review, UT does not keep an ongoing tally of how many underrepresented students have been admitted, nor does UT provide an admissions boost only to applicants from underrepresented racial backgrounds.

The record is also clear that UT's limited consideration of race more than minimally increases diversity at UT. In essence, Petitioner contends that when combined with the Top Ten Percent Law, UT's consideration of race in admissions is ineffectual and thus not narrowly tailored. However, Petitioner ignores the fact that transfer students who are admitted under a race-conscious rubric also add diversity. By ignoring the contributions of transfer students to campus diversity, Petitioner provides a false accounting of the effectiveness of UT's narrowly tailored admissions program.

UT's admissions program is designed to achieve a compelling interest—creating a diverse student body. The record demonstrates the Top Ten Percent

Law was enacted in large part because of the persistence of *de facto* segregation in public high schools. Capturing the educational benefits that flow from diversity is thus an especially compelling interest for UT and the State of Texas. UT's race-conscious admissions program should be upheld.

ARGUMENT

I. UT's limited consideration of race as a 'plus' factor in individual admissions decisions is consistent with this Court's precedent and withstands strict scrutiny.

This Court has long recognized that the First Amendment imbues our nation's universities with academic freedoms that are essential to fulfilling their mission of preparing tomorrow's leaders. *See, e.g., Sweezy v. N.H.*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The university's constitutionally protected freedom "to make its own judgments as to education includes the selection of its student body." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., plurality op.)). Indeed, this discretion is one of "the four essential freedoms of a university." *Bakke*, 438 U.S. at 312 (Powell, J.).

The vast majority of UT students are granted admission by the Texas Legislature through the Top Ten Percent Law. UT thus exercises its academic freedom to assemble its student body only in the area of "non-Top Ten Percent" freshman and non-automatic transfer admissions. Because race may be considered for those groups of admits, UT's admissions program faces the Court's "most rigorous scrutiny." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring). Yet, strict scrutiny is a test UT can withstand. As the record amply demonstrates, UT only considers race as one potential factor among many others in the context of the entirety of each individual's application.

A. UT has a compelling interest in admitting students who will add diversity.

The principal aim of a flagship university is to educate the smartest, hardest working and most interesting class of students to be productive citizens and quality leaders in the public and private spheres. UT's consideration of race as part of a comprehensive review of a student's admissions application is not for the purpose of allocating a benefit according to race, but for the purpose of creating a diverse student body in furtherance of a legitimate and recognized educational purpose. The admission of well qualified students from diverse backgrounds benefits not only those students, but also the other students at the university.

As this Court held in *Grutter*, a university has a "compelling governmental interest in attaining a diverse student body." 539 U.S. at 328; *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1* ("*Parents Involved*"), 551 U.S. 701, 722 (2007). UT's considered judgment is that campus diversity assists in "break[ing] down stereotypes," promotes "cross-racial understanding," and "better prepares students for an increasingly diverse workforce and society." Supp. J.A. 1a. These are precisely the same educational benefits recognized by the Court in *Grutter*. *See Grutter*, 539 U.S. at 330. Though UT's good-faith espousal of these educational principles is to be presumed, *see id.* at 329; *cf. Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring), the evidence provides confirmation. *See, e.g.*, Supp. J.A. 171a-202a. But it is not only UT's good faith that demonstrates its interest is compelling; there is a consensus among educators that "opportunities to learn from those with different points of view, backgrounds, and experiences" assists the educational mission of the university. William G. Bowen & Derek Bok, The Shape of the River 280 (1998).

UT's judgment that diversity promotes understanding is bolstered by the expert report of Dr. Patricia Gurin, who states that "[s]tudents learn more and think in deeper, more complex ways in a diverse educational environment." Patricia Gurin, *Expert Report of Patricia Gurin*, 5 Mich. J. Race & L. 363, 365 (1999). Creating a diverse student body furthers the university's efforts to teach students to think critically. As Professor Gurin notes, "[a] university composed of racially and ethnically diverse students . . . a curriculum that deals explicitly with social and cultural diversity, and interaction with diverse peers produce a learning environment that fosters *conscious, effortful, deep thinking*." *Id.* at 372 (emphasis added). The deep thinking that diversity fosters, moreover, contributes to our democracy by "equipping students for meaningful participation. Students educated in diverse settings are better able to participate in a pluralistic democracy . . . . Democracy is predicated on an educated citizenry. Simply put, students educated in diverse settings are better able to participate in our democratic process." *Id.* at 374 (emphasis removed).

Justice Powell was correct. There are sound educational reasons why institutions of higher education have, virtually without exception, concluded that diversity of all kinds, including racial and ethnic diversity, is important in the context of higher education. *See Bakke*, 438 U.S. at 312-13. Overturning *Bakke* and *Grutter* would only bring the nation further from the "promise of liberty and equality on which it was founded." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring). Given the reality that opportunity is all too often denied on account of race, refusing to permit schools to consider race in admissions would strip our campuses of a powerful educational tool. *See id.*

B. UT conducted a rigorous and careful study that led to the implementation of a narrowly tailored race-conscious admissions program.

Though UT has for many years recognized that there are educational benefits that flow from diversity, UT conducted a rigorous internal review prior to deciding whether to implement a race-conscious admissions program in the wake of *Grutter*. Rather than adopting a hastily fashioned copy of the Michigan plan, UT carefully studied its own campus in order to tailor a program to the specific needs of the university and the students it serves. UT authorized the consideration of race in undergraduate admissions only "after several months of study and deliberation, including retreats, interviews, review of data of diversity in the classroom and other factors . . . ." J.A. 396a. The result is a process that focuses on the individual and only considers race as one factor among many. Moreover, no applicant receives a 'plus' solely due to his or her membership in a particular race; 'plus' considerations are awarded only after determining whether an individual has demonstrated achievement by overcoming racial barriers, or would otherwise bring a unique perspective to UT.

1. UT reviews freshman and transfer applicants as individuals—it does not engage in racial balancing.

The key feature of a narrowly tailored race-conscious admissions program is treating applicants as individuals rather than merely as members of a group. As Justice Powell noted, "[u]niversities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose." *Bakke*, 438 U.S. at 318 n.53. He went on to say that "[s]o long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process." *Id.*

The requirement of individual consideration was the "entire gist of the analysis" in *Grutter*. *Parents Involved*, 551 U.S. at 722. A narrowly tailored use of race in admissions is thus a "highly individualized, holistic review" that gives "serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S.

at 337. This broader assessment of diversity, where race "is but a single though important element," *id.* at 325 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., plurality op.)), is a shield against racial balancing, which is "patently unconstitutional," *Parents Involved*, 551 U.S. at 723 (quoting *Grutter*, 539 U.S. at 330).

UT's race-conscious admissions program is the paradigmatic example of the type of holistic, individualized review that is recommended by this Court's decisions. As the District Court found, and the record affirms, UT considers race only as a "factor of a factor of a factor of a factor." *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009). It is merely one element, considered alongside "socio-economic status of family," "single parent home," "language spoken at home," "family responsibilities," "socio-economic status of school attended," and "average SAT/ACT of school attended in relation to student's own SAT/ACT." J.A. 433a. These "special circumstances" are also considered with other factors, such as "leadership," "extracurricular activities," "awards/honors," "work experience," and "service to school or community." J.A. 433a. Where race is potentially considered, it may apply to persons of *any* race—not just "underrepresented" minorities. J.A. 206a. Race will then only amount to a 'plus' factor when considered in "the context of the file." J.A. 207a.

This is precisely the kind of permissible consideration of race Justice Powell embraced in *Bakke*, and that the Court adopted in *Grutter*. In fact, it is more individualized even than the

Michigan Law program insofar as UT "does not keep an ongoing tally of the racial composition of the entering class during its admissions process." *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 235 (5th Cir. 2011). UT has thus safeguarded individual assessment "through the entire process." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting).

Petitioner attempts to brush away UT's painstaking effort to fairly employ race as a potential admissions factor with unfounded claims of "racial engineering" and proclamations that "[b]ecause UT is not using racial classifications to pursue a compelling state interest, that should be the end of the matter." Pet. Br. 20. Petitioner's claim, made in the face of overwhelming evidence to the contrary, rests on the faulty premise that UT is simply working to achieve some sort of racial balance. Yet, an examination of UT's admissions program does not reveal "an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups . . . ." *Grutter*, 539 US. at 324-25 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., plurality op.)). Instead, UT's program considers "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 325.

Confronted with the fact that UT is not trying to match the composition of the student body to the composition of the Texas population,[9] Petitioner is forced to resort to a more attenuated claim of racial balancing. Petitioner alleges that UT improperly treats ethnic groups differently, claiming that UT "gives no admissions preference to" Asian-Americans even though there are fewer Asian-Americans than Hispanics at UT. *See* Pet. Br. 28. That claim is inconsistent with the record. Nothing in evidence states that UT always gives a preference to Hispanics or never gives a preference to Asian-Americans. In fact, the very notion of a "preference" ignores the careful, individualized review undertaken during the examination of each student's PAI or TAI.

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[9] Though Petitioner charges that UT is seeking to bring its campus into demographic alignment with the rest of the state,

When developing a student's personal achievement score as part of the PAI or TAI, UT reviews the applicant's leadership qualities, extracurricular activities, awards and honors, work experience, service to school or community and special circumstances. Supp. J.A. 28a. It is only under this "special circumstances" analysis that UT considers race—and race is only considered in the

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Pet. Br. 27, the record demonstrates otherwise. If UT had a mission to engage in racial balancing, it has failed miserably. According to 2011 U.S. Census Bureau estimates, 38.1% of Texans are of Hispanic or Latino origin, 12.2% are Black, and 4% are Asian-American. U.S. Census Bureau, *Texas Quickfacts*, http://quickfacts.census.gov/qfd/states/48000.html (last updated June 7, 2012). Yet, in the Fall of 2011, only 20 percent of UT's undergraduate enrollees were Hispanic and only 4.6% were African-American. Office of Information Management and Analysis, University of Texas, *UT Austin Fast Facts-Fall 2011*, http://www.utexas.edu/academic/ima/sites/default/files/UT_Austin_Fast_Facts_2011.pdf. Meanwhile, 17.8% of UT's Fall 2011 undergraduate enrollees were Asian-American. *Id.*

context of other factors. Petitioner's racial balancing claim ignores UT's comprehensive process for determining who does and does not receive a "preference." Clearly Asian-American, Hispanic, African-American and, significantly, white applicants are all eligible to be awarded a high personal achievement score if they deserve it.

2. The impact of UT's race-conscious admissions policy is not "minimal."

Petitioner's central narrow-tailoring challenge is that UT's consideration of race has an alleged "minimal effect." Pet. Br. 20. In support, Petitioner claims that race-neutral means would be as effective at achieving UT's desired diversity as UT's race-conscious program.[10] *Id.* at 21. Yet, Petitioner's cherry-picked statistics fail to show the true impact of UT's race-conscious admissions policies because they ignore transfer students.

Any estimate of the impact of UT's race-conscious admissions policies is insufficient unless it also considers transfer students. In 2007, UT enrolled 2,251 transfer students, not one of whom was automatically admitted under the Top Ten Percent Law and only one-third of whom were admitted under CAP.[11] Included among those non-automatic transfer enrollees were 270 Hispanic and African-American students.[12] Petitioner's claim that UT's race-conscious program has garnered only "trivial gains in minority enrollment," Pet. Br. 40, is thus simply wrong. By ignoring transfer admissions, Petitioner fails to give due regard to the effectiveness of UT's admissions program at capturing the educational benefits of diversity. Viewed in its true light, UT's race-conscious admissions program more closely resembles the program upheld in *Grutter* than the program struck down in *Parents Involved.* In *Grutter*, the Court noted that the consideration of race was "indispensable in more than tripling minority representation at the law school." *Parents Involved*, 551 at 704 (citing *Grutter*, 539 U.S. at 320). Though Petitioner claims that in 2008 "UT enrolled 216 African-American and Hispanic students through use of the race-affected AI/PAI analysis," Pet. Br. 39, she fails to account for the additional 285 African-American and Hispanic students admitted as transfers.[13]

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[10] Using 2004 as her benchmark for race-neutral admissions, Petitioner claims that in 2008 only 33 students, or 0.5% of the incoming class, were affected by UT's race-conscious policies. Pet. Br. 39-40. Yet, if 2003 is used as a benchmark and the exact same calculations are performed for the 2007 admissions cycle, the result is that 185 students, or 2.68% of the freshman class, were affected by UT's consideration of race. Supp. J.A. 157a. This represents a more than fivefold increase over Petitioner's estimate.

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[11] Office of Information Management and Analysis, University of Texas, *Statistical Handbook 2011-2012*, Table S17, http://www.utexas.edu/academic/ima/sites/default/files/SHB11-12Complete.pdf (last visited Aug. 8, 2012).

[12] 270 is the approximate number of transfers admitted under the race-conscious program. That number is calculated by reducing the number of African-American and Hispanic transfer student enrollees by one-third. *See* discussion *supra* note 7. For consistency purposes only, we follow the Petitioner in omitting Native Americans and foreign students from this discussion. Yet as UT correctly points out, Petitioner's failure to consider the impact of other minority racial groups—and diversity within racial groups—gives short shrift to UT's broader educational purpose. This fuller notion of diversity is a hallmark of UT's race-conscious admissions program.

Petitioner's minimal impact argument also fails to grasp the full significance of UT's decision to employ a modest race-conscious admissions program. This is not merely a numbers game, but rather, concerns something of considerable heft: the sphere in which the university exercises one of its "four essential freedoms." *Bakke*, 438 U.S. at 312 (Powell, J., plurality op.). Because the Texas Legislature has opened the doors of UT's campus to those who satisfy a single, or otherwise narrow set of academic criteria, the area in which UT exercises its First Amendment freedom has been circumscribed. Instead of cutting off that freedom entirely, the Court should continue to permit UT to employ considerations of race in a modest way in furtherance of its educational mission. To ignore race, as Petitioner and her *amici* urge, is to take an impoverished view of the ways in which individuals can overcome obstacles, extend themselves, and enrich the campus. While Justice Harlan's statement that "[o]ur Constitution is color-blind" commands our assent as an aspiration, "in the real world, it is regrettable to say, it cannot be a universal principle." *Parents Involved*, 551 U.S. at

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[13] Office of Information Management and Analysis, University of Texas, *Statistical Handbook 2011-2012*, Table S 17, http://www.utexas.edu/academic/ima/sites/default/files/SHB11-12Complete.pdf. The 285 "race-affected" transfers is arrived at by reducing the number of African-American and Hispanic transfer student enrollees by one-third. *See* discussion *supra* note 7.

788 (Kennedy, J., concurring). Unfortunately, racial and ethnic barriers to equality in education continue to exist, and it is appropriate for universities to acknowledge students who have worked to overcome those impediments.

II. UT's admissions program must be evaluated in the context of Texas's long and persisting history of providing separate and unequal educational opportunities to minority high school students.

"Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. UT's admissions program sits within the context of a primary and secondary education system in Texas that continues to isolate students by race and discriminate between haves and have-nots. While the days of *de jure* segregation may be over, de facto separation of high school students by race is still a reality.

On the fiftieth anniversary of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), fully one-half of Houston Independent School District campuses were either 75% Hispanic, 75% African-American, or 75% white. Jason Spencer, *50 Years After Brown v. Board, Diversity Lacking*, Houston Chronicle, May 16, 2004, at A1; *see also* Marta Tienda & Sunny Niu, Capitalizing on Segregation: Pretending Neutrality, College Admissions and the Texas Top 10% Law, 8 Am. L. & Econ. Rev. 312, 321 (2006). At Eliot Elementary school in Houston, 99.7% of the nearly 700 students in 2004 were Hispanic. *Id.* That same year, Houston's Worthing High School was over 96% African-American. *Id.* These examples unfortunately teach the rule, rather than the exception, of the persistence of segregation among Texas's primary and secondary schools.

The Top Ten Percent Law is itself a tacit admission of this de facto racial segregation. It was specifically designed to use racial concentrations at public high schools to increase racial diversity at public universities. To the extent the Top Ten Percent Law has been successful in promoting racial diversity, it is because of this very dynamic: African-American and Hispanic students admitted to UT under the law are disproportionately from high schools in which "minority students comprise a significant or dominant majority of the student body." Tienda & Niu, *supra*, at 341.

As recently as 2005, the Texas Supreme Court confirmed the ongoing flaws in the Texas public school system, noting the "wide gaps in performance among student groups differentiated by race, proficiency in English, and economic advantage." *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 789 (Tex. 2005). More recently, the Texas Education Agency issued a report that shows African-American high school students are three times more likely to drop out than white students, while the drop-out rate for Hispanic students is twice as high as that of white students in Texas.[14]

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[14] Texas Education Agency, Document No. GE12 601 06, Secondary School Completion and Dropouts in Texas Public Schools 2010-11 56 (2012), *available at* http://www.tea.state.tx.us/acctres/dropcomp_index.html (last updated Aug. 3, 2012).

Despite the stark disparities that still exist in Texas public schools, some students reach levels of achievement that cannot be captured by the Top Ten Percent Law's one-dimensional criterion. A minority student in the second decile at an overwhelmingly non-minority high school may have accomplished an achievement equal to or greater than a white student in the same school. Likewise, a white student in the second decile of an overwhelmingly minority school may have reached a similar level of accomplishment. If invited to be part of the student body at UT, or a similarly selective institution, these students will be vehicles through which the educational benefits of diversity flow to other students. Minority and non-minority students who have overcome racial boundaries will likely be experienced in cross-racial communication, and bring a depth of understanding that will help to dispel harmful stereotypes while drawing others out of racial isolation.

It is only through an individual assessment of a student's application that includes an analysis of the role that race may have played in the student's secondary education, whereby a selective college or university can recognize these achievements. Those who excel in the face of racial adversity in Texas have achieved something noteworthy, and their participation in higher education will benefit all students.

Simply put, many Hispanic and African-American students grow up in different worlds compared to their white counterparts. UT has a compelling interest in identifying students who excel in the face of adversity. These students will contribute to a diverse educational experience for all students, but it is only through a rigorous, individual review of a student's application, including race, that UT can fully harness the educational benefits that flow from diversity.

CONCLUSION

UT's modest consideration of race in admissions is a permissible exercise of the school's essential freedom under the First Amendment and satisfies the strict scrutiny demanded by the Equal Protection Clause. HCC supports UT's efforts to bring together a diverse group of students and to create an educational environment that will produce tomorrow's leaders. HCC requests that the Court affirm the decision of the Fifth Circuit upholding UT's admissions program.

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August 13, 2012

AMICUS CURIAE BRIEF

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No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF FOR THE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are faculty members at Howard University School of Law and attorneys in the Law School's Civil Rights Clinic. While Howard is often referred to as one of the nation's premier historically black universities, for nearly 150 years the University's mission has actually been to provide a premier education to all regardless of race. Our history of integrated education has taught us that the practice of diversity is never a simple matter of just saying no to race or using one of its supposedly more palatable proxies such as socio-economic status. If achieving diversity was such an easy thing, surely by now most higher education institutions would have figured out how to do it through race-blind measures instead of inviting upon their heads the sort of constitutional challenges that seem to recur with remarkable frequency no matter how clearly this Court, as it did in *Grutter v. Bollinger*, 539 U.S. 306 (2003), removes constitutional doubt from the issue. For a modern college and university, achieving the sort of student body diversity that will provide thoughtful leadership in our technocratic, multicultural and democratic society requires incalculably complex judgments. Therefore, when, as is the case for the University of Texas at Austin ("UT Austin"), an institution takes race into account as part of a good faith effort at achieving diversity, for the sake of academic autonomy and out of respect for its expertise, its decision deserves judicial deference.

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

We submit this brief in support of respondents in order to respectfully urge this Honorable Court to uphold the decision of the United States Court of Appeals for the Fifth Circuit, affirm its own holding in *Grutter* and find that UT Austin acted within its constitutionally protected zone of academic autonomy when it reintroduced race as one factor in its admission decisions in order to seek the educational benefits flowing from diversity.

SUMMARY OF ARGUMENT

Universities "occupy a special niche in our constitutional tradition." *Grutter*, 539 U.S. at 329. This special niche is rooted in the First Amendment which provides that, within constitutional limits, a university is free to determine on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). In the context of student body selection, the respect for academic autonomy has manifested itself in the Court's deference to a university's good faith determination that a compelling state interest in student body diversity exists and that race can be one of the factors considered in pursuit of such.

The Court's deference is neither without good reason nor without constitutional limits. A diverse class not only benefits classroom discussion but also provides the opportunity for cross-cultural understanding in social settings. Additionally, the maintenance of a diverse student body communicates to the general public the university's willingness to engage diverse viewpoints – a necessary part of a vibrant academic environment. At the same time, in requiring that a university's efforts at diversity be narrowly tailored, the Court has held that any program must respect the rights of each student by considering race as part of a holistic assessment of all the diverse characteristics of each applicant. Moreover, while a university need not have chosen the least restrictive means to achieve the benefits of diversity, it must have considered alternatives. That the Court struck this balance, in *Grutter*, did not constitute an abandonment of strict scrutiny but simply another manifestation of the well-founded principle that context matters. *See Grutter*, 539 U.S. at 331-32; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005); *Johnson v. California*, 543 U.S. 499, 515 (2005) *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995); *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960).

UT Austin tried and failed to achieve diversity in its classrooms using purely race-blind alternatives. Since 1997, UT Austin's main admission policy has been the "Top-Ten Percent Plan" (Plan), pursuant to which a Texas high school student who graduates in the top ten percent of his or her class is admitted to the University. After two separate studies found that, in spite of the plan, UT Austin would not be diverse without employing race as a factor in admissions, UT Austin created a supplement to the Plan, pursuant to which race is used as one of multiple considerations to holistically evaluate students not admitted as a Ten-Percenter. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 224-225 (2011).

The race-neutral Plan remains UT Austin's primary admissions policy; meanwhile, the holistic review program remains extremely narrow in scope. Nonetheless, the program continues to produce the benefits the University envisioned: a more diverse, racially as well as otherwise, student body. This has resulted from both the diverse students admitted via the challenged program and students of all races and backgrounds drawn to the University because of the perception and reality of the campus as an open academic environment.

ARGUMENT

I. INSTITUTIONAL ACADEMIC AUTONOMY IS CONSTITUTIONALLY-PROTECTED AND MUST BE TAKEN INTO ACCOUNT WHEN ASSESSING THE CONSTITUTIONALITY OF A COLLEGE OR UNIVERSITY RACE-BASED ADMISSIONS POLICY

A. Academic Autonomy, Including the Freedom to Determine Who May Study at a University, Is a Special Concern of the First Amendment

> *But the most important aspect of freedom of speech is freedom to learn . . . All education is a continuing dialogue – questions and answers that pursue every problem to the horizon. That is the essence of academic freedom . . .* [2]

As a result of the "expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter* 539 U.S at 329; *see*

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[2] William O. Douglas, VALUES OF FREE SPEECH IN AN ALMANAC OF LIBERTY 363 (Doubleday & Co., Inc. Garden City, NY 1954).

also Regents of Univ. of Calif. v. Bakke 438 U.S. 265, 312-13 (1978) (opinion of Powell, J.) ((“[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”). Academic freedom, as a constitutional concern, “stems from “[t]he essentiality of freedom in the community of American Universities” which this Court has concluded “is almost self-evident.” *Sweezy*, 354 U.S. at 250; *see also Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) (“[o]ur Nation is deeply committed to safeguarding academic freedom, which is… a special concern of the First Amendment”).

The First Amendment protects universities as they

> provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’

Sweezy, 354 U.S. at 263 (citing Academic Freedom Committees of the University of Cape Town and University of Witswatersrand, Johannesburg, *The Open Universities in South Africa* 11-12 (1957 reprinted in 1974).)[3] Thus, “academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985); *see also Bakke*, 438 U.S. at 312 (opinion of Powell, J.) ("[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."). As one of the foremost scholars of academic freedom aptly puts it:

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[3] In 1957, members of the faculties of “the Universities of Cape Town and Witwatersrand declared their opposition to” apartheid’s attempt to exclude African, Asian and Coloured students from universities the National Party government reserved for white students. As those who reissued the report in 1974 noted, “much of the 1957 study was devoted to an exposition of [the] aspect of [academic] freedom [that involved who should be admitted to study] and its importance to South African society.” *The Open Universities in South Africa* at p. 1

> [T]he university is the preeminent institution in our society where knowledge and understanding are pursued with detachment or disinterestedness . . . Disinterested scholarship and research are both goods in themselves and benefits to society as a whole. . . . The disinterested search for knowledge fosters a manner of discourse that, at its best, is careful, critical, and ambitious. Again, the method of discourse is both a good in itself and a benefit to society. [S]cholarly discourse creates the most favorable environment in which thinkers may formulate ideas that stand apart from popular opinion or fashionable error. . . . The university aspires to instill in those entering adulthood a capacity for mature and independent judgment. The elements of this liberal education, which are constantly revised and challenged, inform the student of the knowledge valued from the past, convey the methodological rudiments of critical thought, and foster the capacity for independent and measured thinking.

J. Peter Byrne, *Academic Freedom: "A Special Concern of the First Amendment"*, 99 Yale L. Rev. 251, 333-35 (1989); *see also* Paul Horwitz, *Universities as*

First Amendment Institutions: Some Easy Answers and Hard Questions, 54 U.C.L.A. L. Rev. 1497, 1501 (2007) (advancing an institutional analysis of the First Amendment under which colleges and universities deserve judicial deference when engaged in academic decision-making).

Furthermore, practical "considerations of profound importance counsel restrained judicial review of the substance of academic decisions." *Ewing*, 474 U.S. at 225. Among these considerations are the "lack of standards" by which to judge the institution's choice, as well as "a reluctance to trench on the prerogatives of state and local educational institutions and [the judiciary's] responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'" *Ewing*, 474 U.S. at 226 (citing *Keyishian*, 385 U.S. at 603;) *see also Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2997 (2010) (Stevens, J. concurring) ("Public universities serve a distinctive role in a modern democratic society.")

Accordingly, judicial deference to academic institutions is based on two principles. First is the understanding that "a liberal education is good in itself, both pleasant and virtuous, and a necessity for providing competent leadership in a complex, technocratic, and democratic society." Byrne, *Academic Freedom*, 99 Yale L. Rev. at 335. Second is the recognition that courts are ill-suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions." *Ewing*, 474 U.S. at 226; *see also* Horwitz, 54 U.C.L.A. L. Rev. at 1501 (citing *Ewing* and *Horowitz* for the proposition that deference is owed "to the 'genuinely academic decisions' of university officials.")

Historically, constitutional respect for academic freedom has meant that this Court will neither second-guess nor overturn academic judgments made in good faith. *See e.g., Ewing*, 474 U.S. at 225 ((deferring substantially to an academic decision to dismiss a student where the university reasonably exercised professional judgment); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) (stressing "the importance of avoiding second-guessing of legitimate academic judgments"); *Sweezy*, 354 U.S. at 263 (reversing a university's contempt conviction for refusing to answer questions posed by the Attorney General regarding the content of the professor's lectures and his knowledge of communism); *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. at 96, n. 6 (Powell, J., concurring) (noting that "[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation."); *Martinez*, 130 S. Ct. at 2997-98 (Stevens, J., concurring) (sustaining the constitutionality of a law school's universal application of an organizational non-discrimination policy to all officially registered groups when challenged by campus religious organizations who sought to exclude homosexual members as a violation of First and Fourteenth Amendment rights).

Hence, when a court reviews a genuinely academic decision, it may not override it "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Ewing,* 474 U.S. at 225.

B. Academic Freedom is Also Grounded in a Longstanding Judicial Tradition of Deference to Expert Decisions Made in Good Faith

Academic freedom is also grounded in a longstanding judicial tradition of respecting the good faith decisions of properly charged experts. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In *Chevron*, this Court noted that, when faced with a challenge to an administrative agency's construction of a statute within its authorized jurisdiction and in the absence of an unambiguous answer on the part of Congress as to the precise question at issue, reviewing courts should generally defer to the agency's own reasonable interpretation. 467 U.S. at 842-44. Specifically, judicial deference is warranted when (1) the issue being challenged is highly technical and complex; (2) judges lack expertise in the field in question; (3) the governmental actor did not act negligently in carrying out its official duties; and (4) the governmental actor performed its duties in a detailed and reasonable fashion. *Id.* at 865.

To be sure, the Court has applied the *Chevron* standard in the specific context of determining whether a federal agency, acting under congressional statute, has exceeded the bounds of its authority. However, underlying *Chevron* deference is a deeper concern that there are instances when the judiciary is ill equipped to render judgment and that in such instances courts are well served to defer to expert decisions made in good faith and with care.

In fact, the *Chevron* doctrine did not originate in, nor has it been exclusively reserved for, the expert judgments of federal administrative actors. *See Edwards' Lessee v. Darby*, 25 U.S. 206 (1827). Rather, "federal courts routinely defer to all sorts of bodies: administrative agencies, prison officials, expert witnesses, military officials, state administrators, and the like." Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 Hastings Const. L. Q. 557, 563 (2004). In *Darby*, one of the earlier cases of judicial deference, the Court was asked to nullify a land tract survey made by delegated commissioners of the state of North Carolina. The Court, recognizing a substantial level of deference to be given to the commissioners' decisions, explained that the "construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id.* at 210. The Court agreed with the claimant in that the commissioners were not granted the express authority to survey as they did, but nonetheless held that they retained an implied authority flowing from the statute that covered the scope of their action. *Id.* at 209. The Court further indicated that deference was warranted because the state legislature enacted an additional statute, subsequent to the challenged action, expressly permitting the state actor to act as he did. *Id.* at 210. The Court concluded, "[i]t was a public act, done by a public authorized agent of the government, and afterwards recognized [sic] by the government itself. None but the government itself ought, therefore, to be permitted to call it in question." *Id.* at 211.

The deference provided in *Darby* foreshadowed what was to come in *Chevron*. The Court has repeatedly made clear that courts should not be in the business of substituting their own judgments for those of experts rendered in good faith when sensible minds can reasonably differ about the wisdom of those expert decisions. *See, e.g. Lawton v. Steele*, 152 U.S. 133, 140 (1894) (holding state actors operating under state statute not liable for damage caused to plaintiffs' property stemming from a reasonable interpretation of their statutory authority); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (explaining that decisions as to the restriction of inmate speech are "peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment"); *Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126-30 (1977) (noting that judiciary is ill-equipped to properly handle the complex problems of prison administration, and thus courts must defer to the informed discretion of prison officials regarding the reasonableness of restrictions on inmate freedom).

The point is not that a university, by virtue of its academic freedom and the expertise of its faculty and administrators, is owed absolute deference with respect to its admissions decisions. Rather, admissions decisions not only implicate First Amendment concerns, but also present complex expert subjective judgments about the role of a university and its relationship with the student body and the larger community. Therefore, when, as here, a university takes account of race as one in a series of factors to determine the makeup of a student body consistent with the university's mission, academic freedom and expertise ought to provide the analytical framework within which the Court determines whether the use of race indeed passes strict scrutiny.

C. A University's Choice of Standards Governing the Selection of its Student Body Merits the Deference Accorded Other Academic Decisions

None of this is to say that a university has *carte blanche* in claiming judicial deference for its educational prerogatives. Rather, the institution must demonstrate that it is speaking as to a matter on which it has specialized knowledge. *See Ewing*, 474 U.S. at 225. Moreover, in invoking its academic expertise, the university must be supported by an empirical record instead of mere *post-hoc* rationalizations. *See United States v. Virginia*, 518 U.S. 515, 535-36 (1996) ("Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities[.]").

Applying this constraint, this Court has properly recognized that the composition of a student body whose diversity enriches the academic experience of all students is "at the heart" of a university's mission, and therefore, is worthy of deference. *Bakke*, 438 U.S. at 312 ("The freedom of a university to make its own judgments as to education includes the selection of its student body."); *Id.* at 313; *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 792 (2007) ("The issue in *Gratz* arose . . . in the context of college admissions where . . . precedent supported the proposition that First Amendment interests give universities particular latitude in defining diversity." (opinion of Kennedy, J., concurring)).

The Court in *Grutter* explained: "numerous studies show that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." 539 U.S. at 333. Likewise, Justice Powell in *Bakke* approvingly cited Princeton University's president as to the benefits of a "robust exchange of ideas" in a diverse environment. 438 U.S. at 312 n. 48. Contrary to the amicus brief of "Former Federal Civil Rights Officials", the expression of diverse views does not result from the stereotyping by professors of students, but rather, the self-initiated expression and interaction of students. Nor can it be satisfied by asking students to surf the internet, as they suggest. Rather:

> [The] learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. . . . 'People do not learn very much when they are surrounded only by the likes of themselves.' . . . For many . . . the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student gov-

> ernment can be subtle and yet powerful sources of improved understanding and personal growth.

Id.; *see also id.* at 314 ("An otherwise qualified medical student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school . . . outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."). Accordingly, the consideration of race not only benefits minorities, but all students. As important as these interests are with regards to legal education, there is even "greater force to these views at the undergraduate level . . . " *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

Finally, the Court recognized that a diverse student body is important for the message it sends to the public regarding the institution's legitimacy:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions[.]

Grutter, 539 U.S. at 332-33 (internal citations and quotation marks omitted) (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

II. THE COURT'S DECISIONS AFFORDING COLLEGES AND UNIVERSITIES DEFERENCE REFLECT AN APPROPRIATE LEVEL OF CONCERN FOR THE CONSTITUTIONAL RIGHTS OF STUDENTS.

While the Court has deferred to colleges and universities both as to expert standards in composing student bodies and as to academic policy that diversity constitutes a compelling interest, the Court has also required that colleges and universities demonstrate that race-conscious admissions programs are narrowly tailored to satisfy strict scrutiny. *Grutter*, 539 U.S. at 335-43. Contrary to petitioner's and opposing *amici's* allegations, the Court's refusal to require that a university exhaust every conceivable alternative or impose a "strong basis in evidence standard" – applied only in the employment context – does not transform its review into rational basis, but simply demonstrates a reasonable degree of respect for the unique academic and expert context within which these institutions operate.

The Court has long maintained that all "governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Grutter*, 539 U.S. at 330 (quoting *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995) (internal quotation marks, citation and emphasis omitted)). In practice, this has meant that all racial classifications imposed by the government are analyzed under strict scrutiny such that the state must demonstrate that the challenged program is narrowly tailored to meet a compelling government interest. *Adarand,* 515 U.S. at 227. This is no less true for race-conscious admissions policies at colleges and universities. In fact, despite the traditional deference to academic autonomy, when necessary this Court has not hesitated to find challenged programs unconstitutional where institutions have failed to respect the rights of students. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down the University of Michigan's admission program because it employed race as a determining factor); ***Bakke***, 438 U.S. 265 (holding unconstitutional the University of California-Davis' medical school admission program because it used a quota system).

That said, "such rights are not absolute," ***Bakke***, 438 U.S. at 320 (opinion of Powell, J.), but must sometimes bend to the educational interests of academic institutions. *Grutter*, 539 U.S. 306. As this Court has explained:

> Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . . [W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. But that observation says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the government[] . . . for the use of race in that particular context.

Id. at 331-32; *Johnson v. California*, 543 U.S. 499, 515 (2005) (same).

Put simply, the Court's deference to academic autonomy provides an analytical context for, but not an exception to, strict scrutiny. *Grutter*, 539 U.S. at 326; *Gratz*, 539 U.S. at 275 (2003). In short, "context matters." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006) (noting that context matters when assessing the impact of governmental narcotic prohibitions on the free exercise rights of a church); *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (stating that context matters when reviewing restrictions on the religious practices of incarcerated persons.). *See also* Horwitz, 54 U.C.L.A. at 14 (noting that this context is challenged by the First Amendment's attempt to maintain the doctrinal integrity of content-neutrality). This is neither unique to *Grutter* nor a particularly novel constitutional principle. *See Adarand*, 515 U.S. at 228 (stating that strict scrutiny must take "relevant differences into account) (internal quotation marks omitted)); *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) ("In dealing with claims under broad provisions of the Constitution . . . it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts[.]")

Contrary to petitioner's and opposing *amici*'s claims, strict scrutiny is a substantive constitutional principle not a rhetorical shibboleth. It cannot possibly be applied in the exact same way in every possible context. The use of race in federal government contracts[4] differs from the use of race in state and local contracts,[5] which differs from race-conscious public employment policies,[6] which differ from race-conscious pupil assignments in public primary and secondary schools,[7] which differ from the use of race as one factor in higher education admission decisions.[8] Every one of these instances is subject to strict scrutiny, but strict scrutiny is applied differently in each because each has a unique context.

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[4] *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995).

[5] *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

Taking the unique academic context into account, this Court has plainly held that the attainment of a diverse student class is a compelling interest sufficient to satisfy strict scrutiny. *Grutter*, 539 U.S. at 325. As such, and contrary to petitioner's and opposing *amici*'s attempted analytical sleight-of-hand, a university is not constitutionally required to exhaust every conceivable alternative or demonstrate a "strong basis in evidence standard" because the Court has always applied these standards in the specific context of employment. Rather, once an academic institution has established that the program serves a compelling interest, the institution need only show that the program is narrowly tailored to meet that interest. *Shaw v. Hunt*, 517 U.S. 908 (1996). While petitioner characterizes the court's inquiry in the academic context as nothing short of perfunctory, this is far from the case. Rather, as the Court set out in *Grutter*, the reviewing court must engage in several inquiries before it can conclude that the university has satisfied the standard.

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[6] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

[7] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

[8] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

A. The Program May Not Set Aside Seats for Minority Applicants.

"To be narrowly tailored, a race-conscious admissions program cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 539 U.S. at 334 (quoting *Bakke,* 438 U.S. at 315 (opinion of Powell, J.)). All seats must be open to all students; a university may not set aside a certain number of seats for students of a particular race or ethnicity. *See Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system"). That said, a university may aspire to create an incoming class with a group of students sufficiently large – a critical mass – to adequately represent a diverse viewpoint. *Grutter*, 539 U.S. at 335-36; *see Bakke*, 438 U.S. at 323 (opinion of Powell, J.) ("[Ten] or [Twenty] black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States."). As long as it does not require that a class include a particular number of minority students, the occasional consultation of data regarding the makeup of students accepted will not render the program unconstitutional. *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323 (opinion of Powell, J.)) ("'Some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota.").

B. The Program Must Consider Each Application on an Individual Basis.

The institution must consider each application on an individual basis. *Grutter*, 539 U.S. at 334; *id.* at 392-93 (opinion of Kennedy, J., dissenting) ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure . . . that each applicant receives individual consideration and that race does not become a predominant factor[.]"); *see also Parents Involved*, 551 U.S. at 788-89 (opinion of Kennedy, J., concurring) ("If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."). In doing so, the institution must value not only the racial diversity the individual's enrollment would provide, but any diverse aspect of the applicant's experience. *See Gratz*, 539 U.S. at 271-72 (rejecting a program where the "only consideration that accompanies this distribution of points [was] a factual review of an application to determine whether an individual is a member of one of these minority groups."). The program must be "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)).

C. Race May not be Used Mechanically to Admit or Deny a Student, but May Be Considered a Plus, Along With Other Favorable Aspects of the Application.

While the university may take note of an individual's race or ethnic background, it may not assign a mechanical, predetermined diversity bonus based on race. *See Grutter*, 539 U.S. at 337 (distinguishing a race-conscious admissions program that automatically awards twenty points based on race from a plan that considered race but "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity"). Likewise, it may not deem the race of an individual a basis for automatic admission or rejection. *Id.* (upholding the program as "there [was] no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable."). Instead, the university may consider an individual's race or ethnicity a plus to be considered along with the other favorable aspects of the application. *Id.*; *Parents Involved*, 551 U.S. at 798 (opinion of Kennedy, J., concurring) ("Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered."); *Bakke*, 438 U.S. at 317 (opinion of Powell, J.) ("The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with an Italian-American [applicant] if the latter exhibit[s] qualities more likely to promote beneficial educational pluralism."). Other favorable aspects could include "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

D. A University May Only Adopt a Race-Conscious Program After Considering Race-Neutral Alternatives and Then Must Periodically Review the Program's Necessity.

While a properly designed program may pass constitutional muster, a university may not adopt such without seriously considering race-neutral alternatives that will achieve the diversity the university seeks. *See City of Richmond v. J.A. Croson*, 488 U.S. 469, 507 (1989). (invalidating a set-aside plan not narrowly tailored where "there [did] not appear to have been any consideration of the use of race-neutral means"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, n.6 (1986) (explaining that narrow tailoring "requires consideration" of "lawful alternative and less restrictive means"). However, in deference to the institution's expertise as to its educational priorities and the potential impact alternatives may have, the Court has recognized that "narrow[] tailoring does not require exhaustion of every conceivable race-neutral alternative," in particular those that would require it to sacrifice its educational mission. *Grutter*, 539 U.S. at 339. For example, in *Grutter*, the district court argued that the University of Michigan Law School could have simply lowered its standards with regards to the GPA and LSAT scores of students admitted. *Id.* at 340. The Court recognized that this would require the University to sacrifice the academic quality of students, which would impact the level of classroom discourse. *Id.* Recognizing the impact this would have on the university's educational mission, the Court explicitly rejected the notion that "narrow tailoring requires an institution to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.*; *see Wygant*, 476 U.S. at 280 (explaining that alternatives must serve the interest "about as well"); *Croson,* 488 U.S. at 509-10 (plurality opinion) (rejecting the program because the city had a "whole array of race-neutral" alternatives which "would have [had] little detrimental effect on the city's interests"). Finally, though not necessary, a court may examine if the challenged program had more than merely a minimal impact on the enrollment of minorities at the institution.[9] *Parents Involved*, 551 U.S. at 734-35.

Even if an institution has considered alternative approaches and properly designed the challenged program, a university must ensure that the program "remain[s] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Bakke*, 438 U.S. at 307-08. Nor may such programs continue on ad infinitum. "Race-conscious admissions policies must be limited in time." *Grutter*, 539 U.S. at 341. This requirement can be satisfied by safeguards such as a sunset provision carved into the policy or "periodic reviews to determine whether such policies are still necessary" to meet the university's educational objectives. *Id*. at 342. In the case of the latter, the Court should respect that the school would "like nothing better than to find a race-neutral admissions formula and will terminate its race-conscious admissions program as soon as practicable." *Id*. at 343. Regardless, the court speculated that within twenty five years such programs would no longer be needed.

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[9] The Court in *Parents Involved* highlighted the fact that the plans challenged by the plaintiffs in that case had only a minimal impact on the composition of the school district and therefore further undermined the alleged necessity of the program. 551 U.S. at 734-35. While the court cited *Grutter* for the proposition, this was not a point of emphasis in the Court's decision. The portion of the decision *Parents Involved* cited in support was the discussion of the basis for the district court's decision. *Grutter*, 539 U.S. at 320. Furthermore, as *Parents Involved* involved a secondary school, which is not due the same deference as UT Austin, it is questionable whether the court should look to the impact of the plan and if so, how much of an impact it should require.

E. These Limitations Sufficiently Protect the Rights of Academic Institutions and Students.

While petitioner characterizes these limitations as trivial, they have adequately protected students for nearly thirty-five years in preventing the dangers about which opposing *amici* sound the alarm. For example, *amicus* Asian American Legal Foundation alleges that the consideration of race in admissions program invites the use of stereotypes by admission officers. This argument misunderstands the type of program the Court approved in *Grutter*. Because an admissions officer must consider the application of each student on a holistic basis, a university may ensure that it has a class which not only is racially diverse, but that the students of each race represent an array of backgrounds and perspectives. In fact, that the universities are able to admit a "critical mass" of students of a particular race works to ensure that an admission officer is not forced to pick a handful of students, under a stereotype-based assumption, that they represent the views of all persons of that race.

Likewise, *amicus* California Association of Scholars, echoing Justice Thomas' dissent in *Grutter*, suggests that the consideration of race lays the seed for racial segregation. *See Grutter*, 539 U.S. at 365-66 (opinion of Thomas, J., dissenting). Justice Thomas wondered whether deference to the University of Michigan's decision to value diversity meant courts would have to defer to Historically Black Universities' potential choice to exclude all white applicants. *Id.* The hypothetical exaggerates the degree of deference due colleges and universities. The flaw in *amicus* California Association of Scholars analysis is the failure to recognize student body diversity rather than student body homogeneity is the interest deemed compelling in *Grutter*. 531 U.S. at 313. Even assuming that racial homogeneity constitutes a compelling interest, the program would have to be narrowly tailored to meet this interest. While a Historically Black University could consider the race of an applicant as part of the individualized review of each applicant, it could not foster a concerted effort to eliminate the number of white students on campus. This would in essence institute a quota system, which the court long ago rejected. *Bakke*, 438 U.S. at 314

Finally, the Court has explicitly rejected the argument advanced by opposing *amici* that the individualized consideration it has allowed is merely a form of sophistry:

> A court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the

> absence of a showing to the contrary in the manner permitted by our cases.

Grutter, 539 U.S. at 318-19.

III. THE CIRCUIT COURTS' DECISION IN *FISHER* PROPERLY REFLECTS A RESPECT FOR THE DEFERENCE DUE INSTITUTIONS OF HIGHER EDUCATION AND THE CONSTITUTIONAL RIGHTS OF STUDENTS.

UT Austin has long understood the importance of student body diversity to its educational mission. This belief is not merely founded on its own academic judgment, but has been reaffirmed by several studies confirming that diversity provides students a wider range of perspectives as to the material they study in their classes and better prepares them for the world they will encounter upon graduation. Consistent with *Bakke* and *Grutter*, UT Austin crafted a program narrowly tailored to meet this compelling interest; thus, at once, keeping faith with its academic prerogatives, as well as respecting the constitutional rights of its students. Like the program in *Grutter*, UT Autin's program does not prioritize race, but instead considers race as one diverse factor to be credited alongside several other race-neutral characteristics of each applicant. Furthermore, that UT Austin adopted a race conscious policy only after employing several other race neutral alternatives, only makes evident the fact that the challenged program satisfies strict scrutiny.

A. The University of Texas Has Long Understood, for Good Reason, that Student Body Diversity Is Central to its Educational Mission.

Any review of UT Austin's program must begin with a presumption, "absent a showing to the contrary," that a university acted in good faith, when enacting a race-conscious admissions policy. *Grutter*, 539 U.S. at 308. But, while crucial, this presumption need not be the sole basis for judicial deference. Rather, like *Grutter*, UT Austin's "claim is further bolstered by numerous expert studies and reports showing that . . . diversity promotes learning outcomes and better prepares students for an increasingly diverse work force[,]" 539 U.S. at 308, as well as the University's demonstrated historical commitment to achieving a diverse student body. *Fisher*, 645 F. Supp. 2d at 610 ("To argue UT has failed to give serious, good faith consideration . . . is to ignore the facts of this case").

In their merits brief to the Court, respondents amply demonstrate UT Austin's commitment to the principle that student body diversity is an important and necessary component of its educational mission. Respondents Br. at 3-6. Respondents also fully recount in their brief the long, careful and considered process UT Austin undertook to arrive at its current policy. *Id.* at 6-15. As such, we see neither reason nor need to repeat that history here.

Still, in the context of academic autonomy, several key points, thoroughly documented in respondents' brief, bear emphasis. After the United States Court of Appeals for the Fifth Circuit held in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), that a university's consideration of race when selecting its student body was unconstitutional, UT Austin recognized that in order to produce an academic environment conducive to learning, it needed to institute alternative policies to admit students whose merit was not reflected in only their GPA and standardized test scores. *Id.* at 7. UT Austin, rather than abandoning its commitment to diversity, immediately began considering a variety of policies to meet this priority. Among the alternative policies UT Austin adopted was consideration of factors constantly touted as proxies for race, including the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household. *Id.* However, none of these alternative factors – many of which are now being advocated by petitioner and opposing *amici* – prevented the percentage of African-Americans and Hispanics attending the University from dropping significantly. *Id.* at 7-8. Additionally, the Texas Board of Regents adopted the "Top Ten Percent Plan," pursuant to which any senior who graduates in the top ten percent of his or her class at the time of applying is guaranteed admission to any Texas public university, including UT Austin. *Id.* at 8-9. The Program remains the single most significant admission policy at UT Austin. Nonetheless, UT recognized that it could still not sufficiently provide all of its students the necessary educational experience. Accordingly, in the wake of *Grutter* and faced with empirical evidence the Ten-Percent Plan still did not produce a diverse student body, the University of Texas Board of Regents authorized each school in the UT system to research whether race and ethnicity should be part of an individualized review of each applicant. *Id.* at 9-10. In crafting its holistic plan, UT Austin did not rely simply on its academic judgment, but instead undertook a series of studies that conclusively showed insignificant diversity in most classrooms, including, for example, a finding that "in 2002, 90 percent of classes with 5 to 24 students had one or zero African-American students and 43 percent had one or zero Hispanic students. *Id.* at 10. Nonetheless, UT Austin recognized that day may come where the program may no longer be necessary. The plan requires that every five years the University review the admissions process specifically to determine whether consideration of race is necessary to the admission and enrollment of a diverse student body and whether race-neutral alternatives exist that would achieve the same results. *Id.* at 11-12.

Accordingly, UT Austin is not engaged in post-hoc rationalizations to justify an otherwise unconstitutional policy. Nor is the University asking the Court to simply presume that it legitimately believes that diversity is necessary to its educational mission. Rather, the record demonstrates that the program is necessary for UT Austin to create an environment it genuinely, and for good reason, believes is essential to a well-rounded educational experience.

B. Understanding the Importance of Student Body Diversity, the University of Texas Has Crafted a Program Narrowly Tailored to Meet This Compelling Interest.

The University, in reliance on this Court's decisions in *Grutter* and *Bakke*, has crafted a narrowly tailored program that sufficiently protects the constitutional rights of applicants, while meeting its historic commitment to diversity.

Like the program the Court approved in *Grutter*, the program, rather than using race as a determining factor, merely considers race alongside all other diverse aspects of an applicant's background. Again, since respondents in their brief have comprehensively laid out the components and workings of its program, we will refrain from reproducing all of its details here. *See* Respondents Br. at 12-15. That said, the complex structure of UT Austin's policy bears summarizing here in order to demonstrate the expert care the institution has taken to avoid using race in the mechanical fashion this Court rejected in *Bakke* and in *Gratz*.

Before their candidacies are evaluated, all applicants are divided into one of three categories: Texas residents, non-Texas residents and international students. Texas residents are then further divided into applicants eligible for admission via the Top Ten Percent Program and remaining candidates. Once an applicant is identified as ineligible for the Top Ten Percent Program, the Admissions committee calculates his or her Academic Index (AI), as well as their Personal Achievement Index (PAI). Each student's AI is based on a combination of four factors: (1) high school class rank; (2) completion of UT's required high school curriculum; (3) the extent to which the applicant exceeded the required curriculum; and, (4) SAT (verbal and math) or ACT scores. Some applicants score high enough for admission based solely on their AI. Likewise, others score so low that they are all but denied admission. Race plays no role in the consideration of either of these group's applications. The University then uses the PAI to assess the applications whose AI is neither so low or high as to fall into one of the aforementioned groups. The PAI is based on two essays and a Personal Achievement

Score (PAS). The essays are scored on a scale of 1 to 6, with race being wholly absent as a factor. The PAS also ranges from 1 to 6 and takes account of the following six factors, leadership potential, extracurricular activities, and awards, work experience, community service, and special circumstances. In turn, the special circumstances category includes seven separate attributes, with race being only one. The special circumstances elements are not considered individually or given a numerical value and then added together. Instead, each characteristic is simply considered in light of the individual's overall experience.

But that does not represent the end of the individualized process. When applying, all applicants indicate their first and second choice of programs or majors. Once an applicant's AI and PAI scores have been computed, the data, without any indication of name or race, is placed on a graph with an x-axis, as well as a y-axis, including the scores of all applicants who have indicated an interest in that particular program. Then, a representative of each school or major draws a line on the graph, in a "stair step" design; all applicants to the left of the line are admitted. Those students denied admission to their first choice program are then placed on a second matrix, representing their second choice, where the same process is undertaken. Those non-Top Ten Percent students admitted to neither their first or second choices are given a final chance to be admitted as general Liberal Arts Majors under the process described above. If they fail a final time, they are left to seek admission through a separate summer studies program or to transfer to UT Austin after attending another University of Texas college or university.

In light of that summary, a fair reading of UT Austin's program makes two things abundantly clear. First, this is an institution doing its absolute best to admit the bulk of its entering class with race playing absolutely no role in the process either because most applicants automatically qualify under the Top-Ten Percent plan or, if not, they score high enough on their AI – which does not include race as a factor – to be admitted. Second, even when it does open the door to consider race, this is an institution doing its utmost to make certain that race is so diluted in the mix of factors that it defies common sense to claim that an applicant is admitted *because* they are African-American or Hispanic, or not admitted *because* they are Caucasian. In short, this is an institution that has put its resources and expertise on the line in order to abide by the constitutional command that, even for the sake of a compelling interest, race should be used in a narrowly tailored fashion.

Not only that, but the reality is that UT Austin has gone well beyond *Grutter* in attempting several race neutral policies before adopting the policy challenged here: it instituted special scholarship programs, expanded its outreach efforts to high schools in underrepresented areas of the state, increased recruitment efforts at low income schools throughout the state, and, most significantly, adopted the Top Ten Percent Plan, through which seventy-five percent of all admitted African-American students and seventy-six percent of all admitted Hispanic students are accepted. Nonetheless, these efforts failed to produce a sufficiently diverse student body.[10]

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[10] In 1997, the year after *Hopwood* was decided, only 2.7 percent of the University's undergraduate population was African, and only 15.6 percent were Hispanic. While the percentage

Ironically, petitioner and her *amici* concede the limited scope of UT Austin's race-conscious policy but appear to object to it precisely because it is so limited. It is not at all clear how the very narrow tailoring of a program could possibly be the basis for finding it unconstitutional. During the 2008 cycle, approximately ninety percent of the University's students were admitted through the race neutral Top Ten Percent Program. During the same cycle, a mere 1,216 slots were made available to students not admitted under the Ten Percent Plan. Were the Court to accept petitioner's argument that to be narrowly tailored a plan would have to increase a university's minority enrollment by 30 percent, akin to *Grutter*, the vast majority of the 1,216 slots would have to be allocated to minorities – an impossibility under the Constitution's requirement that the program be narrowly tailored to meet a compelling governmental interest. Realistically, the only way to achieve the impact petitioner alleges is necessary would be to expand the program to cover a greater percentage of students admitted under the program – a position they logically cannot advance if they believe the program, in its narrowest and most necessary sense is not required to fulfill the University's objectives.

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of African-Americans and Hispanics peaked in 2004, with 4.5 percent and 16.9 percent, respectively, the percentage of students were insufficient to meet the University's objectives. As noted above, minorities regularly reported feeling isolated in their classes; while a substantial number of smaller classes had virtually little or no minority representation

In the final analysis, petitioner does not challenge UT Austin's program because it fails to pursue a compelling state interest; the Court's decision in *Grutter* settled that question. Nor does petitioner challenge the program because it is insufficiently narrowly tailored; it is difficult to imagine a race-conscious program that uses race as narrowly as UT Austin's does. The truth is petitioner challenges the program because in her and opposing *amici*'s view race can never be a valid constitutional consideration under any circumstance. Petitioner and her *amici* are entitled to that opinion, but it is not a position this Court has ever adopted. Nor is it a position this Court should now accept. Race in America is a difficult subject, loaded as it is with a record of "rope, fire, torture, castration, infanticide, rape, death and humiliation."[11] Many would agree that for historical reasons and in light of present day evidence, "the color line" remains in the twenty-first century what W.E.B. Dubois identified as the problem of the twentieth century.[12] But the meaning we ascribe to race need not be so indelibly fixed in slavery and apartheid that the only corrective is to avoid any thought of race at any and all cost. Our past notwithstanding, we remain free to choose how to think about race. In that way and in the end, it seems particularly apt that at UT Austin, an institution dedicated to providing the best American higher education has to offer, race should be a factor in building a diverse student body. In considering race in that fashion, UT Austin is doing nothing less than teaching this generation of students the freedom to think and talk anew about race.

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[11] James Baldwin, *The Fire Next Time*, collected in *The Price of The Ticket* 376 (St. Martin's Press 1985).

[12] W.E.B. Dubois, *The Soul of Black Folks* 41 (Bedford Books 1903).

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

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No. 11-345

In The Supreme Court of the United States

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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS ADVOCATES, ET AL., IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE BRIEF ON BEHALF OF RESPONDENTS UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

STATEMENT OF INTEREST[1]

Human Rights Advocates, Poverty & Race Research Action Council, The Advocates for Human Rights, University of Minnesota Human Rights Center, and University of San Francisco Center for Law and Global Justice, hereby request that this Court consider the present brief pursuant to Supreme Court Rule 37.2(a) in support of respondents. The interests of *amici* are described in detail in the Appendix.

Amici urge the Court to consider international law, including the United States' treaty obligations, when applying the standards of the United States Constitution. These standards are part of United States law pursuant to the Supremacy Clause, and they provide for the use of "special measures" (the international law term for affirmative action) when needed to attain equality with respect to rights. Also addressed are the law and practice of other countries, which likewise affirm the use of considerations of race in higher education admissions decisions.

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[1] Letters from all counsel consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No other person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States since the adoption of the Declaration of Independence. The Founders were greatly influenced by international legal and social thought, and throughout the history of the United States, courts have referred to international standards when considering the constitutionality of certain practices.

In this case, holistic consideration of race in admissions decisions to universities is consistent with the United States' treaty obligations as well as international practice. Indeed, the review bodies for two treaties that the United States is party to have urged the United States to undertake special and remedial measures to eradicate *de facto* discrimination in schools. Other independent international law experts have counseled the United States to do the same. The European Court of Justice and the national courts of other countries have also upheld affirmative action measures in relation to addressing racial disparities in higher education. The international treaties and practice support the University of Texas's approach to admissions and they should be considered when assessing its validity under the Fourteenth Amendment.

ARGUMENT

I.

INTERNATIONAL AND COMPARATIVE FOREIGN LAW ARE RELEVANT TO THE SUPREME COURT'S CONSIDERATION OF

THE CONSTITUTIONALITY OF THE UNIVERSITY OF TEXAS' ADMISSIONS PROGRAM

While the constitutionality of the University of Texas's undergraduate admissions program is largely bound up in domestic law and Fourteenth Amendment jurisprudence, examining the permissibility of holistic considerations of race in admissions decisions[2] in the international context would continue the Court's "longstanding practice" of looking at international and foreign law to affirm and inform constitutional interpretation. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

The Declaration of Independence itself speaks to the significance of other nations:

> When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a *decent respect to the opinions of mankind* requires that they

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[2] This terminology is used interchangeably with "affirmative action," both of which are referenced in the Fifth Circuit decision of *Fisher v. University of Texas at Austin*, 631 F.3d 213, 239, 242 (5th Cir. 2011), and by the University of Texas throughout its brief in that case. Br. for Appellees, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 239, 242 (2011) (No. 09-50822) (2010 WL 2624785). The treaties that the United States is party to refer to this concept as "special measures" and "remedial steps."

> should declare the causes which impel them to the separation.

The Declaration of Independence para. 1 (U.S. 1776) (emphasis added).

Thomas Jefferson, drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. He had a broad understanding of eighteenth century political thought, and was greatly influenced by European Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic. *See* Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and the American Founding* 250-51 (2005). John Adams too understood the need to select the best the world had to offer in order to create a better government, and he believed that international opinion should inform the new nation's laws and institutions. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America*, Preface, (1787), *available at* http://www.constitution.org/jadams/ja1_pre.htm (Da Capo Press Reprint ed., last visited July 30, 2012).

In urging courts to afford the requisite "decent respect to the opinions of mankind" Justice Blackmun explained that:

> [T]he early architects of our Nation understood that the customs of nations–the global opinions of mankind–would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed ... that the

> United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 39 (1994) (footnotes omitted). This Court has recognized that history and noted that:

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa v. Alvarez-Machain, 542 U.S. 692, 729-30 (2004) (citations omitted).

In recent decisions, the Court has referred to international standards and has invoked U.S. treaty obligations, particularly when human rights issues arise. *Roper v. Simmons*, 543 U.S. 551, 576-77 (2005) (citing the United Nations Convention on the Rights of the Child as well as other nations' practices in abolishing juvenile death penalty); *see also Lawrence v. Texas*, 539 U.S. 558, 572-73, 578-79 (2003) (referencing a decision from the European Court of Human Rights in finding Texas's sodomy law unconstitutional); Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 88 (2006) (describing this Court's cases as demonstrating "a longstanding tradition of relying on international law to inform constitutional meaning"). Thus, the Court recognizes the relevance of international law even when it is not directly binding. The relevance is even stronger in situations where the United States is party to a treaty.

Members of the Court have invoked international legal obligations in discussions of race-conscious policies in higher education, in particular. *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring). In *Grutter*, the concurrence explained that the Court's decision to uphold the University of Michigan Law School's race-conscious admissions program comported with the United States' obligations under The Convention on the Elimination of All Forms of Racial Discrimination (CERD) to enact "'special and concrete measures'" to guarantee equal protection and enjoyment of human rights for all races. *Id.* (citation omitted); *see also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Lecture: Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999) ("[C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups."). Particularly with respect to the CERD and the International Covenant on Civil and Political Rights (ICCPR), treaties which the United States has ratified, the United States has assumed international legal obligations that should inform the Court's analysis here.

II.

CONSIDERATIONS OF RACE IN ADMISSIONS DECISIONS ARE CONSISTENT WITH THE UNITED STATES' INTERNATIONAL HUMAN RIGHTS COMMITMENTS

A. Human Rights Treaties Ratified by the United States Require the Adoption of Race-Conscious Measures

The United States has ratified two international human rights treaties that support, and indeed require, the race-conscious measures that are at issue in this case: the CERD and the ICCPR. Under the Supremacy Clause of the Constitution, these treaties are the supreme law of the land, U.S. Const., art. VI, cl. 2, and state and local government share responsibility with the federal government for upholding the United States' human rights treaty commitments. [3] The ratification of these treaties creates binding international legal obligations for the

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[3] In ratifying CERD and the ICCPR, the United States attached an understanding setting forth a division of labor between federal, state and local government for domestic implementation. 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994) (U.S. Reservations, Understanding, Declaration and Proviso, ICCPR); 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (U.S. Reservations, Declarations, and Understandings, CERD). The record notes that the United States would implement the Conventions "to the extent that it exercises jurisdiction over the matters covered therein, otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government, shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention." 140 Cong. Rec. S7634-02, at § II.

United States to uphold and implement the principles of the CERD and the ICCPR.[4]

1. *Considerations of Race Are Consistent with the CERD*

CERD was ratified by the U.S. in 1994, and obligates parties to the treaty "to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations" and to "undertake to prevent, prohibit and eradicate all [racially discriminatory] practices." CERD, Preamble & art. 3, *adopted*, Dec. 21, 1965, S. Treaty Doc. No. 95-18, 660 U.N.T.S. 195.

CERD requires state parties to take affirmative steps to accomplish these goals. Article 1(4) states that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such

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[4] In considering the treaties for this purpose, this Court need not address the issue of whether the treaty provisions are self-executing or the validity of the "non-self-executing" declarations that accompany some of the treaties. For background and legislative history of the declarations, *see* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 Cinn. L. Rev. 423, 456-62 (1997). Courts have applied treaty provisions in defensive postures without considering whether they are self-executing. *See United States v. Rauscher*, 119 U.S. 407, 430 (1886); *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992), *rev'd on other grounds*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

> protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.

Id. art 1(4). Article 2(2) reiterates this requirement, providing that States shall take "special and concrete measures" to help guarantee full freedom and protection under the law for groups and individuals of all races. *Id.* art. 2(2). These special measures are limited in that they cannot lead to "unequal or separate rights for different racial groups," and are to end after the intended objectives have been achieved. *Id.* art. 2(2); art. 1(4).

The CERD treaty body, the CERD Committee,[5] has explained that special measures should include laws, policies, or practices that can affect areas such as housing, education, employment, and general participation in public life. UN Comm. on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination* (*Gen. Recommendation No. 32*), U.N. Doc. No. CERD/C/GC/32 24 (Sept. 24, 2009), *available at* http://www.unhcr.org/refworld/docid/4adc30382.html. These laws or policies should be implemented by parties to address the situation of disfavored groups, and should work towards both *de jure* and *de facto* equality for all races. *Id.* ¶ 22. The obligation for parties to "secure human rights and fundamental freedoms on a nondiscriminatory basis" requires that parties address not just intentional discrimination, but also discriminatory effects. *Id.* ¶ 14. Such affirmative or positive actions should be "appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary." *Id.* ¶ 16. The emphasis of the programs adopted as special measures should be to "correct[] present disparities and . . . prevent[] further imbalances from arising." *Id.* ¶ 22.

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[5] In ratifying the CERD and ICCPR, the U.S. accepted the obligation to submit to periodic review by the independent experts charged with monitoring treaty compliance ("the treaty bodies"). For CERD, the treaty body is the "CERD Committee." For the ICCPR, the treaty body is the "Human Rights Committee." The review process entails the submission of a report by the state concerning the steps it has taken domestically to implement the treaty's provisions. The treaty body reviews this report, and then issues a set of recommendations calling attention to areas of concern with regard to that state's compliance. UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 30, The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, June 2005, No. 30, at 15, 17-23, *available at* http://www.unhcr.org/refworld/docid/479477490.html. The treaty bodies also issue comments called General Comments or General Recommendations setting forth

When reviewing countries' compliance with the convention, the CERD Committee has often raised the importance of special measures, particularly in the field of education. *See, e.g.*, CERD, *Report of the Committee on the Elimination of*

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their definitive interpretation of the various treaty provisions. *Id.* at 29.

Racial Discrimination, 50th Sess., Supp. No. 18, ¶ 394, U.N. Doc. A/50/18 (Sept. 22, 1995), *available at* http://www.unhcr.org/refworld/docid/453779970.html ("The Committee strongly recommends that [Mexico] make an increased effort in promoting affirmative measures in the field of education and training."); CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 52nd Sess., Supp. No. 18, ¶ 94, U.N. Doc. A/52/18 (Sept. 26, 1997), *available at* http://www.unhcr.org/refworld/docid/45c30c767.html (urging Guatemala to increase efforts "to promote affirmative measures in the fields of education and training"). Requests for states to initiate or enhance special measures to promote greater equality in education are common in the CERD Committee's annual reports.

Importantly, the Committee has also made numerous references to concerns about access to higher education in particular, underscoring the recognition that inequalities at the university level are within the purview of the treaty, and that addressing those inequalities is part of the parties' legal obligations. *See, e.g.*, CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 51st Sess., Supp. No. 18, ¶ 503, U.N. Doc. A/51/18 (Sept. 30, 1996) *available at* http://www.unhcr.org/refworld/docid/3f52efba4.html (recommending that Namibia adopt "[a]ffirmative measures . . . to overcome vestiges of the past that still hamper the possibilities for black people, including vulnerable groups among them, to have access to secondary and higher education . . . ."); CERD, *Report of the Committee on the Elimination of*

Racial Discrimination, 71st Sess., ¶ 280, U.N. Doc A/62/18 (Oct. 1, 2007) *available at* http://www.unhcr.org/refworld/docid/473424062.html (urging the Former Yugoslav Republic of Macedonia to "intensify its efforts to reduce the high dropout rate in the secondary and higher levels of education among ethnic Albanian and Turkish children"); *Id.* ¶ 220 ("[Israel] should ensure that access to higher education is ensured for all without discrimination, whether direct or indirect, based on race, colour, descent, or national or ethnic origin.").

The United States' policies on education have been the subject of concern for the CERD Committee, as well. In its report to the Committee in 2007, the U.S. cited "race-conscious educational admission policies and scholarships" as evidence of the country's *compliance* with article 2(2) and specifically mentioned the *Grutter* decision as an example of that compliance. CERD, *Reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of all Forms of Racial Discrimination : 6th periodic reports of States parties due in 2005 : add.: United States of America* ¶¶ 128, 131, U.N. Doc. CERD/C/USA/6 (Oct. 24, 2007), *available at* http://www.unhcr.org/refworld/docid/4785e8be2.html. Nevertheless, in the Concluding Observations commenting on its review of the United States' report, the Committee responded that the United States had not done enough to enact special measures to eradicate *de facto* discrimination in schools, recommending that the United States:

> undertake further studies to identify the underlying causes of de facto segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school desegregation and providing equal educational opportunity in integrated settings for all students. In this regard, the Committee recommends that the State party take all appropriate measures [to allow] school districts to voluntarily promote school integration through the use of carefully tailored special measures adopted in accordance to article 2, paragraph 2, of the Convention.

CERD, Consideration of reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of All Forms of Racial Discrimination : concluding observations of the Committee on the Elimination of Racial Discrimination : United States of America ¶ 17, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008), available at http://www.unhcr.org/refworld/docid/4885cfa70.html. Although the Concluding Observations referred specifically to Supreme Court decisions that limit the consideration of individual students' race in K-12 school assignment, it is clear that the CERD Committee is cognizant and concerned about racial equality in American schools generally. Compounded with the numerous recommendations for special measures in higher education throughout CERD's evaluations of other nations, it is clear that parties to CERD, including the United States, are obligated under the treaty to take all necessary measures, including positive action, to end *de facto* segregation—and thus to promote equal opportunity—in all levels of education, as part of the parties' legal obligations. [6] Thus holistic considerations of race in higher education admissions decisions are consistent with the United States' international legal obligations under CERD, and indeed can be defended on the grounds that they implement the United States' treaty obligations.

2. *Considerations of Race Are Permissible and Encouraged under The International Covenant on Civil and Political Rights*

The United States ratified the ICCPR in 1992. ICCPR, *adopted*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171. The treaty obligates member states to protect the human dignity of individuals by upholding "equal and inalienable rights" within their territories. *Id.*, Preamble. The Covenant requires states parties to protect individual rights "without distinction of any kind, such as race, colour, sex, language, religion," *Id.* art. 2, and provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground," *Id.* art. 26.

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[6] For information on recent demographics on race in the United States related to income, education, and employment, *see* Connie de la Vega, *The Special Measures Mandate of the International Convention on the Elimination of All Forms of Racial Discrimination: Lessons from the United States and South Africa*, 16 ILSA J. Int'l and Comp. L. 627, 644-51 (2010).

In its 2006 review of U.S. compliance with the ICCPR, the Human Rights Committee (HRC) expressed concern over "de facto racial segregation in public schools," and reminded the U.S. of its obligations under articles 2 and 26 to guarantee effective protection against practices with discriminatory *effects.* The Committee recommended that the U.S. conduct investigation into racial segregation in schools and "take remedial steps." HRC, *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : United States of America* ¶ 23, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), *available at* http://www.unhcr.org/refworld/docid/45c30bec9.html.

In the United States' report to the Human Rights Committee in 2011 regarding its compliance with its commitments under the ICCPR, the U.S. State Department highlights the Court's consideration of education-specific affirmative action plans and guidance issued by the Departments of Education and Justice to assist educational institutions in pursuing policies to achieve diversity and avoid racial isolation, as evidence of the United States' compliance under ICCPR article 2. HRC, *Fourth Periodic Report of the United States of American to the United Nations Human Rights Committee Concerning the International Covenant on Civil and Political Rights*, ¶ 39, U.N. Doc.

CCPR/C/USA/4 (Dec. 30, 2011), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement. In doing so, the government acknowledges that special measures in higher education serve to uphold the "equal and inalienable rights" championed in the ICCPR and further the U.S.'s compliance with its international obligations under that treaty.

B. Other Independent Human Rights Experts Have Recommended Considerations of Race in Higher Education to Address Inequality

The United Nations Working Group of Experts on People of African Descent [7] has also raised concerns about minority access to higher education in the United States. In a report to the U.N. Human Rights Council concerning its visit to the United States in January 2010, the Working Group found that "the challenges faced by people of African descent in this country related mainly to disproportionately high levels of unemployment, generally lower income levels than the rest of the population, access to education (especially to higher levels of education) and quality of education." Human Rights Council, *Report of the Working Group of experts on people of African Descent: Visit to the United States of America (25 to 29 January 2010)*, Summary, U.N. Doc A/HRC/15/18 (Aug. 6, 2010), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/152/97/PDF/G1015297.pdf?OpenElement. The Working Group suggested that the United States continue the initiatives already in place to remedy inequality in the education system, and also create "positive action policies to achieve parity of educational conditions among students of African descent and those of the majority population." *Id.* ¶ 83.

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[7] The Working Group is a panel of independent experts established by the UN Commission on Human Rights in 2002 to study and make recommendations and programs to combat issues of racial discrimination, xenophobia, and related intolerance. U.N. Office of the High Commissioner for Human Rights, ***Racism, racial discrimination, xenophobia and related intolerance***, CHR Res. 2002/68, U.N. Doc. No. E/CN.4/2002/200 at 287, 290-91 (Apr. 25, 2002), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/152/72/PDF/G0215272.pdf?OpenElement.

C. The University Of Texas' Holistic Race-Conscious Approach To Admissions Is Consistent With International Treaty Obligations And Recommendations

As explained in *Fisher*, 631 F.3d at 242, the University of Texas seeks to admit a "critical mass" of minority students to its undergraduate programs through a holistic, individualized admissions process. The University contends that its program, which looks at a combination of factors concerning each applicant, including race, comports with the Supreme Court's decision in *Grutter*, which allows programs that involve a "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343.

Along with adhering to constitutional requirements under the Equal Protection Clause, the

University of Texas' admissions program is also permissible according to international treaty obligations, including those of CERD articles 1(4) and 2(2) concerning special measures to eliminate racial discrimination. As explained above, under CERD, special measures must be "goal-directed programmes which have the objective of alleviating and remedying the disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination." *Gen. Recommendation No. 32*, ¶ 22. The University of Texas's program seeks to promote equal opportunity in higher education for students of all races by ensuring a critical mass of under-represented minorities who otherwise would be less likely to be admitted due to the entrenched (and documented) discrimination against minorities in the United States' educational system.

Moreover, CERD requires that states implement special and concrete measures, "when the circumstances so warrant," in order to ensure that all racial groups are granted full and equal human rights. CERD, art. 2(2). Thus, CERD does not require a finding of purposeful discrimination, only discriminatory effects. As the Fifth Circuit explained, the admissions program is warranted in light of a low number of minority students attending the University. *Fisher,* 631 F.3d at 223. After conducting studies to assess whether the university was fully obtaining the educational benefits of diversity that result from a critical mass of underrepresented minority students, *Id.* at 225-26, the University implemented a program that would consider race as one of many factors in deciding which applicants to admit. *Id.* at 228. The policy has led to "noticeable results," *Id.* at 226, and thus complies with CERD's requirements that special measures be "appropriate to the situation to be remedied, legitimate . . . [and] respect the principles of fairness and proportionality." *Gen. Recommendation No. 32*, ¶ 16.

Moreover, the University has shown that these special measures are necessary in a democratic society, *Fisher*, 631 F.3d at 226, as achieving a critical mass of racial minorities in higher education will help to '"promote "cross-racial understanding," "break down racial stereotypes," enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, [and] cultivate the next set of national leaders."' *Id.* at 230 (quoting *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587, 603 (W.D. Tex. 2009) (quoting *Grutter*, 539 U.S. at 319-20)). These measures are not discriminatory: the CERD Committee has explained that measures that take into account individuals who are in disadvantaged situations, like the measures at issue here, are "not an exception to the principle of non-discrimination but are integral to its meaning and essential to the [CERD] project of eliminating racial discrimination and advancing human dignity and effective equality." *Gen. Recommendation No. 32*, ¶ 20. The University of Texas's admissions program is a necessary component of instituting nondiscrimination in the United States, as required by the CERD.

Finally, although there is no established end date to the University's program, both informal and formal review processes, *Fisher,* 631 F.3d at 226, ensure that the policy adheres to CERD's mandate that special measures be temporary, *Gen. Recommendation No. 32,* ¶ 16.

III.

OTHER JURISDICTIONS AFFIRM THE USE OF RACE-CONSCIOUS APPROACHES TO PROMOTE EQUALITY AND NON-DISCRIMINATION

In addition to furthering the United States' compliance with its international legal obligations, the University of Texas' race-conscious admissions program comports with affirmative action measures permitted in, and endorsed by, other jurisdictions.

The European Court of Justice, for instance, has endorsed "positive action" programs to promote equality between men and women. In two cases, the European Court has upheld German initiatives that give priority to women in promotion decisions in positions where women were underrepresented. *See* Case C-158-97, *Badeck & Others*, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6, 2000 All ER (EC) 289, 2000 WL 281317 (E.C.J. 2000); Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, 1997 All ER (EC) 865 (E.C.J. 1997) (*available on* Westlaw). The programs under review in *Badeck* and *Marschall* were intended to counteract unequal opportunities for a disadvantaged group, regardless of the presence of intentional discrimination.[8] The European Court found that the German policies lawfully pursued this legitimate social objective and utilized means that were proportionate in relation to the real needs of the disadvantaged group. *Badeck*, 2000 E.C.R. I-1875, Operative Part.

Along with the European Court of Justice, national courts in other jurisdictions have upheld affirmative action measures, specifically in relation to racial disparities in higher education. Most recently, the Federal Supreme Court of Brazil, that nation's highest court of appeals on constitutional matters, declared a race-conscious policy in student admissions at the University of Brasília (UNB) to be constitutional. S.T.F. ADFP 186, April 26, 2012. Just as the University of Texas program aims to promote diversity in the university setting, the Brazilian court found that UNB's affirmative action program was necessary to "set a plural and diversified academic environment." *STF Declared the Constitutionality of the Quota System at the University of Bras*ília, Supremo Tribunal Federal Portal Internacional (Apr. 26, 2012), http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us&idConteudo=207138.

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[8] Similarly, the University of Texas admissions policy, with its "goal of having a student body that is meritorious and diverse in a variety of educationally diverse ways," was designed with recognition of the persistent underrepresentation of African-Americans and Hispanics in the student body. *See* Brief for Respondents at 9-10.

Courts in South Africa have also upheld race-conscious measures in higher education. In one case, an Indian woman who was denied admission to a medical school challenged the school's affirmative action program that was aimed at benefiting historically-disadvantaged African students. *Motala & Another v. Univ. of Natal*, 1995 (3) BCLR 374(D) (Durban Sup. Ct.), 1995 SACLR LEXIS 256, at *16-*17 (S. Afr. Feb. 24, 1995). The court rejected the claim, stating that the experience of African students in the country required specific compensation and thus the program was not discriminatory under the South African constitution. *Id.* at *28.

Other countries permit affirmative action programs as a matter of law. For instance, India's national constitution was amended in 2005 to affirm that the nation would allow affirmative action in higher education: "Nothing in [the constitution's anti-discrimination provisions] shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for [disadvantaged castes and tribes]." India Const. art. 15, cl. 5. Similarly, the Canadian constitution guarantees equal protection under the law, and explains that this guarantee "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 § 15(2), being Schedule B to the Canada Act, 1982, c.11 (U.K.). In addition, statutes in New Zealand and Australia permit affirmative action measures in those countries. *See* New Zealand Bill of Rights Act 1990, § 19, 1990, S.N.Z. No. 109-Human Rights Act 1993, 1993 S.N.Z. No. 82 §§ 58, 73(1); Racial Discrimination Act 1975, § 8(1) (Austl.). These examples evidence the willingness by other countries that are also parties to the CERD and the ICCPR to endorse race-conscious programs. They should inform the Court's consideration here.

CONCLUSION

The University of Texas' race-conscious admissions policy comports with international human rights standards guaranteeing the full freedom from racial discrimination for all and furthers the United States' compliance with its international treaty commitments. Furthermore, the University of Texas' program comports with the law of other jurisdictions upholding and endorsing race-conscious measures in admissions in higher education. This international context should inform the Court's analysis of the constitutionality of the University of Texas's consideration of race in its admissions process.

Respectfully submitted,

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Poverty & Race Research Action Council
The Advocates for Human Rights
University of Minnesota Human Rights Center
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APPENDIX

Human Rights Advocates (HRA) is a California non-profit corporation founded in 1978 with national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for almost thirty years. HRA has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal laws. Cases it has participated in include: *Graham v. Florida,* 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

Poverty & Race Research Action Council (PRRAC) is a civil rights policy organization based in Washington, D.C. Founded in 1989 by national civil rights and poverty law organizations, PRRAC's primary mission is to help connect advocates with social scientists working on race and poverty issues, and to promote a research-based advocacy strategy on structural inequality issues. PRRAC's current work is particularly focused on the causes and consequences of housing and school segregation for low income children of color. PRRAC is a founding member of the National Coalition on School Diversity, and an active member of the U.S. Human Rights Network, a broad coalition committed to domestic implementation of international human rights treaties – including the Convention on the Elimination of All Forms of Racial Discrimination (CERD). As part of this work, PRRAC submitted two coalition "shadow reports" to the U.N. Committee on the Elimination of Racial Discrimination during the Committee's 2008 United States treaty review, and is planning to participate in the CERD Committee's anticipated 2013 review of U.S. treaty compliance.

The Advocates for Human Rights is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 500 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates regularly monitors human rights conditions in the United States and reports on conditions before the United Nations. The Advocates for Human Rights has a strong interest in ensuring that the United States construe the Constitution in a way that is consistent with international human rights standards for the elimination of all forms of racial discrimination.

University of Minnesota Human Rights Center (HRC) is dedicated to the advancement of the fundamental rights guaranteed by national and international law. The HRC seeks to ensure that all persons receive the full panoply of rights accorded to them by national and international law regardless of nationality or immigrant status. The HRC maintains one of the largest human rights collections in the United States (http://www.umn.edu/humanrts). In addition, the Co-Director of the HRC served from 1996-2003 as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and thus has expertise in regard to the human rights law applicable in this matter. The HRC has previously submitted *amicus curiae* briefs; for example in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

University of San Francisco (USF) Center for Law and Global Justice is a focal point for USF School of Law's commitment to international justice and legal education with a global perspective. The Center generates student externships around the globe, protects and enforces human rights through litigation and advocacy, manages and participates in international rule of law programs in developing nations, develops partnerships with world-class foreign law schools, provides a forum for student scholarship, and nurtures an environment where student-organized conferences and international speakers explore topics relating to global justice.

AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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U.S. Census Bureau, "What is Race," http://www.census.gov/population/race 9

INTEREST OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a nonpartisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici are concerned that the use of race and ethnicity by the University of Texas at Austin ("the University") in its admissions policy violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and are further concerned about the corrosive effect of that violation on American society and the rule of law. Among the harms caused by the University's race and ethnically-based admissions policy are: the further enshrinement of the intellectually impoverished concept of race into law; the perpetuation of a culture of racial and ethnic politics in American public life; the increase of racial and ethnic resentment and intolerance in American society; and the continued stigmatization of individuals as "inferior" based on college admissions practices. For these reasons, *amici* urge the Court to overturn the University's policy.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

SUMMARY OF THE ARGUMENT

Human race and ethnicity are inherently ambiguous social constructs that have no validity in science. Invoking race and ethnicity to promote diversity relies on racial and ethnic stereotyping of individuals' viewpoints, backgrounds, and experiences. Admissions policies such as the policy enacted by the University, which seek to classify applicants by crude, inherently ambiguous, and unsound racial and ethnic categories to promote diversity, but which instead promote racial and ethnic stereotyping, can never be narrowly tailored to promote a compelling government interest and therefore cannot survive strict scrutiny.

ARGUMENT

I. RACE AND ETHNICALLY-BASED ADMISSIONS POLICIES ARE CRUDE, INHERENTLY AMBIGUOUS, AND UNSOUND CONSTRUCTS THAT CAN NEVER BE NARROWLY TAILORED TO FURTHER A COMPELLING INTEREST IN DIVERSITY.

A.

"A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination on the basis of race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Classifications of persons according to their race "are subject to the most exacting scrutiny; to pass constitutional muster they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purposes." *Id. quoting McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("all racial classifications, imposed by whatever federal, state, or local governmental action, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests").

In *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), this Court found that the University of Michigan Law School had a "compelling interest in attaining a diverse student body." In the same year that marked the completion of the Human Genome

Project,[2] the Court upheld the Law School's use of race – a concept that has been rejected by science and for centuries has been used to divide, impoverish, oppress, and enslave people – as a "plus" factor weighing in favor of admission. *Id.* at 335-43. In its ruling, the Court assumed that race was a meaningful proxy for diversity without addressing the issue in any direct way. The Court also assumed that race presented a fixed, natural, and unambiguous means of distinguishing between groups of people such that individual Law School applicants could be assigned a particular racial classification and awarded – or not awarded – a "plus" factor based on race. *Grutter* represents only the second time since the adoption of the "strict scrutiny" standard that this Court has validated racial discrimination by government actors in non-remedial circumstances. *Grutter*, 539 U.S. at 351 (Thomas, J., dissenting). The other was *Korematsu v. United States*, 323 U.S. 214 (1944). *Id.*

Following this Court's ruling in *Grutter*, in 2005, the University chose to begin using race in its admissions process, purportedly to achieve greater diversity in its student body. Applicants to the University are now required to complete and submit a standardized "ApplyTexas" application, among other information and materials. Question 7 of the ApplyTexas application, entitled "Ethnicity and Race," first asks applicants, "Are you Hispanic or Latino? (a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race)."[3] Applicants are asked to answer "yes" or "no."[4] No other ethnicities are referenced.[5] Question 7 then directs applicants to "[p]lease select the racial category or categories with which you most closely identify. Check as many as apply: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, White."[6] The accompanying instructions provide no additional guidance, but merely state, "Provide the information regarding your ethnic background and race. The information will be used for federal and/or state law reporting purposes and may be used by some institutions in admission or scholarship decisions."[7]

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[2] *See* Press Release, "International Consortium Completes Human Genome Project," (April 14, 2003) http://www.genome.gov/11006929 (visited May 23, 2012).

An applicant's race is referenced "at the front" of his or her admissions file. *Fisher v. Univ. of Texas*, 645 F. Supp. 2d 587, 597 (W.D. Tex. 2009). Thus, "reviewers are aware of [an applicant's race] throughout the evaluation." *Id.* The District Court concluded that, "even though race is not determinative, it is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application." *Id.* at 597-98.

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[3] *See* ApplyTexas, "Sample Application," https://www.applytexas.org/adappc/html/preview12/frs_1.html (visited May 23, 2012).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See* ApplyTexas, "Instructions for Completing Your ApplyTexas Application, U.S. Freshman Admission Application," https://www.applytexas.org/adappc/html/fresh12_help.html (visited May 23, 2012).

B.

As the following excerpt from the "Statement on Race" issued by the American Anthropological Association on May 17, 1998 demonstrates, science rejected race as a valid system of classification long ago:

> In the United States both scholars and the general public have been conditioned to viewing human races as natural and separate divisions within the human species based on visible physical differences. With the vast expansion of scientific knowledge in this century, however, it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups. Evidence from the analysis of genetics (*e.g.*, DNA) indicates that most physical variation, about 94%, lies *within* so-called racial groups. Conventional geographic "racial" groupings differ from one another only in about 6% of their genes. This means that there is greater variation within "racial" groups than between them. . . .
>
> Historical research has shown that the idea of "race" has always carried more meanings than mere physical differences; indeed, physical variations in the human species have no meaning except the social ones that humans put on them. Today scholars in many fields argue that "race" as it is understood in the United States of America was a social mecha-

nism invented during the 18th century to refer to those populations brought together in colonial America: the English and other European settlers, the conquered Indian peoples, and those peoples of Africa brought in to provide slave labor. . . .

As they were constructing US society, leaders among European-Americans fabricated the cultural/behavioral characteristics associated with each "race," linking superior traits with Europeans and negative and inferior ones to blacks and Indians. Numerous arbitrary and fictitious beliefs about the different peoples were institutionalized and deeply embedded in American thought.

Early in the 19th century the growing fields of science began to reflect the public consciousness about human differences. Differences among the "racial" categories were projected to their greatest extreme when the argument was posed that Africans, Indians, and Europeans were separate species, with Africans the least human and closer taxonomically to apes.

Ultimately "race" as an ideology about human differences was subsequently spread to other areas of the world. It became a strategy for dividing, ranking, and controlling colonized people used by colonial powers everywhere. But it was not limited to the colonial situation. In the latter part of the 19th century it was employed by Europeans to rank one another and to justify social, economic, and political inequalities among their peoples. During World War II, the Nazis under Adolf Hitler enjoined the expanded ideology of "race" and "racial" differences and took them to a logical end: the extermination of 11 million people of "inferior races" (*e.g.*, Jews, Gypsies, Africans, homosexuals, and so forth) and other unspeakable brutalities of the Holocaust.

"Race" thus evolved as a worldview, a body of prejudgments that distorts ideas about human differences and group behavior. Racial beliefs constitute myths about the diversity in the human species and about the abilities and behavior of people homogenized into "racial" categories. The myths fused behavior and physical features together in the public mind, impeding comprehension of both biological variations and cultural behavior, implying that both are genetically determined. Racial myths bear no relationship to the reality of human capabilities or behavior. Scientists today find that reliance on such folk beliefs about human differences in research has led to countless errors.[8, 9]

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[8] *See* American Anthropological Association, "Statement of Race" (May 17, 1998), http://www.aaanet.org/stmts/racepp.htm (visited May 23, 2012); *see also* American Anthropological Association, "Response to OMB Directive 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting" (Sept. 1997), http://www.aaanet.org/gvt/ombdraft.htm (visited May 23, 2012).

[9] The federal government similarly acknowledges that the various categories of race and ethnicity that it has created for

Although science may have rejected race long ago, law and public policy, and in particular the University's admission policy, have yet to catch up. It is time that they did so. Race has no place in either.

C.

The University's admissions policy seeks to use race and "Hispanic or Latino" ethnicity as proxies for diversity. Writing in dissent in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overturned by Adarand Constructors, Inc.*, 515 U.S. at 227, Justice O'Connor challenged whether the use of race as a proxy for diversity could ever be narrowly tailored.

At issue in *Metro Broadcasting, Inc.* were certain "minority preference policies" – "minorities" being defined as "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, and Asiatic American extraction" – that the Federal Communications Commission ("FCC") sought to use to promote "diversity of programming." Justice O'Connor found that the use of race as a proxy for diversity rests on "stereotyping," andso "could not plausibly be deemed narrowly tailored." *Id.* at 617. As Justice O'Connor explained:

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use in the U.S. Census are non-scientific: "The racial categories included in the census questionnaire generally reflect a social definition of race recognized in this country and not an attempt to define race biologically, anthropologically, or genetically." *See* U.S. Census Bureau, "What is Race," http://www.census.gov/population/race (visited May 23, 2012).

> The FCC and the majority of this Court understandably do not suggest how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of broadcast viewpoints . . . the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior.

497 U.S. at 614-15. Justice O'Connor continued:

> The FCC claims to advance its asserted interest in diverse viewpoints by singling out race and ethnicity as peculiarly linked to distinct views that require enhancement. The FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [he or she is] "likely to provide [that] distinct perspective." The policies directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition of securing the preference. The FCC's chosen means rest on the premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. [T]hat premise is utterly irrational and repugnant to the principles of a free and demo-

> cratic society. The policies impermissibly value individuals because they presume that persons think in a manner associated with their race . . . The corollary to this notion is plain: Individuals of unfavored racial or ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity. Both the reasoning and its corollary reveal but disregard what is objectionable about a stereotype: The racial generalization does not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race rather than upon a relevant criterion.

Id. at 618-620 (internal quotation marks omitted; citation omitted).

There is no meaningful difference between the FCC's use of racial stereotyping to promote "diversity of programming" in broadcasting and the University's use of racial and ethnic stereotyping to promote diversity in its student body. Justice O'Connor's dissent in *Metro Broadcasting, Inc.* applies equally to the University's admissions policy. The University's policy does not promote diversity. It promotes racial and ethnic stereotyping by making generalizations that equate an applicant's race or "Hispanic or Latino" ethnicity with his or her viewpoints, backgrounds, and experiences.

It is irrelevant whether racial and ethnic stereotyping is the result of a quota, a point system, or a "plus" factor because, as the District Court found, even a "plus" factor "is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application." *Fisher*, 645 F. Supp. 2d at 597-98. Obviously, the University must believe that its use of a race or ethnicity-based "plus" factor is meaningful, or it would not use it in its admissions policy. Because the University's use of race and "Hispanic or Latino" ethnicity to promote diversity in its student body rests on stereotyping that equate race and ethnicity with diversity, the policy can never be narrowly tailored to achieve a compelling government interest and therefore cannot survive strict scrutiny.

D.

The use of race and ethnicity as proxies for diversity cannot survive strict scrutiny because it rests on racial and ethnic stereotyping about individuals' viewpoints, backgrounds, and experiences. In addition, the University's admissions policy also cannot survive strict scrutiny because it makes no effort to define the crude racial and ethnic categories that it invokes or otherwise instructs its applicants on how they should self-select their race or ethnicity. Obviously, such endeavors are fraught with difficulties. Nonetheless, this failure makes the University's use of race and ethnicity all the more ambiguous and unsound.

Because race and ethnicity are crude social constructs, not verifiable, scientific facts, they are inherently ambiguous. This inherent ambiguity is compounded by the ambiguity of applicants self-selecting the race or ethnicity to which they belong in order to gain a "plus" factor towards admission. These dual ambiguities run afoul of the Court's admonition in *Adarand Constructors, Inc.* that "[a]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." 515 U.S. at 224. The use of such crude, self-identified, and ambiguous racial and ethnic classifications can never be narrowly tailored to favor one applicant over another.

The University has chosen to use five broad racial categories – "American Indian or Alaska Native," "Asian," "Black or African American," "Native Hawaiian or other Pacific Islander," or "White," and a single ethnic category "Hispanic or Latino" – in its admissions policy. None of these categories are defined or delineated in any meaningful way. Students are left to self-identify their race and "Hispanic or Latino" ethnicity. Unstated is what makes one applicant a "Hispanic or Latino," an "American Indian or Alaska Native," an "Asian," "Black or African American," a "Native Hawaiian or Pacific Islander," or simply "White," in order to be granted or be denied a "plus" factor. The University does not specify whether an applicant must be a "full-blooded" member of his or her self-identified race or a "full-blooded "Hispanic" or "Latino," or whether 1/2, 1/4, 1/8, 1/16, or 1/32 is sufficient to be granted or denied the "plus" factor. Nor does the University specify whether an actual ancestral link is required for an applicant to be granted or denied a "plus" factor for race or "Hispanic or Latino" ethnicity, or whether a cultural affinity or some other identification with a particular race or with "Hispanic or Latino" ethnicity is sufficient.

With one important exception, Question 7 from the ApplyTexas application mirrors the 1997 *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity* issued by the U.S. Office of Management and Budget ("OMB").[10] Unlike the University, the OMB standards provide cursory definitions of the racial categories that the standards employ.[11]

Equally if not more significant is the fact that the OMB standards were developed to "promote uniformity and comparability for data on race and ethnicity" and to "provide consistent data on race and ethnicity throughout the Federal Government."[12] The OMB standards disavow their use for anything other than statistical compilation:

> Foremost consideration should be given to data aggregation by race and ethnicity that are useful for statistical analysis and program administration and assessment, bearing in mind that the standards are not intended to

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[10] *See* Office of Management and Budget, "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," (Oct. 30, 1997), http://www.whitehouse.gov/omb/fedreg_1997standards/ (visited May 23, 2012).

[11] *Id.*

[12] *Id.*

> be used to establish eligibility for participation in any federal program.[13]

Thus, the OMB standards were not intended to be used in the manner in which the University is using them, much less to satisfy the strict scrutiny of an equal protection analysis.

Turning to the categories themselves, each and every one of them is ambiguous. The fact that Question 7 offers only one possible choice of ethnicity – Hispanic or Latino – is particularly problematic. Obviously, this single ethnic category does not begin to recognize or encompass the tremendous diversity of cultures, languages, religions, and heritages of the human race.

In addition, according to an April 2012 study by the Pew Hispanic Center entitled "When Labels Don't Fit: Hispanics and Their Views of Identity," only twenty-four percent (24%) percent of Hispanic adults most often identify themselves by the terms "Hispanic" or "Latino."[14] Fifty one percent (51%) say they identify themselves most often by their family's country or place of origin.[15] Twenty one percent (21%) use the term "American" most often to refer to themselves.[16] This share rises to forty percent (40%)

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[13] *Id.*

[14] *See* Pew Hispanic Center, "When Labels Don't Fit: Hispanics and Their Views of Identity," (April 4, 2012), http://www.pewhispanic.org/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity/, at 9 (visited May 23, 2012).

[15] *Id.*

[16] *Id.*

among those who were born in the U.S.[17] The study also found that self-identification as "Hispanic" or "Latino" varies depending on which generation of a person's family immigrated to the United States:

> Among first-generation (or immigrant) Hispanics, more than six-in-ten (62%) say they most often use their family's country of origin to describe themselves. Among second-generation Hispanics, the share using their family's country of origin falls to 43%. And among third-generation Hispanics, the share falls to just 28%—less than half that seen among immigrant Hispanics. Not surprisingly, the use of the term "American" increases in a mirror-image pattern. While just 8% of immigrant Hispanics most often call themselves American, that share rises to 35% among second-generation Hispanics and 48% among third-generation Hispanics.[18]

The study concluded that, although federal law requires the U.S. government to categorize and collect data on "Hispanics," the government's "system of ethnic and racial labeling does not fit easily with Latino's own sense of identity." [19]

Also undefined by the University's policy is whether the terms "Hispanic" and "Latino" refer to persons of full or partial Spanish ancestry only, or also to persons of other European ancestry such as the Germans and Italians and persons of Jewish background who immigrated to predominantly Spanish speaking countries in Central and South America and the Caribbean before immigrating to the United States. It also is unclear whether Question 7's reference to South America "or other Spanish culture or origin" includes Portuguese-speaking Brazil.

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[17] *Id.*

[18] *Id.* at 12.

[19] *Id.*

With respect to the "American Indian or Alaska Native" racial category, the Native Americans Rights Fund acknowledges that "[t]here exists no universally accepted rule for establishing a person's identity as an Indian."[20] While the OMB standards created for data collection purposes define an "American Indian or Alaska Native" as "A person having origins in any of the original peoples of North America and South America (including Central America), and who maintains tribal affiliation or community attachment," Question 7 provides no definition whatsoever.[21] The University's policy is completely silent as to who is entitled to a "plus" factor for being an "American Indian or Alaska Native."

The recent controversy over former Special Advisor to the Secretary of the Treasury and U.S. Senate candidate Elizabeth Warren highlights the multiple ambiguities inherent in the University's reliance on undefined, self-identified, and inherently ambiguous categories of race and ethnicity in its admissions policy. Based on nothing more than "family lore" and "high cheek bones," Ms. Warren claimed, perhaps quite sincerely, that she was 1/32nd Cherokee and therefore a Native American and a minority.[22] Under the University's policy, an applicant who similarly identified herself as an "American Indian" based on "family lore" and "high cheekbones" would gain a "plus" factor toward admission, but an identical applicant without this same "family lore" or "high cheek bones" (or who was unaware that one of her 32 great-great-great grandparents happened to be Cherokee) would not. Imagine a freshman class at the University comprised of 6,715 Elizabeth Warrens, all identical but for the difference in the race or ethnicity of a single great-great-great grandparent.[23] How much additional diversity would the University have achieved by taking the race and ethnicity of these students into account in the admissions process?

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[20] *See* Native American Rights Fund, "Answers to Frequently Asked Questions About Native Peoples," http://www.narf.org/pubs/misc/faqs.html (visited May 23, 2012).

[21] *See* Office of Management and Budget, "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," (Oct. 30, 1997), http://www.whitehouse.gov/omb/fedreg_1997standards/ (visited May 23, 2012).

The University makes no effort whatsoever to define the term "Asian," which just as commonly refers to the four billion human beings who inhabit the largest and most populous continent on Earth as it does to a single "race" of people. It lumps together the two most populous countries on the planet, China and India, each of which has more than a billion people and a multitude of languages, cultures, and religions. It is unclear whether the University's use of the term includes applicants who are or whose ancestors were of full or partial Near or Middle Eastern origin, including persons of full or partial Arab, Armenian, Azerbaijani, Georgian, Kurdish, Persian, or Turkish descent, or whether such applicants are to be considered "White." The term "Asian" as anything other than a geographic reference is largely meaningless.

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[22] Lucy Madison, "Warren explains minority listing, talks of grandfather's 'high cheekbones,'" *CBS News*, (May 3, 2012), http://www.cbsnews.com/8301-503544_162-57427355-503544/warren-explains-minority-listing-talks-of-grandfathers-high-cheekbones/ (visited May 23, 2012).

[23] The University's 2010 freshman class was comprised of 6,715 students. *Fisher*, 645 F. Supp. 2d at 590.

Defining who is "Black" is a deeply sensitive subject, inextricably woven into the history of slavery and segregation in the United States. Perhaps most illustrative is the infamous case of *Plessy v. Ferguson*, 163 U.S. 537 (1896). Homer Plessy considered himself to be "White," but the State of Louisiana considered him to be "Black" because one of his great grandparents had been from Africa, making him 7/8ths "White" and 1/8th "Black." *Id.* at 541. When Mr. Plessy took a seat in a railroad car reserved for "Whites," he was forcibly ejected and imprisoned in a New Orleans jail for violating a statute requiring "equal but separate accommodations for the white[] and colored races." *Id.* at 540. This Court upheld the constitutionality of the Louisiana statute, noting:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opin-

> ion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, others that it depends upon the preponderance of blood, and still others that the predominance of white blood must only be in the proportion of three fourths.

Id. at 552 (citations omitted). Perhaps because of the deep sensitivity of the subject, the University makes no effort to define what it means by its use of the term "Black or African American" in its admissions policy. However, its failure to do so further highlights the inequality that its use of race creates. If two applicants are of both European and African ancestry, but one applicant self-identifies as "Black" and the other applicant self-identifies as both "Black" and "White," do both applicants receive the same "plus" factor? If one applicant self-identifies as "Black" and the other, like Mr. Plessy, self-identifies as "White," should the latter applicant be denied the "plus" factor?

The final category of "White" really appears to mean "None of the Above." As with all of the University's categories for race and its single category of "Hispanic or Latino" ethnicity, this category ignores the multitude of experiences, immigration paths, political histories, and socioeconomic statuses of the millions of immigrants who came to the United States over centuries. It treats as one undefined mass all persons of European ancestry – English, French, German, Greek, Irish, Italian, Czech, Polish, and Russian, to name just a few – regardless of their often very different backgrounds and personal histories. Using "White" as a single, catch-all category for "None of the Above" puts the lie to the interest of diversity that the University's use of race and ethnicity purportedly promotes.

The University's racial and ethnic categories cannot withstand a moment's scrutiny, much less the strict scrutiny required by the Equal Protection Clause. Ultimately, however, the point is not that the University must adopt a standardized test by which it ascertains and verifies the race or ethnicity of each applicant, but that the crude social constructs of race and ethnicity are too inherently ambiguous to survive strict scrutiny, especially given the mixing of cultures, heritages, and nationalities so prevalent in the backgrounds of many Americans. They can never be narrowly tailored to further a compelling governmental interest.

E.

Other courts have weighed in on the inherent ambiguity of race and ethnicity as well. In 2008, one prominent jurist, the Honorable Jack B. Weinstein of the U.S. District Court for the Eastern District of New York, addressed the issue at length in rejecting the use of racially-based life expectancy tables and related data to find a reduced life expectancy for an "African-American" claimant:

> In the United States, there has been "racial mixing" among "Whites," "Africans," "Native Americans," and individuals of other "racial"

> and "ethnic" backgrounds for more than three and a half centuries. *See, e.g.*, Annette Gordon-Reed, *The Hemingses of Monticello: An American Family* 660 (2008) (Thomas Jefferson fathered children with his "mixed blood" slave Sally Hemings. "[T]he choices the children of Sally Hemings and Thomas Jefferson made would separate their lines forever. Three would live in the white world, and one would remain in the black world."); Gregory Howard Williams, *Life on the Color Line: The True Story of a White Boy Who Discovered He Was Black* (1996) . . . Clear-eyed observers of the American scene scoff at the use of "blood" in characterizing "race." *See, e.g.*, Mark Twain, *Pudd'nhead Wilson* (1894) ("White" and "Black" babies who looked "White" taken home by wrong mothers and raised inadvertently in "wrong 'racial' categories").

McMillan v. City of New York, 253 F.R.D. 247, 249 (E.D.N.Y. 2008) (Weinstein, J.). In a section entitled "'Race' as a Biological Fiction," the Court noted:

> Franz Boas, the great Columbia University Anthropologist, pointed out that "[e]very classification of mankind must be more or less artificial;" he exposed much of the false cant of "racial" homogeneity when he declared that "no racial group is genetically 'pure.'" *Quoted in* Keay Davidson, *Franz Boas* in 3 American National Biography 83 (1999) . . . *The Concept of Race* xi (Ashley Montagu, ed., 1964) ("the biological concept of race has become unac-

> ceptable to a growing number of biologists"); . . . James C. King, *The Biology of Race* 146 (2d ed. 1981) ("estimates of the proportion of genetic material from white ancestry in American blacks range all the way from a few per cent [sic] to more than 50 percent").

Id. at 249. The Court continued:

> DNA technology finds little variation among "races" (humans are genetically 99.9% identical), and it is difficult to pinpoint any "racial identity" of an individual through his or her genes. International gene mapping projects have only "revealed variations in strings of DNA that correlate with geographic differences in phenotypes among humans around the world," the reality being that the diversity of human biology has little in common with socially constructed "racial" categories.

Id. at 250 (citations omitted).

Another court found that the term "Hispanic" was nothing more than a self-identification:

> [w]hether or not a person is an Hispanic is not a biological characteristic but a psychological characteristic as to how one identifies himself or herself. It is not simply whether one has some Spanish ancestry or whether one speaks Spanish as a first language . . . [I]f an Hispanic man married an admittedly non-Hispanic woman and they had children, the children

> would have to make a decision about whether they would identify themselves as Hispanic . . . [F]actors such as whether the children are living with the father, how they feel about themselves, and the neighborhood where they live would influence whether the children would identify themselves as Hispanic. A person's surname is not a definite indicator. Some last names of persons who may consider themselves Hispanic may not be or may not appear to be of Spanish derivation. Conversely, a woman of admittedly non-Hispanic descent may take her husband's Hispanic surname upon marriage. Suffice it to say that whether a person is Hispanic in the final analysis depends on whether that person considers himself or herself Hispanic.

United States v. Ortiz, 897 F. Supp. 199, 203 (E.D. Pa. 1995).

F.

In 1938, Justice Stone proposed a "more searching judicial inquiry" for reviewing government action based on race, thus giving rise to the "strict scrutiny" standard. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In the intervening 74 year period, much has been learned about race, including that it is a crude, inherently ambiguous social construct that has no validity in science. Race and ethnicity-based admissions policies enacted to achieve diversity are unconstitutional because they classify applicants by crude, inherently ambiguous, and unsound racial and ethnic categories and rest on racial and ethnic stereotyping. They represent a step back from the tremendous advances towards fulfillment of the promise of the Equal Protection Clause that have occurred since *Carolene Products Co.* As the Circuit Court's concurring opinion observed:

> Given the highly personal nature of the college admissions process, this kind of class-based discrimination poses an especially acute threat of resentment and its corollary – entitlement. More fundamentally, it assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved.

Fisher v. Univ. of Texas, 631 F.3d 213, 265-66 (5th Cir. 2011) (Garza, J., concurring) (internal citations omitted). To fulfill the promise of the Equal Protection Clause, the Court should find that race and ethnicity can never be narrowly tailored to promote diversity in admissions policies and therefore cannot survive strict scrutiny.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the decision of the Circuit Court.

Respectfully submitted,

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AMICUS
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IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE LAW SCHOOL ADMISSION COUNCIL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE LAW SCHOOL ADMISSION COUNCIL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of the Law School Admission Council as amicus curiae in support of respondents.[1]

INTEREST OF AMICUS CURIAE

The Law School Admission Council ("LSAC") is a nonprofit corporation devoted to facilitating and enhancing the admissions process for more than 200 law schools in the United States, Canada, and Australia. Founded in 1947, LSAC is best known for administering the Law School Admission Test ("LSAT"), but it also sponsors and publishes research about law school admissions.

LSAC has a strong interest in ensuring that standardized test scores are given the proper weight in the admissions process, and a longstanding commitment to ensuring equal access to legal education for members of minority groups. LSAC participated as amicus curiae before the United States Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amicus or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

SUMMARY OF ARGUMENT

The inescapable lesson of the statistical evidence compiled year after year by LSAC is that unless America's law schools are allowed to adopt race-conscious admissions policies, many of the nation's lawyers will be trained in an environment of racial homogeneity that bears almost no relation to the world in which they will work.

The simple, demonstrable statistical fact is that most selective law schools in this country will have almost no students of certain races unless they adopt admissions policies designed to alter that outcome. How best to achieve diversity in the face of this problem is a question of educational policy. For good reason, the Court generally defers to the judgment of the States and their expert educators on such questions.

The vast majority of LSAC member law schools have long recognized and acted upon the need to take explicit measures to achieve racially diverse student bodies. Petitioner's suggestion that effective racial diversity may be achieved through race-neutral means is, for law schools, factually incorrect. Neither the use of "percent plans" nor the consideration of "special circumstances" that "disproportionately affect minority candidates," such as socioeconomic status and single-parent households, Pet. Br. 3, is a satisfactory solution for law schools. "Percent plans" do not translate to the law school setting, where they would both fail to achieve diversity and succeed in undermining educational quality. And while considering "special circumstances" could promote diversity in other, important ways, it would fail to ensure *racial* diversity.

The more modest solution is the actual practice, approved in *Grutter*, of the overwhelming majority of the nation's law schools: including race among the many factors considered in assembling a class rich in diversity, experience, and potential. This approach accounts for numeric measures to an appropriate degree. Test scores and grades assess acquired verbal reasoning skills and certain other cognitive skills, but they do not capture many other qualities important to success both in law school and in the legal profession, and they certainly do not *entitle* anyone to law school admission. As LSAC has long noted, numeric criteria say nothing about the degree to which an applicant's personal attributes—including but not limited to race—might affect the mix of backgrounds, experiences, and ideas from which all students learn.

As the Court considers whether the University of Texas's admissions process for its undergraduate students is a constitutionally legitimate means of providing students the educational benefits of diversity, LSAC respectfully submits that the Court should leave intact the approach approved for law schools in *Grutter*. The *Grutter* solution has been effective in facilitating optimal legal education, allowing law schools to account for numeric measures of certain cognitive skills along with many other applicant attributes, including race, in assembling a class that will maximize the educational experience of all students.

In support of that view, LSAC offers the Court the benefit of decades of experience with the law school admissions process. This brief shares with the Court LSAC's accumulated knowledge about the effect of selective admissions policies on the racial diversity of student populations, and about the value and limitations of performance measures such as the LSAT and undergraduate grades.

ARGUMENT

I. EDUCATION IN A RACIALLY DIVERSE ENVIRONMENT IMPROVES THE QUALITY OF EDUCATION FOR ALL STUDENTS

The importance of educational diversity along multiple valences is not open to question. In *Grutter*, the Court recognized that racial and ethnic diversity in higher education is valuable not for its own sake, but because it contributes significantly to the overall quality of education afforded to all students. For that reason, the Court adopted Justice Powell's suggestion in *Bakke* that diversity "is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325.

Justice Powell appreciated that a "great deal of learning" happens

> through interactions among students of both sexes[,] of different races, religions, and backgrounds ... who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.

Bakke, 438 U.S. at 312 n.48 (quotation omitted). Decades of empirical research have confirmed that insight. In approving the consideration of race among many factors in law school admissions, the Court in *Grutter* had the benefit of express district court findings as well as extensive social science research showing that diversity "helps to break down racial stereotypes, ... promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." *Grutter*, 539 U.S. at 330 (quotations omitted).[2] The need for racial and ethnic diversity within law schools is particularly important, the Court concluded, given the disproportionate representation of the legal profession in positions of national leadership. *Id.* at 332-33.

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[2] Social science research published since *Grutter* has confirmed the positive effect of racial diversity in a college setting on cognitive skills such as critical thinking and problem solving. *See, e.g.*, Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. Educ. Res. 4, 20, 22 (2010); Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates* 17, 18, Research and Occasional Paper Series, Center for Studies in Higher Education, Univ. Cal. Berkeley (Feb. 2005); Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 Am. Educ. Res. J. 322 (2009); Samuel R. Sommers et al., *Cognitive Effects of Racial Diversity: White Individuals' Information Processing in Heterogeneous Groups*, 44 J. Experimental Soc. Psych. 1134, 1134 (2008). The positive impact of racial diversity has also been observed in the law school setting. Charles E. Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. 82, 84 (2012). That recent research is consistent with earlier findings that racial and ethnic diversity facilitates creative problem solving, promotes concern for the public good, and enhances cross-racial sensitivity and understanding. *See, e.g.*, Taylor Cox, Jr., Cultural Diversity in Organizations: Theory, Research, and Practice (1993); Poppy Lauretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Res. 248, 257 (1996); Daniel A. Powers & Christopher G. Ellison, *Interracial Contact and Black Racial

Law schools recognize that no two individuals are influenced in precisely the same way by a shared experience. Each individual's experiences and perspectives, even within a given racial or ethnic group, will be unique. But "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority" in our society. *Grutter*, 539 U.S. at 333. Racial diversity therefore fosters a greater multiplicity of individual perspectives, and including a variety of students increases the likelihood that the aggregate range of experiences and perspectives within the student body will be broader—and the educational experience of all students correspondingly richer.

Petitioner does not contest the educational benefits that racial diversity provides all students. Petitioner instead contends that those benefits may be pursued only at the institutional level, and not at the classroom level. That argument turns the logic of *Grutter* on its head. A school cannot fulfill its "compelling interest in securing the educational benefits of a diverse student body," *id.* at 333, if students are not in fact encountering and engaging each other in a learning environment. A "critical mass" of underrepresented minorities within the meaning of *Grutter*, *id.*, is necessarily one of sufficient size to fa-

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Attitudes: The Contact Hypothesis and Selectivity Bias, 74 Soc. Forces 205, 213-16 (1995).

cilitate the interactions that are the very design of race-conscious admissions, and any school that is serious about implementing the educational goals of diversity will analyze whether such interactions are in fact being achieved.

II. THE COURT SHOULD NOT SECOND-GUESS THE UNIVERSITY'S EDUCATIONAL POLICY JUDGMENT ABOUT HOW BEST TO ACHIEVE A DIVERSE STUDENT BODY

In *Grutter*, the Court deferred to the law school's "educational judgment that ... diversity is essential to its educational mission," in keeping with the Court's "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328. The question of *how* to achieve such diversity is likewise a question of educational policy warranting the Court's deference.

Petitioner opposes any special regard for a school's own determination of the best admissions program for its needs, but the Court has always been "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). The Court's forbearance reflects both federalism concerns and a healthy awareness of judges' limited competence in university administration. *See id.*; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (courts lack "specialized knowledge and experience" in educational policy). Because federal courts are not "suited to evaluate the substance of the multitude of academic decisions" made by public educational institutions, those institutions are granted "the widest range of discretion" in carrying out their educational missions. *Ewing*, 474 U.S. at 225 n.11, 226 (quotation omitted).

University and law school decisions about *how* best to pursue student-body diversity are, like the decision whether to pursue diversity at all, educational policy judgments entitled to substantial deference. In evaluating the likely effectiveness of a proposed policy, schools are aided by a cumulative understanding of the workings of educational institutions that is the province of educators, not the courts. *See id.* at 226. Perhaps most important, the success of any policy must be measured not only by whether it produces racial and ethnic diversity, but also by whether it does so without sacrificing other, equally important educational goals—such as academic selectivity and diversity along other dimensions. Striking the optimal balance among these different and sometimes competing objectives calls for the exercise of the most careful and informed educational judgment. Schools are entitled to "the widest range of discretion," *id.* at 225 n.11, in making that complex and educationally critical decision.

III. LAW SCHOOLS CANNOT ACHIEVE MEANINGFUL RACIAL DIVERSITY WITHOUT TAKING RACE INTO CONSIDERATION AS ONE OF MANY ADMISSIONS FACTORS

A. Minority Law School Applicants Are Significantly Underrepresented In The Highest Ranges Of Numeric Admissions Criteria

No nationally accredited law school in the United States is open to all applicants who can afford the tuition.[3] Because of what society rightly expects and demands of its lawyers, law schools rightly expect and demand much of their students. To help law schools predict which applicants will be able to meet their expectations, the schools have for decades relied on two numeric measures: undergraduate grade point average ("UGPA") and performance on the LSAT.

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[3] Indeed, the American Bar Association has promulgated a longstanding accreditation standard (Standard 501(b)) that provides: "A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar." Am. Bar Ass'n, *2011-2012 Standards and Rules of Procedure for Approval of Law Schools*, Standard 501(b), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_standards_chapter_5.authcheckdam.pdf (last viewed Aug. 12, 2012). Interpretation 501-3 to this Standard advises that "the factors to consider in assessing compliance with Standard 501(b)" include "the academic and admission test credentials of the law school's entering students, the academic attrition rate of the law school's students, the bar passage rate of its graduates, and the effectiveness of the law school's academic support program." *Id.*

Such measures are valuable tools for admissions decisionmakers, but they also create a potential problem when formulating an educationally optimal class on the basis of a broad range of attributes and factors. Applicants of certain minority races and ethnicities are significantly underrepresented in the highest LSAT/UGPA ranges. *See infra* at 10-12. Most law schools seek students who excel in all areas, including the critical-thinking skills measured by the LSAT and the academic achievement reflected in undergraduate grades. Accordingly, law schools do place value on high grades and test scores. And minority applicants are simply much less likely than others in the general applicant pool to fall in the highest ranges of these numeric indicators.

The raw numbers are startling. For the fall 2010 entering class, there were a total of 7,789 law school applicants who had both LSAT scores of 165 or above and UGPA of 3.5 or above. Of that number, just 63 were black. LSAC, *National Decision Profiles, 2006-2010* (2012), http://www.lsac.org/private/selectnatdecisionprofiles.pdf. Only 236 were Hispanic or Puerto Rican. As shown in the below table, the numbers are consistent for preceding years, with the share of African-American applicants in this upper range lingering just under 1%, and the percentage of Hispanic applicants remaining about 2.5%:

Applicants in the 165+ LSAT/3.5+ UGPA Range			
	Total applicants	Black applicants	Hispanic applicants[4]
2010	7,789	63 (0.81%)	236 (3.03%)
2009	6,276	57 (0.91%)	160 (2.55%)
2008	5,691	42 (0.74%)	129 (2.27%)
2007	5,837	43 (0.74%)	141 (2.42%)
2006	5,950	47 (0.79%)	150 (2.52%)

See id.; *see also* Jeffrey Evans Stake, *Minority Admissions to Law School: More Trouble Ahead, and Two Solutions*, 80 St. John's L. Rev. 301, 316 (2006) (explaining that in 2005, the students with LSATs above 159 and UGPAs above 3.75 were 82% white, 10% Asian, 3% black, 4.4% Hispanic/Latino, Chicano Mexican, or Puerto Rican, and 0.4% American Indian).

These statistics affect all of American legal education, not just the most highly selective law schools. Their impact on law school admissions is obvious and inevitable. Even with the use of race-conscious admissions policies, black applicants as a group still experience one of the lowest overall acceptance rates of any race or ethnic group. *See National Decision Profiles, 2006-2010, supra* (showing 2009-2010 admissions ratio of 44% for black applicants, 75% for white applicants, 67% for Asian applicants, and 59%

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[4] These figures include individuals who self-identified as Hispanic, Latino, or Puerto Rican, as well as individuals who self-identified as Chicano or Mexican American before 2010, when that category was abandoned.

for Hispanic applicants); *see also* Symposium, *Who Gets in? The Quest for Diversity After* Grutter, 52 Buff. L. Rev. 531, 573 (2004) (remarks of D. Chambers) (lower rate of acceptance among black and Hispanic applicants "is due almost entirely to [their] somewhat lower mean undergraduate grades and much lower mean LSAT scores"). An analysis of predicted admissions data for the 2000-2001 applicant pools demonstrated that the acceptance rate for black law-school applicants would have fallen by nearly 40% if grades and test scores had been the sole admissions criteria. Updated analyses, using data from the 2010 entering law school class, show that little has changed in the intervening years. For that class, 76% of white applicants were admitted to at least one nationally accredited law school, while acceptance rates for minority groups lagged at 46% for black applicants; 61% for Hispanic applicants; and 69% for Asian applicants. In a numbers-only admissions model, minority acceptance rates would plummet, particularly for black candidates, whose acceptance rate would fall to just 24%. LSAC, *Updated Wightman Race-Blind Admission Model Results: 2009-2010 Applicant Data* 4 (Aug. 2012), http://www.lsac.org/LSACresources/publications/PDFs/raceblindadmissionresults.pdf.

The real-world consequences of these statistics are illustrated by the experience of law schools that have prohibited affirmative action. In 1997, the first year in which the University of California, Berkeley School of Law was legally barred from considering race pursuant to a California ballot measure, it enrolled no African-Americans—not one—and only seven Latino applicants. *See* Rachel F. Moran, *Di-*

versity and Its Discontents: The End of Affirmative Action at Boalt Hall, 88 Cal. L. Rev. 2241, 2247 (2000). At UCLA School of Law, African-American and Latino first-year enrollment dropped from 64 in 1996 to 49 in 1997. *See* Linda F. Wightman, *Consequences of Race-Blindness*, 53 J. Legal Educ. 229, 230 n.7 (2003). By 2000, there were only 21 African-American or Latino students enrolled in University of California law schools. *Id.*[5] In Texas, the results were similar. In the years just after University of Texas Law School was barred from taking race into account along with test scores and grades, African-American enrollment fell from 7% to 1.7%. *See* Clark D. Cunningham et al., *Using Social Science to Design Affirmative Action Programs*, 90 Geo. L.J. 835, 855-56 (2002) (7% in 1996; 1.7% in 1999). The University of Michigan Law School likewise enrolled fewer underrepresented minorities after that State's affirmative-action ban, even as the law school's class size increased. Teresa A. Bingman & Daniel M. Levy, *More Fair to Whom*, Mich. Bar J., Jan. 2012, at 26.[6]

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[5] Minority enrollment has been rebounding somewhat at California schools, apparently because of creative diversity strategies that might not be permissible under all affirmative action bans. *See, e.g.*, Erin Zlomek, *California Schools Get Around an Affirmative Action Ban*, Bloomberg Businessweek (Apr. 19, 2012), http://www.businessweek.com/articles/2012-04-19/california-schools-get-around-an-affirmative-action-ban (last viewed Aug. 12, 2012).

[6] A recent report found that affirmative action bans have reduced minority enrollment in graduate school by about 12% across multiple fields. *See* Liliana M. Garces, *The Impact of Affirmative Action Bans in Graduate Education* 4, Civil Rights Project Report, UCLA (July 2012). Also, minority students evi-

Petitioner's account of the experience of Texas schools post-*Hopwood* is not inconsistent with these data. The University of Texas Law School's current 31% minority enrollment lags the Texas undergraduate system's majority minority enrollment. *Compare* Pet. Br. 10, *with* UT Law Admissions, *Quick Facts*, http://www.utexas.edu/law/admissions/jd/quickfacts.php (last viewed Aug. 12, 2012). The statistics petitioner cites are the product of policies instituted at the undergraduate level for the express purpose of restoring minority representation. Even assuming the policies petitioner discusses could survive constitutional scrutiny when explicitly race-conscious policies would not, they are not effective solutions for law schools, as explained below. *Infra* at 15-19; *cf.* Mark C. Long, *Race and College Admissions: An Alternative to Affirmative Action?*, 86 Rev. of Econ. & Stat. 1020, 1029-30 (2004) (analyzing why minority enrollment at public colleges would plummet if percent plans wholly replaced affirmative action).

Given these data, it is clear that for many law schools, the only way to achieve racial diversity is to adopt some policy consciously designed to enhance the representation of minorities among the students they admit.

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dently experience greater "hostility and internal and external stigma" in States with affirmative action bans. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1199 (2010).

B. Discarding Test Scores And Grades Is Not An Educationally Responsible Answer To The Problem Of Minority Underrepresentation In The Highest UGPA/LSAT Ranges

Petitioner asserts that there are purportedly race-neutral alternatives that could effectively facilitate satisfactory racial diversity. Pet. Br. 3, 34-42. But none of the alternatives is a sound or efficacious means of pursuing meaningful diversity in a law school setting.

1. Petitioner contends that Texas's "ten percent plan" ensures sufficient racial diversity to render unnecessary any consideration of race at the margins. But percent plans, even if effective for undergraduate admissions, make no sense for law schools. At the undergraduate level, the idea is that the state college or university attains diversity by offering admission to the top x percent of the class (on the basis of grade point average alone) at all state high schools. If such a plan promotes diversity at all, it is only because it depends on de facto racial segregation in state high schools. *See* Jose L. Santos et al., *Is "Race-Neutral" Really Race-Neutral?: Disparate Impact Towards Underrepresented Minorities in Post-209 UC System Admissions*, 81 J. Higher Ed. 675, 678 (2010).[7] But the nation's colleges and universities are not racially segregated in the way high

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[7] Because percent plans are "heavily dependent on segregation," it is not clear they can properly be characterized as "race-neutral." Marta Tienda & Teresa A. Sullivan, *The Promise and Peril of the Texas Uniform Admission Law* 16, Presentation at Am. Ed. Res. Ass'n (Apr. 8, 2006).

schools in Texas apparently are. Even if it were wise to adopt a diversity policy that depends for its success on continued racial segregation, it is impossible to see how such a plan would work to enhance diversity where there is no pool of racially segregated institutions from which to draw.

The fundamental challenges for a law school contemplating a percent-plan admissions program are obvious. What pool of colleges and universities would a Texas state law school draw from, for example? All colleges and universities nationwide? If so, the law school could offer admission to only a minuscule fraction of the very top graduates—maybe no more than the valedictorian of every college and university in the nation. But do enough of them want to go to law school? And is the pool of valedictorians nationwide racially diverse? Perhaps the plan could be limited to just colleges and universities in Texas, or the Big Twelve schools. But are those schools sufficiently segregated that adopting such a plan would enhance the law school's diversity? Perhaps Texas could focus on accepting only the top graduates of historically black colleges. But in what sense would that be "race-neutral"? LSAC knows of no workable design for a percent-plan program in a law school.

Even if they worked to obtain diversity, percent plans would seriously compromise the educational values served by selectivity in law school admissions. Percent plans exalt undergraduate grades while discarding test scores for applicants sufficiently close to the top of their classes. Yet test scores are a critical piece of the evaluation process. The fact that a college student is in some top percentage of her class may say much about her preparation for legal study—or it may not. *See* Lisa Anthony Stilwell et al., *Predictive Validity of the LSAT: A National Summary of the 2009 and 2010 LSAT Correlation Studies*, LSAC Technical Report 11-02, at 8 (2011) (showing that LSAT scores predict law school performance better than undergraduate GPAs do). If the college is small and noncompetitive, or academically lax, or if it has a reputation for inflating grades, then a high grade point average alone signifies very little. *See* LSAC, *LSAC Statement of Good Admission and Financial Aid Practices* 2 (2012). Indeed, it is easy to imagine a forward-planning college applicant intentionally matriculating at a less selective institution than may be ideal for him in part to game a professional-school percentage plan, and equally easy to imagine that some less-than-scrupulous institutions might encourage such gaming. The LSAT was designed in part to fill the information gaps and dissimilarities that are inherent in a selective admission process drawing candidates from a wide array of educational backgrounds. *See infra* at 20-21. Depriving law schools of its use would impose significant educational costs.

But there is more to the problem than just the elimination of test scores. Most law schools take very seriously the process of selecting, from among the thousands of applications they receive, the students they think will contribute the most to the interactive educational environment characteristic of American law schools. *See infra* at 23-26. In this process, law schools consider a wide range of attributes beyond just grades and test scores. Any admissions plan that focuses rigidly on undergraduate grades would cut off that critically important subjective evaluation process, forcing the school to live with whatever applicants fall within an arbitrarily defined grade category. That is not a sensible path to quality legal education. *See* LSAC, *Cautionary Policies Concerning LSAT Scores and Related Services* (2005).

By contrast, it makes good sense for law schools to seek to promote experiential, linguistic, and socioeconomic diversity in their student bodies—the "special circumstances" touted by petitioner as potential admissions criteria. In fact, most law schools already do pursue such forms of diversity. But pursuing other forms of diversity does not significantly promote racial diversity in law schools, which is why the many law schools that rely on non-racial diversity criteria also consider race in admissions. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 44 (1997). It bears special emphasis that the most commonly suggested proxy for race—socioeconomic status—does not in fact facilitate racial diversity. Because racial variances in numeric criteria are consistent across all socioeconomic levels, *see id.* at 42 (tbl. 10), an admissions policy that considers socioeconomic status is of little or no assistance to minority candidates. *See* William Darity et al., *Who Is Eligible? Should Affirmative Action be Group- or Class-Based?*, 70 Am. J. Econ. & Sociology 238, 239 (2011); Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 Law & Soc. Inquiry

711, 755 (2004). Further, the vast majority of people who are economically disadvantaged are white, meaning that "poverty-based affirmative action" primarily benefits white applicants, "by simple force of the numbers." Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. Legal Educ. 452, 465 (1997).[8] Racial diversity simply cannot be realized through consideration of purportedly race-neutral factors believed to predominate in one racial group or another.

2. If schools cannot expressly consider race among many factors in admissions, the only option remaining to law schools for which racial diversity is a priority is to ease admission requirements for all students and hope that the result is a more variegated student body. LSAC believes that discarding grades and test scores as tools for evaluating certain important skill sets in the admissions process would be a profoundly unwise course for American legal education. It goes without saying that when it comes to the study of law, an applicant's cognitive ability and critical-thinking skills are significant indicators of success. They are not the only indicators; nor are they the only quality for which law schools appropriately screen when selecting a class. But the educational mission of law schools depends in critical part on the ability to identify and admit applicants whose cognitive skills will enable them to benefit

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[8] *See also* Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 Denv. U.L. Rev. 751, 766 n.95 (2011); Monica L. Rose, *Proposal 2 and the Ban on Affirmative Action: An Uncertain Future for the University of Michigan in Its Quest for Diversity*, 17 B.U. Pub. Int. L.J. 309, 333 (2008).

from—and contribute meaningfully to—the legal learning process.

Undergraduate grades and LSAT scores are the principal means by which law schools can screen and select for these skills. *See* Pamela Edwards, *The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 St. John's L. Rev. 153, 157 (2006); Linda F. Wightman, *The Role of Standardized Admission Tests in the Debate About Merit, Academic Standards, and Affirmative Action*, 6 Psychol. Pub. Pol'y & L. 90, 94-95 (2000). LSAT scores, which reflect acquired, high-level reading and verbal reasoning skills, are an effective predictor of students' performance in law school. *See* Stilwell et al., *Predictive Validity*, *supra*, at 8; Linda F. Wightman, *Beyond FYA: Analysis of the Utility of LSAT Scores and UGPA for Predicting Academic Success in Law School*, LSAC Research Report 99-05, at 3 (Aug. 2000). LSAT scores are also used in conjunction with undergraduate grades, to help law school administrators better understand and evaluate the records of students at colleges with which they are not especially familiar. *See* William P. LaPiana, A History of the Law School Admission Council and the LSAT, Keynote Address, LSAC Annual Meeting, at 5-10 (1998).

Indeed, the LSAT was designed in part to serve precisely that function. In the years before World War II, law schools had developed "a very complex system for the evaluation of college grades and ... had built up a lot of tables predicting what a certain average at a particular college meant." *Id.* at 5 (quotation omitted). After the war, with returning veterans attending college in record numbers, law schools were faced with a flood of transcripts from new colleges for which they had little or no data. The LSAT, introduced in 1947, gave law schools both a tool for evaluating unfamiliar college transcripts and a reliable universal standard by which all students could be compared. *Id.*

In that respect, the LSAT worked—and works today—to increase access to legal education. In the past, high LSAT scores opened the doors of elite law schools to applicants from minority religious groups and white ethnic groups who might otherwise have been overlooked, often because they attended less prestigious colleges from which a high grade point average was of uncertain significance, and sometimes as a result of cultural biases. *See id.* at 9-10. Even now, the LSAT helps law schools identify promising students at undergraduate institutions with which they do not have extensive experience. "[I]f one believes in the relative validity of the test results, then their widespread use in admissions can be seen as a net gain for fairness." *Id.* at 7.

Despite the LSAT's success in expanding access to legal education, we have already seen how the test could have the opposite effect for certain racial minorities, if given inappropriate weight in the admissions process. But addressing that problem by discarding test scores and grades altogether would seriously undermine the important educational interest in accurately measuring the critical-thinking skills necessary for success in law school.[9] The academic mission and standards of the nation's law schools depend in no small part on accounting for these skills when selecting students. Law schools have carefully honed their selection processes over the decades to reflect their values and missions. Their academic judgment in the selection of their students warrants the Court's deference and respect.

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[9] Repeated studies by LSAC researchers have confirmed that the test accurately predicts minority law school performance, and the LSAT therefore cannot be discounted as inherently racially biased. *See, e.g.*, Lynne L. Norton et al., *Analysis*

In sum, the alternatives to race-conscious admissions would allow a law school to effectuate racial diversity only by discarding admissions criteria long deemed important to the educational mission. But an approach that undermines educational quality defeats the entire purpose of law school diversity programs to *maximize* the quality of education offered to all students, and is therefore unsound. Even absent the usual deference this Court gives to the academic policy judgment of States and their experienced educators, there is simply no plausible basis for concluding that there are educationally responsible, "race-neutral" means to attain the benefits of racial and ethnic diversity in legal education.

C. Race-Sensitive Admissions Policies Can Achieve Racial Diversity Without Compromising The Ability Of The School To Assemble An Educationally Optimal Class

Faced with the need to take some measures to ensure diversity, most law schools have correctly rejected proposals that they abandon altogether the

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of Differential Prediction of Law School Performance by Racial/Ethnic Subgroups Based on 2005-2007 Entering Law School Classes, LSAC Technical Report 09-02 (2009).

selective and comprehensive admissions process through which they assemble classes maximizing the educational experience for all students. Instead, they pursue a much more modest course, including race among the many non-numeric factors they consider in deciding which applicants will create a class that best advances the school's overall educational goals. In doing so, law schools merely recognize that membership in an identifiable racial or ethnic minority group is at least as salient as other experiential and background attributes—attributes that schools properly regard as valuable because they broaden the perspectives students bring to the interactive classroom environment. *See supra* at 4-6. This approach to admissions strikes the appropriate balance between reliance on numeric measures of critical-thinking skills and assessment of other attributes equally important in the admissions process.

1. It has been the consistent position of LSAC that "[t]here is no entitlement to a seat in law school, regardless of one's test scores and undergraduate grades." Philip D. Shelton, *Top Ten Misconceptions About the LSAT*, Law Services Report, Jan./Feb. 1999, at 9; *see also* LSAC, *Cautionary Policies Concerning LSAT Scores and Related Services*, *supra*. That conclusion follows from the recognition that the goal of law school admissions is not simply to reward academic promise or achievement, whether measured by LSAT scores, UGPA, or any other indicator. Legal education is not an awards program. Rather, it is a process with a two-fold mission: to enhance students' legal reasoning skills and mastery of legal principles, and to prepare them for meaningful participation and leadership in the profession and in so-

ciety. *See Grutter*, 539 U.S. at 332-33; *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The goal of law school admissions is to compose a class that best promotes those objectives for all students.

Grades and LSAT scores are important factors in this process. *See supra* at 19-21. But they are not the only important factors. As LSAC has repeatedly cautioned, "[t]est scores and grade-point averages should play only a limited role in the admission process," LSAC, *The Art and Science of Law School Admission Decision Making* 3 (2002), and should be "examined in relation to the total range of information available about a prospective law student," LSAC, *Cautionary Policies Concerning LSAT Scores and Related Services* 1 (2005).[10]

The LSAT, for instance, was never intended to serve as a measure of "merit." *See* LaPiana, *supra*, at 8. Though it is an important measure of cognitive abilities, the LSAT "measures only a limited set of skills." Shelton, *Misconceptions*, *supra*, at 9. It does not, for instance, assess writing ability, effectiveness of advocacy, negotiating ability, leadership potential, or a number of other skills and attributes integrally related to success in law school and the legal profession. *See* LSAC, *LSAC Statement of Good Admission and Financial Aid Practices*, *supra*, at 1; Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 St. John's L. Rev. 41, 59 (2006). Nor does the LSAT evaluate important personal characteristics—including motivation, perseverance, personal integrity, courage, social skills, and passion—that play a crucial role in determining success in law school and in a legal career. *See* Kevin McMullin, *Building a Better Legal Population: Schools Shouldn't Rely So Heavily on Test Scores in Admissions*, Tex. Law., Nov. 23, 1998, at 6; Edwards, *The Shell Game*, *supra*, at 158; *see also* LSAC, *LSAC Statement of Good Admission and Financial Aid Practices*, *supra*; Michael J. Sandel, Justice: What's the Right Thing To Do? 169 (2009).

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[10] The proper role of test scores and grade point averages is best appreciated by considering all of the other factors LSAC deems important to the admissions decision. Those factors are reviewed in *The Art and Science of Law School Admission Decision Making*, *supra*, at 9-10, and include academic factors such as advanced degrees and the difficulty of college course work; demographic factors including age, gender, race/ethnicity, geographic residence, socioeconomic status, family size, religion, and dominant language; work experience; leadership and extracurricular experience including community, volunteer, and athletic activities; accomplishments such as special artistic talents or overcoming adversity; evidence of good character and qualities such as integrity, maturity, honesty, compassion, judgment, and motivation; and other skills and abilities, such as communication, analytical, or advocacy skills.

Most significantly, neither LSAT scores nor grades provide any indication of how an applicant will affect the mix of backgrounds, experiences, outlooks, and ideas reflected within the class of students. As discussed, most of the nation's law schools base their entire approach to legal education on the premise that heterogeneity in the student body improves both cognitive learning and preparation for leadership in the profession and society. Heterogeneity along a number of dimensions—race, gender, age, socioeconomic status, personal history, geography, special skills and talents among them—

contributes significantly to the learning process on a law school campus.

In sum, a "sound admission program" is more than an exercise in assessing an applicant's cognitive skills and "predicting first-year academic performance." LSAC, *Art and Science of Law School Admission*, *supra*, at 4. Its "goal is much broader—assembling a class of individuals who contribute to each other's learning experiences, and who possess talents and skills that will contribute to the profession, frequently talents and skills not measured on the LSAT or captured in undergraduate grades." *Id.*; *see* LSAC, *LSAC Statement of Good Admission and Financial Aid Practices*, *supra*, at 12; Post, *supra*, at 54. Assessing which applicants best meet those criteria is a quintessential academic judgment, properly entrusted to university officials. *See Grutter*, 539 U.S. at 329; *Ewing*, 474 U.S. at 226-26; *Bakke*, 438 U.S. at 312 (Powell, J.). A policy that includes the appropriate consideration of grades and test scores but also gives weight to other factors, including racial and ethnic diversity, provides law school administrators with the information and latitude they need to compose a class that maximizes the quality of education for all students.

2. It is precisely the flexibility afforded admissions officials that distinguishes the type of race-sensitive law school admissions policy approved in *Grutter* from "quota" systems. Under the quota system in *Bakke*, admissions decisionmakers had no opportunity to compare minority candidates to non-minority candidates. There was no way to consider, for instance, whether the cognitive skills and special talents of a given non-minority candidate might bet-

ter enhance the school's overall educational environment than those of a given minority candidate. It was this flaw—the "insulat[ion]" of a racial group from "competition with all other applicants"—that defined "quota" for Justice Powell in *Bakke*, *id.* at 315, and now marks the constitutional line between permissible and impermissible consideration of race. *See Grutter*, 539 U.S. at 336-39.

Under *Grutter*, a law school faculty and staff who make admissions decisions evaluate all aspects of all applicants, separately and as compared to one another, in order to assemble a class that provides the best education to all students. Non-minority candidates, just like minority candidates, are screened for subjective factors: Would the candidate make the student body more heterogeneous along a non-racial dimension? Bring some exceptional talent or personal experience to the class? Be a leader or otherwise contribute to the law school community in a way not readily captured by numeric criteria? The current systems operate in a way "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at 337. Research sponsored by LSAC into law school admissions processes confirms that such systems do not in practice operate like the quota system in *Bakke*. *See* Wightman, *Consequences of Race-Blindness*, *supra*, at 252.

* * * *

The admissions practices authorized by the Court in *Grutter* have enabled law schools to pursue meaningful enrollment of minority students without forsaking other important measures such as test scores and grades. The data are unambiguous: there is still a demonstrated need for policies that include race among the many other factors relevant to admissions. The Court accordingly should reaffirm the constitutional validity of those policies.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 11-345

In the Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTERESTS OF AMICI CURIAE[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy to provide legal representation to the victims of civil rights violations. Its members include former presidents of national Bar Associations, law school professors, and many of the nation's leading lawyers. For almost fifty years, the Lawyers' Committee and its independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco and Washington, D.C. have represented members of minority groups and others in hundreds of civil rights cases. Among the essential interests of the Lawyers' Committee is the proper construction and implementation of programs to provide for racial diversity in higher education. The Lawyers' Committee filed an amicus curiae brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the

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[1] The parties have consented to the filing of this brief. No party to this case or their counsel authored this brief in whole or in part, and no person other than amici and their counsel paid for or made a monetary contribution toward the preparation or submission of this brief.

National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, religions and socio-economic backgrounds. The Leadership Conference works to build an America that is as good as its ideals, and toward this end, supports the use of race as one factor in admissions policies to promote diversity in the nation's colleges and universities. Diversity improves the quality of education for all students and promotes leadership and civic engagement. The success of The Leadership Conference as a multiracial and multiethnic coalition dedicated to common goals illustrates the tangible contribution of diversity to contemporary American society.

Additional amici curiae listed in the Appendix represent a broad array of allied organizations that have a common interest in promoting diversity in the nation's colleges and universities.

SUMMARY OF ARGUMENT

Nine years ago, this Court reaffirmed that attaining the benefits of diversity in higher education is a compelling state interest that can justify the use of race in university admissions. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (endorsing "Justice Powell's view" in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314-15 (1978)). For decades, Justice Powell's opinion in *Bakke* "has served as the touchstone for constitutional analysis of race-conscious admissions policies," as "[p]ublic and private universities across the Nation have modeled their own admissions programs on [his] views on permissible race-conscious policies." *Grutter*, 539 U.S. at 323. This Court endorsed Justice Powell's view because diversity in education remains important "in a society, like our own, in which race unfortunately still matters." *Id.* at 333. For reasons explained below, the reasoning and holdings of *Bakke* and *Grutter* remain sound and should govern this case.

It is crucial that the Court's consideration of this case be informed by a proper understanding of the nature of a university's interest in diversity. As this Court has recognized, the presence of a diverse student body on campus leads to a range of educational benefits, including improved learning outcomes and better preparation for work and citizenship. Because race and ethnicity continue to affect the experiences and perspectives of individuals in society, racial and ethnic diversity[2] are important aspects of the diversity that promotes the best educational outcomes. As Justice O'Connor observed in *Grutter*, "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333. A student's identity as a member of a particular racial group inevitably shapes, in various ways, the experiences and perspectives that student brings to both campus life and the classroom. For that reason, admitting a student body that is racially diverse remains a compelling educational interest of a college or university.

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[2] Throughout the remainder of this brief, for the sake of brevity, references to "racial diversity" encompass both racial and ethnic diversity.

But there are no magic numbers that produce diversity's benefits. That is because, as studies show, the educational benefits of diversity flow from meaningful interactions among students of different races, and whether such interactions occur on campus may depend on a wide array of factors beyond percentages. This compels at least three conclusions:

First, to realize the benefits of a racially diverse student body, a university must have leeway to consider race as one factor in holistic, individualized admissions decisions. Social science research shows that a university's courses, programs, and extracurricular activities may each be a forum for the meaningful interactions critical to achieving diversity's benefits. Consideration of how individual applicants will contribute to these environments is therefore crucial to a university's mission.

Second, Petitioner's assertion that the University of Texas ("UT")'s compelling interest is necessarily satisfied by numbers alone—here, that it was satisfied when aggregated "Hispanic and African-American enrollment" constituted "21.4% of the incoming freshman class," Pet. Br. 35—is misplaced. Focusing exclusively on the numbers or percentages of students of color on campus without also permitting race to factor into individualized admissions decisions fails to protect the university's interest in promoting meaningful interactions of students of different races inside and outside the classroom.

Third, the Court's scrutiny of UT's limited use of race in its admissions decisions must take into account that these decisions are made in an educational context. *See Grutter*, 529 U.S. at 327

("Context matters when reviewing race-based governmental action under the Equal Protection Clause."). As Justice Frankfurter stated in *Sweezy v. New Hampshire*, the "four essential freedoms of a university" are: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and *who may be admitted to study*." 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added). Admissions decisions, including efforts to realize the benefits of racial diversity, require numerous judgments about the students to be admitted and the nature of their interactions inside and outside the classroom. These judgments require expertise in higher education that universities clearly possess and that is squarely within their constitutional domain. Courts should therefore accord some deference to a university's judgments about both the need for racial diversity and the means that will achieve it without sacrificing other important educational interests.

ARGUMENT

I. BECAUSE OF THE ENDURING ROLE OF RACE IN AMERICAN SOCIETY, RACIAL DIVERSITY REMAINS AN IMPORTANT ASPECT OF DIVERSITY IN HIGHER EDUCATION

Racial diversity remains an important component of the diversity that universities may strive to attain in order to provide the best learning environment and outcomes for their students. This Court has recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at

332. But this goal is not yet realized, and the Nation's long struggle with racial inequality is not over. As Justice Kennedy observed just five years ago, "[t]he enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring).

The continuing significance of race in our society means that a student's racial identity will very likely affect the experiences and perspectives he or she brings to the educational environment at a university. This is not to say that members of a minority race all have the *same* experiences or perspectives; certainly they do not. But, because race too often "matters," racial identity may imbue an individual applicant with experiences and qualities that would enrich the learning environment. *See Grutter*, 539 U.S. at 333 ("one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters" "is likely to affect an individual's views").

A. Race Still Matters in American Life

Race continues to play a significant role in individuals' experiences in many realms of society. Because of both the reality and perception that race matters throughout society—in education, employment, criminal justice, healthcare, and many other sectors—race continues to inform and shape the individual identities of people of color. *See, e.g.*, The Psychology of Prejudice and Discrimination: Racism in America, Vol. 1 (Jean Lau Chin ed., 2004).

Racial disparities in educational attainment persist. Indeed, despite our "historic commitment to creating an integrated society that ensures equal opportunity for all . . . children," *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring), experts continue to report "barriers at every step of the academic pipeline" for underrepresented minority students. Moin Syed, et al., *Identity and Academic Success Among Underrepresented Ethnic Minorities*, 67 J. Soc. Issues 442, 442-43 (2011).

Racial segregation persists at the elementary and secondary levels: In the 2006-07 school year, 73% of black students attended predominately (more than 50%) minority public schools, and 38.5% attended schools that are "intensely segregated" (90–100% minority). Gary Orfield, *Reviving the Goal of an Integrated Society*, at 12, 26 (2009).

Race-based achievement gaps also persist and are linked to racial and socioeconomic segregation. The results of the National Assessment of Educational Progress (NAEP), the largest nationally representative and continuing assessment of student performance in various subject areas, show that racial and ethnic gaps persist for both reading and math. *See* National Center for Education Statistics, Institute of Education Sciences, U.S. Dept. of Education, *The Nation's Report Card: Reading 2011*, at 11, 44 (2011), *available at* http://nces.ed.gov/nationsreportcard/pdf/main2011/2012457.pdf; National Center for Education Statistics, Institution of Education Sciences, U.S. Dept. of Education, *The Nation's Report Card: Mathematics 2011*, at 14, 18, 39, *available at* http://nces.ed.gov/nationsreportcard/pdf/main2011/2012458.pdf.

Racially isolated high schools are less likely to offer a full menu of college-preparatory courses and rigorous curricula that would allow students to earn higher grade point averages or early college credit, and students of color are underrepresented in gifted and talented programs and have less access to higher level academic programs in math and science. *See* Office for Civil Rights, U.S. Dept. of Education, Civil Rights Data Collection 2012, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf. In addition, the rate of out-of-school suspensions is significantly higher for African-American students than for white and Asian American students. Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, at 14 (2012) (nationwide in the 2009-10 school year, 17% of African-American students suspended at least once, compared to 5% of white and 2% of Asian American students).

Taken together, these factors produce lower rates of academic success for minority students. Dropout rates are significantly higher in racially isolated and impoverished schools, and nearly all of these "dropout factories" are doubly segregated by race and poverty. *See* Balfanz, R. & Legters, N., *Locating the dropout crisis: Which high schools produce the nation's dropouts?* (2004), *available at* http://www.csos.jhu.edu/crespar/techReports/Report70.pdf. As of 2008, of public high school students who enter school as freshman approximately 61% of African Americans, 63% of Hispanics, and 64% of Native Americans graduate in four years, as compared to 81% of white and 91% of Asian students. *See* John Michael Lee, Jr., et al., *The College Completion Agenda 2011*, at 62 (College Board Advocacy & Policy Center 2011), *available at* http://completionagenda.collegeboard.org/sites/default/files/reports_pdf/Progress_Report_2011.pdf.

These disparities persist in higher education. The percentage of U.S. adults with at least some post-secondary education varies by race. As of 2009, only 29.5% African Americans and 19.2% of Hispanics ages 25 to 34 had earned an associate degree or higher, as compared to 48.7% of white students and 69.1% of Asian students. *See* Lee, *The Completion Agenda 2011*, *supra*, at 11–12. Over the past few decades, flagship public universities "have become much less representative of the racial composition" of those who graduate from high school. Danette Gerald & Kati Haycock, *Engines of Inequality: Diminishing Equity in the Nation's Premier Public Universities*, at 7 (The Education Trust, 2006). Black and Hispanic students are significantly underrepresented at highly selective colleges. Sean F. Reardon, et al., *Race, Income, and Enrollment Patterns in Highly Selective Colleges, 1984-2004*, at 5-11 (Stanford Center for Education Policy Analysis, 2012).

"Poverty rates for blacks and Hispanics" also "greatly exceed the national average." National Poverty Center, *Poverty Facts: Poverty in the U.S.*, *available at* http://www.npc.umich.edu/poverty/#2. Indeed, even when controlled for educational attainment, the African-American poverty rate is almost double that of white Americans. *See* U.S. Census Bureau, Current Population Survey, 2010 Annual Social and Economic Supp., *Years of School Completed by Poverty Status, Sex, Age, Nativity and Citizenship*. Wealth gaps between racial groups are at an all-time high. *See* Paul Taylor, et al., *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks, and Hispanics*, Pew Research Center (2011). Among the poor and the middle class, residential and employment spheres remain largely segregated by race. *See* George Wilson, *Racialized Life-Chance Opportunities Across the Class Structure: The Case of African Americans*, 609 Annals Am. Acad. Pol. & Soc. Sci. 215, 216 (2007). These conditions contribute to poorer life outcomes for minorities. People who live and work in low socioeconomic circumstances are at increased risk for mortality, morbidity, unhealthy behaviors, reduced access to health care, and inadequate quality of care. Center for Disease Control and Prevention, *Health Disparities and Inequalities Report – United States, 2011*, at 13. Disparity in access to healthy and adequate housing is also significant: non-Hispanic blacks experience the highest percentage of householders living in inadequate and unhealthy housing, followed by Hispanics and American Indians or Alaskan Natives. *Id.* at 21.

Studies show that race also still matters in the juvenile justice system. According to the most recent Civil Rights Data Collection, more than 70% of students who were arrested or referred to law enforcement from public schools were Hispanic or black. Black youths are more likely than their white peers to be arrested for the same crimes and more likely to be detained; and, while black youths represented 34% of the overall delinquency caseload in 2008, they made up 41% of the detention caseload. *See* Office of Juvenile Justice & Delinquency Prevention, U.S. Dept. of Justice, *Juvenile Offenders and Victims: Juvenile Arrests 2009* (Dec. 2011).

The significance of race elsewhere in the criminal justice system is well documented. For example, black and Hispanic defendants on average receive longer sentences than white defendants. *See* Stephen Demuth & Darrell Steffensmeier, *Ethnicity Effects on*

Sentence Outcomes in Large Urban Courts: Comparisons Among White, Black, and Hispanic Defendants, 85 Soc. Sci. Q. 994 (2004) (noting that black and Hispanic defendants receive harsher sentences than white defendants, particularly in drug and property crimes).

B. Students of Different Races Contribute Diverse Viewpoints, Perspectives, and Experiences

Because race still plays such an influential role in so many spheres of life, it is not surprising that a person's race tends to inform his or her identity, experiences, and perspectives. *See* Mitchell J. Chang, et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Ed. 430, 431-32 (2006). Minority youth—in particular, African-American and Latino children—are more likely to attend segregated schools, suffer more severe school discipline, live in poverty, and have relatives in the criminal justice system. Whether minority youths have experienced such hardships firsthand or not, they are more likely than others to feel stigmatized by or sensitized to racial disparities in society. Thus, both directly and indirectly, racial disparities in society affect individuals' experiences and their perspectives. In turn, and as explained in more detail below, "because of the persistent power of race to shape life experiences, racial and ethnic compositional diversity can create a rich and complex social and learning environment that can subsequently be applied as an educational tool to promote students' learning and development." *Id.* at 432.

To be sure, individuals of any given race will have varied experiences and a wide range of perspectives. *See Grutter*, 539 U.S. at 333. One student of color may have a parent, friend, or relative in jail and develop strong views, of whatever valence, regarding criminal justice and punishment. Another may have parents who have never received so much as a traffic ticket; she may feel frustrated or stigmatized by a prison system filled disproportionately with racial minorities or by media portrayals that correlate race and crime. A third student of color may study law or law enforcement in order to break down stereotypes and combat disparities in incarceration rates. A fourth may be focused on pursuing her dream of becoming a doctor and be indifferent to criminal justice issues. For each, the "unique experience of being a racial minority in [our] society" has the potential to enrich classroom and dormitory discussion and the exchange of ideas within a university. *Id.*

Furthermore, students' interactions with peers with different racial backgrounds may reveal more similarities than differences. Students of different races will sometimes discover that they have far more in common than they anticipated. *See* Sylvia Hurtado, *Preparing College Students for a Diverse Democracy: Final Report to the U.S. Department of Education* 37-38 (Univ. of Mich., Ctr. for the Study of Higher & Postsecondary Educ. 2003) [hereinafter *Preparing College Students*]. Discovery of such similarities is just as important as exposure to different opinions, as it "promotes 'cross-racial understanding' [and] helps to break down racial stereotypes." *Grutter*, 539 U.S. at 330; *see also Preparing College Students*, *supra*, at 37 (explaining that realization of "commonalities" in cross-racial interaction can "facilitate self-reflection about [students'] own assumptions").

II. REALIZING THE EDUCATIONAL BENEFITS OF DIVERSITY REQUIRES MEANINGFUL INTERACTIONS AMONG STUDENTS OF MANY BACKGROUNDS AND PERSPECTIVES

As this Court has held, the compelling interest in diversity is specifically an interest in "*obtaining the educational benefits* that flow from a diverse student body." *Grutter*, 539 U.S. at 343 (emphasis added). That interest is decidedly "*not* simply 'to assure within [a school's] student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *Grutter*, 539 U.S. at 329-30 (emphasis added) (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)). "That would amount to outright racial balancing," which the Court has held is "patently unconstitutional." *Id.* Instead, obtaining the "substantial" educational benefits of diversity, *Grutter*, 539 U.S. at 330, requires creating an educational community that fosters those benefits by supporting meaningful interactions among diverse students.

Of course, numbers do matter. *See Grutter*, 539 U.S. at 336 ("[S]ome attention to numbers without more, does not transform a flexible admissions system into a rigid quota.") (internal quotation marks omitted). A university cannot even hope to foster meaningful interactions among diverse students without some sufficient number of enrolled minority students. *Id.* at 340. But a university may properly conclude that sterile enrollment numbers alone are of limited use. Percentages alone may be a limited predictor of the interactions that fuel diversity's benefits, and they may miss the significant diversity of individual applicants *within* racial groups. For these reasons, social science compels the same conclusion the Court has reached on constitutional grounds: that the "critical mass" a school may seek to enroll through its admissions decisions should be defined in a manner more nuanced than sheer numbers—"by reference to the educational benefits that diversity is designed to produce." *Id.* at 330.

Having admitted certain numbers or percentages of diverse students must not preclude a university from considering race in its individualized admissions decisions in order to promote meaningful interactions among diverse students. While enrolling some number of students is obviously a necessary element of a university's effort to further its compelling educational interest in diversity, a university may properly adopt an admissions strategy that looks beyond numbers. In this section, Amici first explain further the critical role of meaningful interactions among students in achieving diversity's benefits and then identify, with reference to empirical evidence, the educational benefits that those interactions yield.

A. The Educational Benefits of Diversity Are Realized Primarily Through Meaningful Interactions Among Students of Different Backgrounds

Part of the benefit of a college education, this Court has recognized, is that students "are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Bakke*, 438 U.S. at 313 & n. 48 (quoting

Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). These educational benefits are realized primarily when students have meaningful interactions with one another. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development*, 80 Rev. Educ. Res. 4, 22-23 (2010) [hereinafter *Cognitive Development*]. Campus diversity "operates *through* students' experiences," and in key part through their "actual interactions with diverse peers." Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 360 (2002) [hereinafter *Theory and Impact*].

These interactions may occur productively in multiple contexts on campus. They may occur formally or informally, inside or outside of the classroom. *See id.* at 351–58. In some circumstances, structured classroom discussions provide the operative interactions. *See id.* Other times, "unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth." *Bakke*, 438 U.S. at 313 & n. 48 (quoting Bowen, *Admissions and the Relevance of Race*, at 7, 9).

The frequency of students' cross-racial interactions affects the educational benefits they derive from campus diversity. *See Interaction Among Undergraduates, supra*, at 449. As a student's level of cross-racial interaction increases, he or she demonstrates more significant gains in cognitive development, self-confidence, and understanding and tolerance of members of other racial groups, among other characteristics. *See id.* In a survey of 6,049 alumni of four major research institutions, researchers found that individuals reporting "substantial" levels of cross-racial interaction in college demonstrated significantly higher skill development in seven areas, including formulating creative ideas or solutions and developing awareness of complex social problems, than individuals reporting "some" or "little" cross-racial interaction. *See* Jiali Luo & David Jamieson-Drake, *A Retrospective Assessment of the Education Benefits of Interactions Across Racial* Boundaries, 50 J. Cal. Student Dev. 67, 80 (2009). The frequency of interaction also matters at a macro level; a campus's overall level of cross-racial interaction may affect the extent to which individual students experience diversity's benefits. *See Interaction Among Undergraduates*, *supra*, at 449–50. A university must therefore be allowed to foster formal and informal interactions among students of different races by, among other things, considering race as one factor in its individualized admissions decisions.

B. Empirical Evidence Shows That Diversity Yields Important Educational Benefits When Meaningful Cross-Racial Interactions Occur

Powerful empirical evidence shows that, when accompanied by meaningful cross-racial interactions, diversity yields substantial educational benefits. *Cf. Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting) ("[this Court's] precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence"). The benefits fall loosely into two categories: improved learning outcomes and improved preparation for work and citizenship. *Cf. Fisher v. University of Texas*, 631 F.3d 213, 219-20 (CA5 2011) (identifying educational benefits of diversity, including "Increased Perspectives," "Professionalism," and "Civic Engagement").

1. Improved Classroom Experiences and Learning Outcomes

In *Grutter*, this Court recognized that diversity contributes to improved classroom discussion. *Grutter*, 539 U.S. at 330 ("'[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'") (citation omitted). In addition, the *Grutter* Court found that "numerous studies show that student body diversity promotes learning outcomes." *Id.* at 330. *See also Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (diversity promotes "[t]he atmosphere of 'speculation, experiment, and creation' . . . [that is] so essential to the quality of higher education.").

These benefits—many of which were identified by the University of Texas in its 2004 *Proposal to Consider Race and Ethnicity in Admissions*—find substantial support in the empirical literature. *See* Univ. of Tex. at Austin, *Proposal to Consider Race & Ethnicity in Admissions* 24 (2004) (discussing improved learning, cross-racial understanding, classroom discussions, workforce preparation, civic participation, and leadership in public and private life). Students' informal and curricular interactions with diverse peers is "positively associated with a wide range of student outcomes in the higher education context, including improving academic skills; academic and social self-concept; cognitive outcomes; personal growth/development; teamwork and leadership skills; prejudice reduction; . . . perceived exposure to diverse ideas; racial/cultural understanding and engagement; pluralistic orientation; social agency and civic development; retention; well-being; and satisfaction with college." *See* Mitchell James Chang, *Quality Matters: Achieving Benefits Associated with Racial Diversity*, at 11–12 (Kirwan Institute 2011) (listing studies); Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615, 620–21 (2008) (same). Evidence indicates that personal interactions with students of diverse races promote cognitive growth and that the positive effects of such interactions are greater than the effects of either formal instruction about diversity or interactions with students who are diverse only in respects other than race. *Cognitive Development*, *supra*, 20–22 (2010).

2. Preparing Students for Work and Citizenship

As this Court found in *Grutter*, diversity in higher education furthers the "overriding" educational goal "of preparing students for work and citizenship," in addition to improving learning outcomes. *Grutter*, 539 U.S. at 331. Students who experience a racially diverse educational environment are better prepared for success in the workforce, because "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330.

In the years since *Grutter*, numerous studies have confirmed that cross-racial interaction increases students' professional competency by improving their ability to see the world from others' perspectives, fostering openness to opposing viewpoints, reducing prejudice, increasing tolerance of others with different beliefs, improving their ability to negotiate controversial issues, and enhancing their social self-confidence. *See, e.g.*, Jayakumar, *supra*, at 641; *see also* Mark E. Engberg, *Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students' Development of a Pluralistic Orientation*, 48 Res. Higher Educ. 283, 310–312 (2007) (finding diversity experiences in college are key to achieving students' workforce preparation); *Theory and Impact*, *supra*, at 361 (same); *cf.* Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751, 757 (2006) (meta-analysis finding that intergroup interaction consistently reduced individuals' prejudice levels).[3]

This Court's precedents also recognize that student-body diversity helps facilitate diverse leadership within society, because universities "represent the training ground for a large number of our Nation's leaders," *Grutter*, 539 U.S. at 332, and leaders must be "expos[ed] to the ideas and mores of students as diverse as this Nation of many peoples," *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). This Court has further acknowledged that a university's training of diverse future leaders is crucial to an essential attribute of our democracy—the public's trust in government: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332.

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[3] Petitioner thus creates a false dichotomy when she argues that *Grutter* "endorses an inward-facing concept of diversity focused on enhancing the university experience," but "not an outward-facing concept of diversity focused on achieving a level of minority enrollment that is in proportion to the general population." Pet. Br. 26. As the studies above demonstrate, a university's desire to avoid a student-body composition that significantly under-represents racial minorities is itself an inward-facing effort that serves the educational mission of preparing leaders and citizens.

Meaningful interactions with a racially diverse student body, both in and out of the classroom, also prepare students to be better citizens. Through such interactions, students discover that there is not "some characteristic minority viewpoint on any issue," which in turn "diminish[es] the force of [racial] stereotypes." *Grutter*, 539 U.S. at 333 (internal quotation marks omitted). Learning in a diverse environment "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" *Id.* at 330 (alteration in original) (citation omitted).

Research confirms that interaction with racially diverse peers has positive effects on students' ability and willingness to participate in civic life. *See, e.g.*, Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 Rev. Educ. Res. 29, 46–50 (2010) (finding a significant positive relationship between studying in a diverse environment and improved leadership skills and civic engagement); *see also* Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. Issues 17, 24 (2004) [hereinafter *Benefits of Diversity*] (finding interactions with diverse fellow students increased students' appreciation for democracy and commitment to civic activities).

III. THE NATURE OF THE COMPELLING INTEREST IN DIVERSITY MAKES CLEAR THAT A UNIVERSITY MUST HAVE LATITUDE TO CONSIDER RACE AS PART OF AN INDIVIDUALIZED ADMISSIONS ASSESSMENT

Three conclusions follow from the fact that meaningful interactions among diverse students lead to important educational benefits:

First, to realize the benefits of a racially diverse student body, a university must have the latitude to consider how individual applicants of particular races will fit into university life inside and outside the classroom—an analysis that requires holistic, flexible, and individualized treatment of applicants. In other words, social science supports the use of the same holistic, applicant-by-applicant assessment that the *Grutter* Court deemed constitutionally required if race is to be considered in admissions.

Second, Petitioner's approach to this case is fundamentally at odds with the University's interest—recognized by this Court in *Grutter* and elsewhere as compelling—in realizing the educational benefits of racial diversity, and doing so without relying on rigid numerical racial percentages or quotas. Petitioner wishes to define the University's compelling interest very narrowly, as merely reaching a "percentage of [the University's] student body that must be filled by underrepresented minorities in order to achieve critical mass." Pet. Br. 34. As demonstrated above, however, merely admitting certain numbers of various racial groups is, by itself, not a reliable way to promote meaningful cross-racial interaction.

Third, designing an admissions program that will result in a racially diverse student body and promote meaningful cross-racial interactions within a particular educational environment—without sacrificing other educational objectives—requires nuanced expert judgments about both individual applicants and the overall educational context. Such judgments fall squarely within the core of the educational prerogative of a university and are therefore entitled to a measure of deference within the strict scrutiny framework.

A. Obtaining Diversity's Full Benefits Requires Attention to Individual Applicants

Because the benefits of a diverse student body depend on the character and frequency of students' cross-racial interactions, a narrowly tailored means of obtaining diversity's benefits requires attention to individual applicants and assessment of their likely contributions to all facets of student life. A school must, as the University of Michigan Law School did in *Grutter*, "focu[s] on each applicant as an individual, and not simply as a member of a particular racial group," *Parents Involved*, 551 U.S. at 722, and give "serious consideration to all the ways an applicant might contribute to a diverse educational environment," *Grutter*, 539 U.S. at 337.

Contrary to Petitioner's argument, such an admissions program may properly consider diversity within classrooms as one component of its analysis. The classroom is obviously a crucial forum for the types of interactions and discourse that lead to the educational benefits of diversity.[4] *See, e.g.*, Robert D. Reason et al., *Faculty and Institutional Factors that Promote Student Encounters with Difference in First-Year Courses*, 33 Rev. Higher Educ. 391 395 (2010) (noting that academic coursework is "[o]f course" "the most influential mechanism by which an institution of higher education can shape its students' learning experiences" and that "among the most consistent findings in studies of college effects is that students' classroom activities relate to a number of student outcomes"). Moreover, for some students, the classroom may be the primary site of meaningful interaction with other students. *See* Resp. Br. 43. By making individualized admissions decisions with an eye to promoting diversity within classrooms and departments, a university substantially furthers its compelling interest in realizing the educational benefits of diversity.

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[4] To be sure, *Grutter* made numerous references to "student body" diversity. *See* Pet. Br. 29 (emphasizing *Grutter*'s "repeated[] reference[s] [to] 'student body' diversity"). But, while overall student-body diversity is necessary to realizing diversity's benefits, it may not be sufficient.

B. University Admissions Policies Must Be Permitted To Look Beyond Numbers Alone and Consider Race at an Individual Level

1. Petitioner's Reliance on Numbers Alone Is Misplaced and Constitutionally Impermissible

Petitioner claims that the University of Texas "had already achieved educational critical mass as early as 2000," based on the University's aggregate Hispanic, African-American, and Asian-American enrollment. Pet. Br. 35–36. Petitioner's argument misunderstands both the nature of the University's diversity interest and this Court's precedents.

As discussed above, an attempt to realize diversity's benefits without consideration of individual applicants' potential contributions to the student community—including their pre-college background, academic interests, possible major, and likely extracurricular pursuits—may fail to ensure a diverse campus-wide environment in which quality interactions can flourish. Using numbers alone, a university might admit high percentages of Latino students, but largely those who have excelled in the humanities and few with an interest in science. Or a university might admit high percentages of African-American students, but only those who hail from suburban areas and none from urban environments. Such outcomes limit the university's ability either to foster a broad-range of cross-racial interactions and the educational benefits that follow or to expose students to the varying experiences and perspectives *within* racial groups—exposure that breaks down racial stereotypes.

Petitioner's position is, moreover, defective as a matter of constitutional law. Petitioner urges that diversity's benefits have been realized, and individualized consideration of race is impermissible, because over 20% of admitted students in 2004 were Latino or African-American. Pet. Br. 35. But "[t]he entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved*, 551 U.S. at 722–23. "The classification of applicants by race upheld in *Grutter* was only as part of a 'highly individualized, holistic review,'" for "[t]he importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount." *Id.* (quoting *Grutter*, 539 U.S. at 337). Declaring victory based solely on percentages blithely assumes that whatever benefit is to be gained by having racial diversity within a university is satisfied merely by counting the number of students of each particular race. In doing so, Petitioner's position flies squarely in the face of both this Court's explicit rejection of racial quotas and the relevant educational research.

2. Petitioner's Reliance on Aggregate Data Is Improper and Misleading

Petitioner's reliance on data that aggregate members of different racial groups under the single rubric of "racial minorities" is also improper.

Petitioner's figures mask one minority's underrepresentation with another's strong representation, and vice-versa. For example, while UT ranked fifth in the nation in undergraduate degrees awarded to African-American, Latino, Native

American, and Asian-American students, *collectively*, in 2003–2004, UT failed to break the top one hundred schools in degrees awarded to African Americans, *considered alone*. *See* Amicus Brief of the Black Student Alliance at the University of Texas at Austin and the NAACP Legal Defense & Educational Fund, Inc. in Support of Appellees at 9–10, *Fisher*, 631 F.3d 213 (No. 09-50822) (citing *Top 100 Degree Producers*, Black Issues in Higher Education, June 2, 2005, at 44).

In *Parents Involved*, this Court faulted Seattle and Jefferson County for "employ[ing] only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/'other' terms in Jefferson County." *Parents Involved*, 551 U.S. at 723; *see also id.* at 787 (Kennedy, J., concurring) (criticizing the Seattle district's "blunt distinction between 'white' and 'non-white'" students). Thus, in addition to failing as a mechanism for helping realize the educational benefits of racial diversity, lumping minority groups together runs afoul of the Court's prohibition of binary race classifications. Holistic, individualized decision-making seeks, among other things, specifically to avoid such simplistic, potentially counterproductive, classifications based on race.

C. A University's Constitutional Interests in Academic Freedom, Including the Freedom To Decide Whom To Admit, Should Inform the Strict Scrutiny Analysis

"Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. In particular, the narrow-tailoring inquiry "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education." *Id.* at 334. Here, universities' First Amendment interest in academic freedom should shape the way in which the Court applies strict scrutiny to their admissions policies. As explained above, realizing diversity's benefits may require fine-grained analysis of students' individual attributes and the fit of those attributes with a university's particular curricular and extracurricular environment. At the same time, admissions decisions must account for all of a university's other educational objectives, such as ensuring students are adequately prepared and are diverse across a range of other characteristics. *See id.* at 339 ("Narrow tailoring does not require . . . a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."); *id.* at 340 (university need not adopt alternative that "would effectively sacrifice all other educational values, not to mention every other kind of diversity"). Sound judgments about these issues depend upon the peculiar experience and expertise of education professionals within the university. For that reason, even in the context of strict scrutiny, the courts should give significant deference to a university's judgments concerning what admissions policies will realize the educational benefits of racial diversity without sacrificing the institution's other important educational objectives.

This Court has long afforded deference to a university's educational judgments. The Court has interpreted the First Amendment to give universities wide discretion to make decisions, including about admissions policies, that will further their legitimate educational goals. As Justice Kennedy explained in *Grutter*, the "approval of the use of race in university admissions reflect[s] a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission." *Id.* at 387 (Kennedy, J., dissenting). Because the classroom is "peculiarly the 'marketplace of ideas,'" *Keyishian*, 385 U.S. at 603, and "expansive freedoms of speech and thought [are] associated with the university environment, universities occupy a special niche in our constitutional tradition," *Grutter*, 539 U.S. at 329; *see also Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring) (noting that academic freedom is essential to "extending the bounds of understanding and wisdom"). Consequently, academic freedom is a "special concern of the First Amendment." *Keyishian*, 385 U.S. at 603; *see also Bakke*, 438 U.S. at 312 (Powell, J., concurring) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.").

1. Under the First Amendment, Universities' Educational Judgments Are Entitled to Deference

In light of this constitutional interest and universities' particular expertise, courts have refrained from "substitut[ing] their own notions of sound educational policy for those of the school authorities." *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2988 (2010) (quoting *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206 (1982)). For example, in *Board of Curators of the University of Missouri v. Horowitz*, the Court "decline[d] to ignore the historic judgment of educators" and upheld a student's dismissal from medical school without a hearing because the university's decision "rested on the academic judgment of school officials that [the student] did not have the necessary clinical ability to perform adequately as a medical doctor." 435 U.S. 78, 89-90 (1978). Because such academic determinations are inherently "subjective and evaluative" and "require[] an expert evaluation of cumulative information," the Court found that they were "not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90.

Similarly, in *Regents of the University of Michigan v. Ewing*, the Court recognized that "judges [who] are asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment." 474 U.S. 214, 225 (1985) (upholding a university's decision not to allow a student to retake a required examination). Respecting a university's "professional judgment" does not, of course, mean that courts abdicate their responsibility to interpret the Constitution. Rather, as the *Ewing* Court recognized, courts give universities' educational judgments a measure of deference out of "a reluctance to trench on the prerogatives of state and local educational institutions and [a] responsibility to safeguard their academic freedom." *Id.* at 226.

2. Educational Judgments Entitled to Deference Include University Admissions Policies

Academic freedom protects specifically a university's ability to "make its own [educational] judgments as to . . . the selection of its student body." *Grutter*, 539 U.S. at 329 (*quoting Bakke*, 438 U.S. at 312 (Powell, J., concurring)). In *Sweezy v. New Hampshire*, Justice Frankfurter stated that the "four essential freedoms of a university" are: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 354 U.S. at 263 (Frankfurter, J., concurring); *see also Ewing,* 474 U.S. at 226 n.12 ("Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms' of a university."). This freedom means "[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed." *Id.* at 230 (Powell, J., concurring). Thus, in the context of college admissions, a university's decision to seek racial diversity should be entitled to deference when based on "available empirical data." *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

The decisions that universities make to shape their student bodies are integral to their academic missions. Admissions decisions intended to increase meaningful interaction among students of different backgrounds, including different races, are judgments made on academic grounds. As discussed above, studies have shown that students who interact more frequently with members of different racial and ethnic groups gain better critical thinking skills and are more prepared to participate in a diverse society and workforce. A university may conclude that it is insufficient for cross-racial interactions to occur only in dormitories or dining halls, and that classroom interaction more effectively promotes students' intellectual and social growth. *See supra* Part II. As this Court has recognized, "[e]ducation is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view." *Wieman*, 344 U.S. at 197 (Frankfurter, J., concurring); *see also Keyishian*, 385 U.S. at 603 ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues . . . .") (internal quotation marks omitted). Because realizing the educational benefits of a diverse student body is therefore "at the heart" of UT's "proper institutional mission," its decision to implement admissions policies that promote interaction among students of different races implicates the First Amendment. *Grutter*, 539 U.S. at 329.

3. Because a University's Judgments About Its Educational Mission Are Entitled to First Amendment Protection, Its Conclusions That Race-Conscious Admissions Policies Will Further Its Academic Goals Should Be a Factor in the Strict Scrutiny Analysis

Recognizing that "First Amendment interests give universities particular latitude in defining diversity" does not require courts to relax the exacting standard of judicial scrutiny required under the Equal Protection Clause. *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring). It does, however, require that courts take those First Amendment interests into account when applying strict scrutiny. Doing so is not a departure from common constitutional analysis. To the contrary, this Court often balances multiple interests and enforces one constitutional right in light of the competing interests underlying another. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (reconciling the right to engage in political discourse with the right to vote); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (considering whether and when a criminal trial can be closed to the public to protect the defendant's right to a fair trial); *Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (considering whether a defendant's testimony to support a motion to suppress evidence on Fourth Amendment grounds can subsequently be admitted against him at trial without violating the Fifth Amendment). Moreover, as noted, this Court has expressly held that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. Universities' important First Amendment interest in academic freedom, including the right to decide who shall be admitted to study, is an essential part of the context in this case. The Court should not ignore it.

Just as the *Grutter* Court deferred to "[t]he Law School's educational judgment that [student body] diversity is essential to its educational mission," *Grutter*, 539 U.S. at 328, this Court should give the University of Texas freedom, within bounds, to craft admissions policies that will promote cross-racial interaction among students. Strict scrutiny is "no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Id.* Rather, taking the university's judgment into consideration properly acknowledges that it has "invoke[d] a countervailing constitutional interest, that of the First Amendment." *Bakke*, 438 U.S. at 313 (Powell, J., concurring). Flexible, race-conscious admissions policies are therefore not only "in keeping with [the Court's] tradition of giving a degree of deference to a university's academic decisions," *Grutter*, 539 U.S. at 328, but also entirely consistent with the Equal Protection Clause and the application of strict scrutiny.

CONCLUSION

For the foregoing reasons, the Fifth Circuit's decision should be affirmed.

Respectfully submitted,

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August 13, 2012

APPENDIX

APPENDIX
LIST OF ADDITIONAL AMICI CURIAE

Appleseed

Appleseed, the national office of a network of 17 public-interest justice centers, works to open doors to opportunity and justice for all through research and advocacy. Much of Appleseed's work relates to promoting educational opportunities for diverse populations and supporting institutional structures that promote meaningful interaction among diverse populations.

Chicago Lawyers' Committee for Civil Rights Under Law, Inc.

The Chicago Lawyers' Committee, established in 1969, is the public-interest law consortium of Chicago's leading law firms. The Committee's mission is to promote and protect civil rights, particularly of poor, minority, and disadvantaged people in our nation's social, economic, and political systems. The preservation of diversity programs is a crucial interest of the Chicago Lawyers' Committee.

Children's Defense Fund (CDF)

The Children's Defense Fund (CDF), a national organization, has worked for nearly 40 years to ensure a level playing field for all children, with particular attention to poor and minority children and those with disabilities. The issues of this case relate to CDF's efforts in character and leadership development, intergenerational mentoring, and interracial and interfaith dialog about children's issues.

Gay & Lesbian Advocates & Defenders (GLAD)

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading public-interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated and provided amicus support in a wide range of anti-discrimination matters, including in this Court.

Grand Boule of Sigma Pi Phi Fraternity (the "Boule")

The Grand Boule of Sigma Pi Phi Fraternity (the "Boule"), founded in 1904 and encompassing 129 local chapters in the United States and internationally, is a non-profit organization of college- and university-educated professional men dedicated to the uplift of communities of the African Diaspora through social-action programs concentrated in education. The Boule supports preserving equal educational opportunity in order to ensure full participation in society.

Japanese American Citizens League

Japanese American Citizens League is a national membership organization working to combat discrimination and promote inclusion. The issues of this case are directly related to Japanese American Citizens League's work in these areas.

Lambda Legal

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV, many of whom are members of racial and ethnic minorities, through impact litigation, education, and public policy work. Lambda Legal has participated in this Court and lower courts in many cases addressing constitutional principles that apply in public higher education.

National Coalition on Black Civic Participation

The National Coalition on Black Civic Participation is a 501(c)(3), non-profit, non-partisan organization dedicated to increasing civic engagement and voter participation in Black and underserved communities. The National Coalition strives to create an enlightened community by engaging people in all aspects of public life through service/volunteerism, advocacy, leadership development, and voting. The issues in this case directly relate to the National Coalition's work in promoting equity in higher education and economic security and sustainability.

National Council of Negro Women, Inc.

Founded in 1935, the National Council of Negro Women, Inc. (NCNW), a 501(c)3 organization, includes 39 national African American women's organizations and over 240 community based sections, with an outreach to nearly four million women. For over 75 years, at the heart of our national focus have been the issues of education and economic empowerment. As such, the maintenance of diversity is of high value to NCNW as the policy represents a continuing necessary step towards reaching the goal of access to opportunity for all.

National Immigration Law Center (NILC)

National Immigration Law Center (NILC) is a national legal advocacy organization based in Los

Angeles whose mission is to defend and promote the rights and opportunities of low-income immigrants and their family members, which includes working to combat discrimination and promote their inclusion in institutions of higher education. NILC has a direct interest in the outcome of this case.

National Urban League

The National Urban League, founded in 1910, is an historic national civil rights organization dedicated to economic empowerment, combating discrimination, and promoting inclusion in order to elevate the standard of living in significantly underserved urban communities. The organization and its 98 local affiliates work through program development, public policy, research, and advocacy, and provide direct services—including education, employment training and placement, health services, and housing—that improve the lives of over 2.6 million people. The issues of this case relate directly to the National Urban League's work in education, employment and economic empowerment.

Public Advocates Inc.

Public Advocates Inc., a non-profit and one of the nation's oldest public-interest law firms, uses litigation and other strategies to challenge the persistent causes and effects of poverty, segregation, and discrimination. Advocacy to advance equal educational opportunities for low-income students, students of color, and English Learners has been a focus of Public Advocates' work. This case will have long-standing impacts on the educational rights and opportunities enjoyed by children in the communities Public Advocates represents.

The Rainbow PUSH Coalition

The Rainbow PUSH Coalition, a national membership organization with more than 300,000 members and supporters, has worked for 41 years to combat discrimination and promote inclusion, particularly on behalf of African-Americans, other minorities, and women. The issues of this case relate directly to Rainbow PUSH's advocacy of equal educational opportunity.

Southern Poverty Law Center

The Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization based in Montgomery, Alabama, dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of society, including women and persons of color. Founded in 1971, SPLC represents students of color to ensure equal opportunities in secondary and post-secondary educational institutions.

Washington Lawyers' Committee for Civil Rights and Urban Affairs

The Washington Lawyers' Committee is a nonprofit civil rights organization that works to eradicate discrimination through civil rights litigation. In the Committee's 40-year plus history, it has successfully represented tens of thousands of individuals in cases alleging discrimination on the basis of race, national origin, gender, disability, and/or other protected classes, and has thereby amassed expertise regarding the legal questions in this case.

YWCA USA

The YWCA USA is a national organization dedicated to eliminating racism, empowering women and promoting peace, justice, freedom and dignity for all. In over 1300 locations nationwide, YWCAs offer women job training, housing, anti-violence and recovery programs, and more. Our clients are women of all ages and backgrounds, including the elderly, survivors of domestic and sexual violence, military veterans, and low-income and homeless women and their families. The YWCA is committed to promoting equal opportunity in housing, employment, and education and seeks to uphold laws to protect people from discrimination on the basis of race and gender. The issues in this case are directly related to the YWCA's mission.

AMICUS
CURIAE
BRIEF

No. 11-345

In The
Supreme Court of the United States

◆

ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

◆

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF FOR LEADING PUBLIC RESEARCH UNIVERSITIES THE UNIVERSITY OF DELAWARE, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, INDIANA UNIVERSITY, THE UNIVERSITY OF KANSAS, THE UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, THE UNIVERSITY OF NEBRASKA-LINCOLN, THE OHIO STATE UNIVERSITY, THE PENNSYLVANIA STATE UNIVERSITY, AND PURDUE UNIVERSITY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Amici, leading public research universities, submit this brief as amici curiae in support of respondent.[1]

INTEREST OF AMICI CURIAE

Like respondent, amici are all large, leading public research universities. To the extent allowed by their respective States' laws, amici strive to educate a diverse population of students in an environment that is itself diverse.[2] As such, amici have a keen interest in this Court's resolution of this case.

---

[1] Letters from the parties providing blanket consent to the filing of amicus curiae briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The University of Delaware is a research-intensive, technologically advanced institution with a tradition of excellence extending back to its founding in 1743. It offers 137 bachelor's programs, 117 master's programs, 50 doctoral programs, and 12 dual graduate programs through its 7 colleges and in collaboration with more than 60 research centers. At present, the University's student body includes nearly 17,000 undergraduates, 3,700 graduate students, and 850 students in professional and continuing studies programs.

The University of Illinois is a world leader in research and discovery and Illinois's most comprehensive public university. Founded in 1867, its three campuses—in Urbana-Champaign, Chicago, and Springfield—enroll more than 77,000 students in hundreds of undergraduate, graduate, and professional programs, making the University the largest educator in Illinois. As part of its commitment to serving Illinois, the University runs more than 700 public service and outreach programs.

---

[2] Since this Court's decision in *Grutter*, some States, including Michigan, have taken actions whose effect is to prevent their public universities from using admissions programs like that approved in *Grutter*, where race plays a limited role in admissions. Institutions in those States must comply with state law.

Indiana University is a major multi-campus public research institution, grounded in the liberal arts and sciences, and a world leader in professional, medical, and technological education. Founded in 1820, it enrolls more than 100,000 students across 8 campuses and boasts more than 555,000 living alumni, nearly 272,000 of whom are Indiana residents.

The mission of the University of Kansas is to lift students and society by educating leaders, building healthy communities, and making discoveries that change the world. Established in 1865, it is Kansas's flagship university and a member of the prestigious Association of American Universities, an organization of 61 leading research universities in the United States and Canada. The University of Kansas's five campuses are home to more than 28,000 students studying in more than 345 degree programs.

Established in 1817, the University of Michigan is a world-class research institution known for its diversity of people, heritage, academic disciplines, and scholarly pursuits. The University enrolls more than 58,000 students across 3 campuses and 28 schools and colleges. In the 2010-2011 academic year alone, Michigan awarded close to 15,000 undergraduate, graduate, and professional degrees. The University also boasts one of the largest alumni bodies in the country with more than 517,000 living alumni, many of whom continue to live in the State of Michigan.

Founded in 1855, Michigan State University is the Nation's pioneer land-grant university and one of the top research universities in the world. With one of the largest, greenest campuses in the Nation, Michigan State University is home to nationally ranked and recognized academic, residential college, and service-learning programs. Its student body includes close to 48,000 individuals from all 83 counties in Michigan, all 50 States in the United States, and 130 other countries enrolled in 200 undergraduate, graduate, and professional programs of study.

The University of Nebraska-Lincoln was chartered in 1869 as a land-grant university and today is an educational institution of international stature. It is one of the nation's preeminent teaching and research institutions with a wide array of sponsored projects aimed at broadening knowledge in the sciences and humanities. Through its three primary missions of teaching, research, and service, the University of Nebraska-Lincoln is Nebraska's primary intellectual center and economic development engine, providing leadership throughout Nebraska and the world through quality education and the generation of new knowledge.

The Ohio State University, founded in 1870, is one of the Nation's top public universities and research centers. At The Ohio State University's main Columbus campus, 55,000 students select from 14 colleges, 175 undergraduate majors, and 240 master's, doctoral, and professional degree programs. The Ohio State University has awarded 622,368 degrees and its legacy extends to more than 465,000 living alumni.

The Pennsylvania State University, founded in 1855 as an agricultural college, is now a top-tier public research university that educates students from Pennsylvania, the Nation, and the world. The University improves the well being and health of individuals and communities through integrated programs of teaching, research, and service. As Pennsylvania's land-grant university, it also provides unparalleled access and public service to support the citizens of the Commonwealth, and engages in collaborative activities with industrial, educational, and agricultural partners here and abroad to generate, disseminate, integrate, and apply knowledge that is valuable to society.

Founded in 1869, Purdue University is a major research institution known for discoveries in science, technology, engineering, and math, among other areas. Purdue enrolls more than 70,000 students in 10 colleges and schools located across 5 campuses. It is particularly well known for its aviation program, which includes studies in advanced spaceflight, and has produced 22 astronauts, including Neil Armstrong, the first man to set foot on the moon, and Eugene Cernan, the last man to leave it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Public universities form the core of the American post-secondary educational system. These institutions educate millions of the best and the brightest from all walks of life. These universities develop future leaders who serve our Nation and their respective States' diverse communities. Amici thus have developed programs designed to foster leadership skills in their students, with the understanding that many of these students, once they graduate, will become leaders in their communities in any number of fields.

Admitting diverse student bodies that have a strong connection to the communities amici serve remains essential to achieving amici's dual objectives of promoting academic excellence and leadership in students. Current research continues to show that student bodies diverse in a multitude of ways lead to improved learning outcomes for all students and benefit the entire educational community. For these and other reasons, amici all share a commitment to inclusiveness and public service as part of their various missions.

The Court should not set aside its precedent recognizing amici's constitutionally based rights to adopt admissions programs that seek to provide their students with these compelling benefits, particularly when petitioner did not even challenge *Grutter* in her question presented to this Court. Amici have relied on the Court's opinion in *Grutter* to implement narrowly tailored programs that consider (when permitted by state law), in a holistic and individualized manner, an applicant's race as one of many factors. Leading public universities have committed significant resources to carefully crafting student bodies that fit their missions based on the holistic and individualized analysis this Court has required. Public universities commonly have multiple admissions programs and staffs for colleges or programs within the university. Each of these has been adapted to comply with this Court's constitutional pronouncement in *Grutter*. Under this Court's *stare decisis* jurisprudence, such reliance weighs strongly in favor of adherence to *Grutter*'s constitutional holding. This is particularly the case where the prior holding has proved workable and there has been no fundamental change in law or fact to justify repudiation of that precedent.

Finally, the Court should tread lightly when reviewing university admissions programs. As leading public universities, amici share an interest in the academic freedom, grounded in the First Amendment, that they have as universities to choose how to implement their institutional missions. Which students a university decides to admit is a core part of that academic freedom. For over half a century, the Court has exercised significant deference when addressing a broad range of issues that affect an institution's academic freedom—from who can teach, to what can be taught, to who will be taught. The Court has recognized that depriving the Nation's universities of sufficient latitude to exercise academic judgment would imperil the future of our Nation. Universities need the freedom to select the individuals who will best further their particular educational missions.

ARGUMENT

A. This Court Should Not Depart From The Principles Enunciated In *Grutter*

Amici are large, public research universities whose missions include educating the best and the brightest from all over the Nation and the world, including the diverse communities of their respective States. For over three decades, amici have relied on the equal protection framework established by this Court in *Grutter*, and before that *Bakke*, to design and implement their admissions programs. *See University of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J.); *Grutter v. Bollinger*, 539 U.S. 306 (2003). This Court should not depart from that framework, particularly where, as here, petitioner did not ask this Court to overrule *Grutter* in her question presented. Principles of *stare decisis* dictate adherence to *Grutter*'s constitutional holding, especially in light of the reliance it has induced. That holding has proved workable, and petitioner has failed to demonstrate any significant change in legal doctrine or factual premises that might justify departure from the Court's prior explication of the Constitution.

1. *Public universities serve and educate diverse communities throughout the Nation and their respective States*

a. Public universities play a unique and vital role in the American educational system. These institutions provide post-secondary education to a large segment of the Nation's high school graduates in almost every geographic region and community. Public colleges and universities enroll approximately 60% of post-secondary education students attending four-year, degree-granting institutions in the United States. National Ctr. For Educ. Stats., U.S. Dep't of Educ., *Digest of Education Statistics: 2011*, ch. 3, tbl. 196 at 288 (2012).[3]

As leading public universities of their respective States, amici offer access to highly ranked degree and research programs to some of the best students in the Nation and their respective States. Amici educate hundreds of thousands of students each year in hundreds of different disciplines. While amici draw from a national pool of talented applicants, the mission of public universities includes serving the communities of their respective States. *See, e.g.*, University of Delaware, *Path to Prominence: A Strategic*

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[3] http://nces.ed.gov/programs/digest/d11/.

Plan for the University of Delaware.[4] This includes broadly educating the State's population and producing graduates who are not only diverse themselves, but also are equipped to be leaders in a diverse world.

Amici's effort to fulfill this mission is not aspirational; it involves concrete, practical programs that have been developed and refined over decades. Some innovative programming has been designed to promote the development of practical leadership skills and to nurture students' interest in assuming future leadership roles in their communities. The University of Delaware Legislative Fellows Program, for example, "links the research capacity of the University of Delaware with the research needs of the Delaware General Assembly." University of Delware Inst. for Pub. Admin., *Legislative Fellows Program: Introduction.*[5] "[T]he experience offers a valuable opportunity to observe and contribute to the governmental decision-making process," as "Fellows assist legislators in dealing with critical issues facing the state." University of Delaware Inst. for Pub. Admin.,

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[4] http://www.udel.edu/prominence/principles.html ("Our first and most important commitment is to be the flagship of higher education for the State of Delaware—both by ensuring that every Delawarean has access to a top-quality education, and by applying the strengths and resources of the University to benefit the greater Delaware community.").

[5] http://www.ipa.udel.edu/legfellows/.

Legislative Fellows Program: Apply for the Legislative Fellows Program.[6]

Likewise, The Ohio State University established the OSU Leadership Center. The Center's mission is to provide "research-based resources and high quality practical programs to build and strengthen leadership capacities that make a positive difference in the lives of Ohio's citizens." The Ohio State Univ. Leadership Ctr., *Welcome.*[7]

Amici have developed these and other programs with the understanding that significant numbers of their matriculated students are from the individual university's home State and will choose to remain in their State following graduation. Many of these students, once they graduate, will become leaders in their communities in any number of fields. Indeed, in recent years, in-state residents have comprised upwards of 65% of the freshman undergraduate classes enrolled at large public institutions such as the University of Nebraska-Lincoln, The Ohio State University, Michigan State University, and the University of Michigan. *See* University of Nebraska-Lincoln, *Fact Book: 2011-2012*; The Ohio State Univ., *Facts: By the Numbers*; University of Michigan, *Comparison of the University of Michigan and Michigan State*

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[6] http://www.ipa.udel.edu/legfellows/LF_recruitment.pdf.

[7] http://leadershipcenter.osu.edu/.

University.[8] Additionally, institutions including Indiana University and Penn State University have seen a majority of their graduates continue to reside within the State. *See* Penn State Alumni Ass'n, *Alumni Maps: 315,967 Alumni Living in Pennsylvania*; Indiana Univ. Inst'l Research & Reporting, *Living Alumni: Indiana University—Fall 2011*.[9]

Leading public universities find it important to foster national and local leaders who embody, and can learn from and collaborate with, the diverse communities that they will lead. Throughout the Nation, public universities provide all potential students visible pathways to leadership opportunities. Democracy dictates that those potential paths must remain open to all the Nation's citizens. As Justice Powell explained: "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 313 (Powell, J.) (quoting *Keyishian v. Board of Regents of Univ. of New York*, 385 U.S. 589, 603 (1967)); *see also* Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78

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[8] University of Nebraska-Lincoln (*see* http://irp.unl.edu/fb11_12_5.pdf); The Ohio State Univ. (*see* http://www.osu.edu/facts.php); University of Michigan (http://www.umich.edu/~crlteach/UMMSUcomparison.html).

[9] Penn State Univ. (http://alumni.psu.edu/about_us/Alumni%20Maps%202012.pdf); Indiana Univ. (http://www.iu.edu/~uirr/reports/standard/factbook/?path=/2011-12/University/Additional_Facts/Alumni/Living_Alumni).

TUL. L. REV. 1767, 1799-1800 (2004) (discussing how a "failure to educate a leadership class among disadvantaged minority populations" would not only harm those students, but could threaten equality and social stability in the communities these universities serve).

b. A diverse student body is essential to achieving amici's dual objectives of promoting academic excellence and leadership in students.

Contrary to petitioner's suggestion (Pet. Br. 19), the goal of having a diverse student body to help fulfill a public university's mission does not suggest quotas, racial balancing, or an attempt to mirror the racial and ethnic composition of a particular State or the Nation. Rather, public universities broadly consider the demographics of their States and the Nation to determine which groups and which communities might be underserved or underrepresented, without setting a target or quota. When permitted by state law, race is but one factor among many in the holistic and individualized admissions processes that many public universities employ. *See* pp. 21-23 *infra*.

Indeed, institutional consideration of such policies of inclusion is not a recent educational innovation. It traces its origins to the time of the Founding, when George Washington bequeathed funds for the establishment of a national university so that "the youth * * * from all parts" could free themselves from "local prejudices and habitual jealousies" through association. George Washington, *The Will of George Washington* (July 9, 1799).[10]

Amici continue to embrace this inclusive vision of diversity. Amici have long asserted: "enroll[ing] a student body that is diverse in a rich variety of ways" "creates the best learning environment for all our students, majority and minority alike."[11] The University of Kansas, for example recognizes that diversity "enhances our productivity, spurs new ideas, and helps us perform on a higher level." The Office of Diversity & Equity, Univ. of Kansas, *Provost Statement on Diversity*.[12] "Diversity provides our students valuable experiences that will help them prosper after graduation in an increasingly global and multicultural world." *Ibid*. Likewise, The Ohio State University emphasizes that diversity is "philosophically essential to the nature and well being of any university; and that as a practical matter, diversity is an essential condition for excellence in higher education." The Ohio State Univ., *Renewing the Covenant: Diversity Objectives and Strategies for 2007 to 2012*.[13] The University of Delaware similarly views "diversity as a core value and guiding principle" and consequently "work[s] to make diversity an integral part of everyday life on campus." University of Delaware, *President's Diversity Initiative: UD's Commitment to Diversity and Excellence.*[14]

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[10] *Transcribed in* THE PAPERS OF GEORGE WASHINGTON (Alderman Lib., Univ. of Va.), http://gwpapers.virginia.edu/documents/will/text.html.

[11] Tomislav Ladika, *CIR to file brief with Supreme Court today*, MICH. DAILY, Jan. 16, 2003, *available at* http://www.michigandaily.com/content/cir-file-brief-supreme-court-today.

[12] http://www.diversity.ku.edu/provost.shtml.

[13] http://www.osu.edu/diversityplan/index.php.

Nor is the educational benefit achieved from these goals theoretical; it is supported by substantial empirical research. For example, a recent study confirms that "being in an *environment* where students are more engaged with diversity had significant positive educational effects," including improving "student[s'] general academic skills." Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 AM. EDUC. RES. J. 322, 343 (2009) (emphasis in original). These positive effects extend to "all students," minority and non-minority alike. *Id.* at 344.

Further quantitative research continues to confirm that "[c]ollege diversity experiences are associated with gains in cognitive skills, cognitive tendencies, and multiple/other cognitive outcomes" for all students. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RES. 4, 21 (2010). These gains include positive effects on "basic cognitive skills, such as critical thinking and problem solving." *Id.* at 22. Indeed, this Court has recognized that a diverse student body "enables students to better understand persons of different races" and that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Grutter*, 539 U.S. at 330 (brackets and internal quotations omitted); *see also ibid.* ("[N]umerous studies show that student body diversity promotes better learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.") (internal quotations omitted).

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[14] http://www.udel.edu/diversity/commitment.html.

2. *Public universities have reasonably relied on* Grutter *to tailor their admissions programs*

For almost three decades, amici have relied extensively on Justice Powell's opinion in *Bakke* and on *Grutter*, which reaffirmed and strengthened Justice Powell's reasoning, to shape and to refine their admissions policies and procedures.

Before *Grutter*, as the Court recognized, "[p]ublic and private universities across the Nation * * * modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." *Grutter*, 539 U.S. at 323. Amici and numerous other public universities understandably recognized *Grutter* as a definitive pronouncement. University of Michigan President Mary Sue Coleman conveyed a sense shared by amici that public universities, where authorized by state law, continue to have a "green light to pursue diversity," and that "[t]he court has given us a road map * * * [consisting of] more individualized attention." News Release, University of Michigan, U.S. Supreme Court rules on University of Michigan cases (June 23, 2003);[15] David Zeman & Maryanne George, *U-M Hails Top Court's Support Of Race Factor*, DETROIT FREE PRESS, June 24, 2003, at 1A.

In the near-decade that has followed this Court's ruling in *Grutter*, universities have viewed the decision as an express validation of the diversity values espoused in *Bakke* and as a useful guidepost for charting their future course. Nothing has changed since *Grutter* was decided to justify a sudden and abrupt departure from that precedent. Where state law allows, amici and other public universities have complied with *Grutter*'s "highly individualized, holistic" guidelines, with this Court's assurance that these measures were consistent with the federal Constitution. These universities have spent millions of dollars to increase staff, to develop new programs, and to adjust policies and procedures to meet *Grutter*.

To be sure, any revision to admissions policies comes with a cost, but this Court in *Grutter* recognized the importance of what universities long have known: the educational benefits of diversity constitute a compelling interest. Furtherance of this interest, based on this Court's ruling, will have been wasted if the Court were now to adopt a new constitutional framework, particularly given that there is no compelling justification, in law or fact, for the Court to reverse its holding. Compliance with any new equal protection proclamation would be complicated by the fact that public universities commonly have multiple admissions programs and staffs for colleges or programs within the university.

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[15] http://www.ns.umich.edu/new/releases/20237-us-supreme-court-rules-on-university-of-michigan-cases.

3. *Altering* **Grutter's** *constitutional holding would violate fundamental principles of* **stare decisis**

Universities did not establish these admissions policies based on legislative enactments that might be subject to repeal or to revision depending on prevailing political priorities. Rather, they did so based on this Court's precedent, which interpreted longstanding constitutional principles of equal protection. In such circumstances, *stare decisis* weighs strongly in favor of adherence to the Court's holding in *Grutter*, as well as to Justice Powell's separate opinion in *Bakke*.

The Court consistently has recognized that "*stare decisis* is of fundamental importance to the rule of law." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987); *see also Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (O'Connor, Kennedy & Souter, JJ.) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

Adherence to past precedent "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Thus, while "*stare decisis* is not an inexorable command," *ibid.* (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)), "departure from it is exceptional, requiring 'special justification,'" *Randall v. Sorrell*, 548 U.S. 230, 234 (2006) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). There is no such justification in this case.

Of especial relevance here, "individual or societal reliance on [past precedent] cautions with particular strength against reversing course." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citing *Casey*, 505 U.S. at 855-856). Any departure from *Grutter* "would dislodge settled rights and expectations." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Here, when permitted to do so by state law, amici reasonably relied on *Grutter*—and on *Bakke* before it, *see Grutter*, 539 U.S. at 323—to fashion their admissions programs in a manner consistent with the Court's constitutional interpretation. A change now would "add inequity to the cost of repudiation." *Casey*, 505 U.S. at 854; *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1319 (2012); *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *Payne*, 501 U.S. at 828.

Other *stare decisis* factors historically considered by the Court further weigh against any precipitous departure from *Grutter.* As amici's highly individualized admissions programs demonstrate, *Grutter's* principles have proven practical and workable. *See, e.g., Casey,* 505 U.S. at 854 (considering "whether the rule has proven to be intolerable simply in defying practical workability") (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

Nor has any intervening incremental change in law or fact undermined *Grutter* in such a way as to justify departure from that precedent. *See Casey*, 505 U.S. at 855, 857-861. This Court has explained that departing from prior precedent is unwarranted when "[n]o evolution of legal principle" leaves a prior decision's "doctrinal footings weaker than they were" at the time of the decision. *Id.* at 857. For a change in factual circumstances to weigh in favor of abandoning a decision, the facts must "have so far changed * * * as to render [the earlier decision's] central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed." *Id.* at 855.

Neither justification exists here. Petitioner can identify no meaningful evolution of law or fact on a societal scale that has developed since *Grutter.* Indeed, amici's extensive experience educating students demonstrates that the need for a diverse student body exists as much today as it did when the Court decided *Grutter. See* pp. 13-16 *supra*; Denson & Chang, *supra*, at 343-344; Bowman, *supra*, at 21-22. To the extent permitted by state law, narrowly tailored admissions programs that consider race as one of many factors continue to be an essential tool in crafting a diverse student body.

B. Universities Faithfully Apply The Narrow Tailoring Required By *Grutter*

Leading public universities consider a number of factors when creating diverse scholarly communities to meet the current and future needs of their very diverse States and of our increasingly diverse Nation. Such holistic and individualized admissions determinations permit a university to consider all aspects of a candidate, while preserving the university's academic freedom to assemble a student body that helps the university achieve its mission, and thus reflects the character and nature of the learning environment the university has shaped. Such a result is permissible under *Grutter*, and it preserves each university's long-standing freedom to decide who will teach, what will be taught, how it will be taught, and who will be admitted to study.

1. *Race is only one of many factors considered by public universities*

Since *Grutter*, and to the extent permitted by relevant state law, amici consider an applicant's race as just one consideration in a holistic and individualized evaluation of an applicant's capacity to contribute to diversity and to the academic excellence of the student body as a whole.

For example, The Ohio State University's diversity plan expressly recognizes that "racial and ethnic diversity should be one factor among the many considered in admissions * * * in order to provide a quality education for all students." The Ohio State Univ., *Renewing the Covenant: Diversity Objectives and Strategies for 2007 to 2012.*[16]

Amici seek to create a diverse campus not only along racial and ethnic lines, but across many attributes. This means that the search for a diverse student body broadly benefits the entire applicant pool, even those who are not underrepresented minorities. Indeed, because diversity encompasses more than race, the holistic and individualized component of the University of Texas's admissions process has admitted Caucasian students with lower Academic Index and Personal Achievement Index scores than some underrepresented minority applicants who were denied admission. Resp. Br. 15-16. Although amici use admissions procedures that differ from those of the University of Texas, amici likewise have admitted Caucasian applicants based on diverse characteristics and achievements possessed by those applicants.

The highly individualized admissions process thus looks at numerous factors in addition to academic achievement. For example, Penn State University's Framework to Foster Diversity 2010-2015 recognizes and fosters multiple dimensions of diversity, including not only race, but also "gender * * * LGBT people; those with disabilities; veterans; low-income, first-generation students; adult learners; and those with dependent-care responsibilities." Penn State Office of the Vice Provost for Educ. Equity, *A Framework to Foster Diversity at Penn State: 2010-15.*[17] Similarly, The Ohio State's Freshman Admissions page expresses a preference for attracting not only students who provide racial diversity, but also those who provide "cultural, economic, * * * or geographic diversity" as well as those who "are a first-generation college student," those who have "demonstrated outstanding talent in a particular area," and those whose "high school performance was adversely affected by physical, mental, or learning environment factors." The Ohio State Univ. Office of Admissions, *Undergraduate Admissions: Freshman admission.*[18]

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[16] http://www.osu.edu/diversityplan/index.php.

2. *When a university employs an individualized admissions policy, core First Amendment issues of academic freedom are implicated which must be reflected in the application of strict scrutiny*

A university's judgment about which students will best further the university's mission is entitled to deference by the courts. This is not simply because universities have greater institutional expertise in making such decisions—although universities do have long and deep experience in matching students with their educational missions. Rather, this deference derives from the constitutional principle of academic freedom. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312 (Powell, J.). This freedom includes a university's exercise of its own judgment as to whom to admit into its student body. *Ibid.*

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[17] http://equity.psu.edu/framework/.

[18] http://undergrad.osu.edu/admissions/freshman/.

a. Over half a century ago, this Court held that the "essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In the face of McCarthy era interference into academic freedom, a plurality of the Court explained that to "impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Ibid.* Concurring in the result, Justice Frankfurter recognized "four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263 (Frankfurter, J., concurring in the judgment) (internal quotations omitted).

In the decades that have followed, the Court has recognized that the academic freedom of universities is a "transcendent value" to which "our nation is deeply committed." *Keyishian*, 385 U.S. at 603. Academic freedom "thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also * * * on autonomous decisionmaking by the academy itself." *University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (internal citations and quotations omitted). This Court has reiterated what Justice Frankfurter recognized—that the "[d]iscretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms' of a university." *Ibid.* (internal citations and quotations omitted); *Bakke*, 438 U.S. at 312 (Powell, J.) (same); *see also* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION § 2.2.5 (4th ed. 2006) (discussing "judicial (academic) deference"); Robert M. O'Neil, *Academic Freedom and the Constitution*, 11 J.C. & U.L. 275, 283-287 (1984) (discussing doctrinal evolution of academic deference).

b. To achieve their academic missions, universities exercise considerable academic judgment—consistent with the holistic and individualized requirements that *Grutter* requires—to select student bodies that will further their goals. As Justice Powell explained, the "right to select those students who will contribute the most to the 'robust exchange of ideas,'" is necessary to "achieve a goal that is of paramount importance in the fulfillment of [the university's] mission." *Bakke*, 438 U.S. at 313.

While all amici seek to educate and create future leaders (*see* pp. 9-13 *supra*), the individual missions of each public university differ and reflect the institution's (and its State's) traditions, cultures, and values. This fact is self-evident to anyone who visits the campuses, attends lectures, and interacts with the students, faculty, and alumni of the numerous public research universities throughout the Nation. Indeed, even particular colleges or programs within a large public research university can have specific missions. Universities need the ability to select the individuals that will best fit their particular missions and goals. This is true not only at the university-wide level, but also within each of the separate colleges and schools that comprise large public universities such as amici.

Within the strictures of *Grutter*, amici should be permitted to exercise their well-established constitutional rights under the First Amendment by choosing the students they will educate. Such individualized decisions are not readily susceptible to judicial oversight and intervention. As the Court has recognized, there are a number of "complex educational judgments" that "lie[ ] primarily within the expertise of the university" to which the Court will defer "within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328; *see also Christian Legal Soc'y Chapter of Univ. of California v. Martinez*, 130 S. Ct. 2971, 2988-2989 (2010) (recognizing the "on-the-ground expertise and experience of school administrators" in higher education). Courts thus should be "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Ewing*, 474 U.S. at 226. The "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection."

Keyishian, 385 U.S. at 603 (internal quotations and brackets omitted).

c. Nor is this result inconsistent with the Court's equal protection jurisprudence outside the context of university admissions. The First Amendment issues at stake here differentiate equal protection cases involving core areas of academic freedom—such as whom to teach—from equal protection cases in other contexts. As this Court explained in *Grutter*, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause," as "the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in th[e] particular context" must be taken into account. *Grutter*, 539 U.S. at 327.

To be sure, deference to universities cannot be absolute, and should not insulate universities from judicial scrutiny. As the Court's ruling in *Gratz* demonstrates, when race is considered in admissions, academic freedom can be limited where the university fails to exercise sufficient educational judgment in its admissions policies. *Gratz v. Bollinger*, 539 U.S. 244, 270-271 (2003). In *Gratz*, rather than conduct a holistic and individualized admissions process, the undergraduate admissions policy at issue automatically gave twenty points to every "underrepresented minority applicant," rather than examining each candidate as a whole. *Ibid.*

But that is not the case here. Where a university faithfully has applied *Grutter*'s endorsement of a holistic and individualized consideration of race as one of many factors, the decisions as to which students to admit to further the university's mission fit squarely within the category of academic determinations over which educational institutions historically have held plenary authority.

3. **Grutter** ***does not require universities to forgo consideration of a candidate's race in selecting their student bodies***

Other non-individualized admissions regimes, such as percentage plans, notably are not mandated by *Grutter*. To the contrary, *Grutter* rejected such a mandate because those alternatives can require "a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." *Grutter*, 539 U.S. at 340. "Narrow tailoring does not require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.* at 339.

Requiring non-individualized policies would impose a top-down solution that would run counter to the historical deference to educational institutions to craft admissions programs responsive to their unique needs and the needs of the communities they serve. Such admissions plans operate as broad, blunt instruments that fail to account for differences in the admissions standards and universities' applicant pools. Indeed, as this Court has recognized, such plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340. Moreover, there is little evidence that these non-individualized policies are effective in promoting diversity without grossly distorting academic admissions standards. *See, e.g.*, CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES 59-60 (THE CIVIL RIGHTS PROJECT, HARVARD UNIV. 2003).

Diversity is but one aspect of the admissions process; racial diversity is but one aspect of diversity. To the extent permitted by the laws of their States, amici recognize this in their detailed and carefully calibrated plans, which were adopted in reliance on the constitutional rulings in *Grutter* and *Bakke*, to select a student body.

CONCLUSION

For the foregoing reasons and those in the brief for respondent, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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AND
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In The
Supreme Court of the United States

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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

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BRIEF *AMICUS CURIAE* OF THE LOUIS D. BRANDEIS CENTER FOR HUMAN RIGHTS UNDER LAW, THE 80-20 NATIONAL ASIAN-AMERICAN EDUCATIONAL FOUNDATION, ET AL., IN SUPPORT OF PETITIONER

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Global Organization of People of Indian Origin

QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment permits the University of Texas at Austin's use of race in undergraduate admissions decisions.

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INTERESTS OF *AMICI CURIAE*[1]

The Louis D. Brandeis Center for Human Rights Under Law ("LDB") is a nonprofit organization dedicated to advancing the civil and human rights of the Jewish people, and promoting justice for all. LDB is committed to advancing the concept that the law must treat all people equally, without regard to religion, race, or other immutable personal characteristics having no bearing on individual merit. In particular, LDB is focused on combating the resurgent problem of anti-Semitism in higher education. LDB is concerned that aspects of the diversity rationale raised in this case were historically developed as a means of restricting the enrollment of Jewish students in highly selective colleges and universities, and have the continuing effect of limiting the enrollment of other minority students, such as Asian Americans.

The 80-20 National Asian American Education Foundation ("80-20") is a national nonprofit, nonpartisan organization sharing a commitment of equal opportunity and civil rights for Asian Americans and all people. 80-20 speaks for the Asian American community with authority by virtue of its open and neutral national surveys of the community. 80-20's historically unprecedented survey of approximately 47,000 Asian Americans revealed overwhelming support (by a more than 52:1 ratio) within the community for race-neutral, merit-based college admission policies. More information about 80-20's survey is available at http://www.80-20educationalfoundation.org/projects/colleges.asp.

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The National Federation of Indian American Associations, the Indian American Forum for Political Education and the Global Organization of People of Indian Origin, together represent hundreds of Indian American organizations promoting the security of civil rights, political empowerment, and cultural interaction.

Amici are concerned that many colleges employ racial preferences in their admission processes, demanding higher standards for some applicants on the basis of race. Abusing the discretion extended in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), the University of Texas has established a system in which disfavored minority groups, such as Asian Americans, face more stringent admissions standards than either whites or African Americans. In devaluing the hard work of deserving students on account of race, these policies foment racial strife, undermine our society's basic meritocratic values, and deprive all Americans of the benefits that might be expected from channeling educational resources at those students exhibiting the greatest merit.

Sanctioning pretexts used to perpetuate invidious discrimination also breeds cynicism about our legal system's commitment to equal justice. Students who know that they and their friends have been treated unequally on account of race are neither fooled nor placated by attempts to rationalize a plain injustice. Race conscious admission standards are unfair to individuals, and unhealthy for society at large. The decision below should be reversed.

◆

SUMMARY OF ARGUMENT

Admission to the Nation's top universities and colleges is a zero-sum proposition. As aspiring applicants capable of graduating from these institutions outnumber available seats, the utilization of race as a "plus factor" for some inexorably applies race as a "minus factor" against those on the other side of the equation. Particularly hard-hit are Asian American students, who demonstrate academic excellence at disproportionately high rates but often find the value of their work discounted on account of either their race, or nebulous criteria alluding to it.

"Asian Americans are the new Jews, inheriting the mantle of the most disenfranchised group in college admissions. The nonacademic admission criteria established to exclude Jews, from alumni child status to leadership qualities, are now used to deny Asians." Daniel Golden, THE PRICE OF ADMISSION 199-200 (2007) ("Golden"). According to one former

Princeton provost, "Historically, at the Ivies, the situation of the Asian minorities parallels very closely the situation of the Jewish minorities a half a century earlier." *Id.* at 200.

Supporters of race-conscious admissions policies may bristle at any comparisons between supposedly-beneficent, modern efforts to promote "diversity," and the historic forms of discrimination and exclusion directed against disfavored minorities, particularly Jews. But history reveals no distinction between the modern rationales for discriminatory practices and those invoked to justify quotas in an earlier era. Then, as now, fuzzy notions of "character," "sociability," "leadership," and athletic prowess were utilized to consciously restrict an ethnic group believed to be deficient in these qualities, lest its members overwhelm schools by virtue of their superior academic performance.

The applicant pool's demographic makeup has shifted markedly since the introduction of Jewish quotas nearly a century ago. The mechanics of discrimination, and the various excuses for it, remain essentially unchanged. If the Jewish quotas of old would be unacceptable to this Court, then neither should this Court accept today's discriminatory systems based on "diversity" and "holistic" or "comprehensive" review.

Granting Respondents discretion to pursue race-conscious policies would effect an abdication of this Court's duty to enforce constitutional limits on governmental action. In the end, this Court's task is not to impose its vision of an ideal college admissions system. Nor should it matter whether this Court's precedent would allow Respondents the latitude to pursue racially discriminatory policies. Rather, the Court is tasked with evaluating whether Respondents' practices are compatible with the constitutional command that no person be denied the equal protection of the law. Few would argue that the Jewish quotas of the 1920s comport with the equal protection values ratified by the Fourteenth Amendment. Regardless of how they are packaged or who they impact today, these practices cannot be allowed to continue in any public institution.

◆

ARGUMENT

I. Race Frequently Plays A Decisive Factor in College Admissions, Most Greatly Disadvantaging Fully Qualified Asian American Students.

A. Race Is Heavily Correlated to Prospects for School Admission.

There is little question that a college applicant's race strongly impacts the odds of admission at many of the Nation's leading educational institutions. According to one widely-cited, comprehensive study, Asian American students' SAT scores must exceed their white colleagues' results by 140 points to gain an equivalent chance of admission at private institutions. The corresponding black and Hispanic SAT advantages relative to whites are 310 and 130 points, respectively. Thomas Espenshade, Alexandria Radford, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 92 Table 3.5 (2009) ("Espenshade"). For public institutions, the Asian American disadvantage relative to whites is 3.4 ACT points (out of 36), while the corresponding black and Hispanic advantages are 3.8 and 0.3 points, respectively. *Id.* "[F]or the same SAT scores, the chances of being admitted are usually highest for black and Hispanic candidates and lowest for Asian applicants. For example, in the highest SAT range (1400-1600), 77 percent of black students are admitted, followed by 48 percent of Hispanics, 40 percent of whites, and 30 percent of Asian candidates." *Id.* at 81.

Among enrolled students admitted to UT Austin outside the Top Ten Percent program in 2009, the mean SAT scores (out of 2400) were 1991 for Asians, 1914 for whites, 1794 for Hispanics, and 1524 for blacks, while mean grade point averages for these demographic groups were 3.07, 3.04, 2.83, and 2.57 respectively. *Implementation and Results of the Texas Automatic Admissions Law (HB588) at the University of Texas at Austin* (December 23, 2010), at 14, Table 7-SAT, available at http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf (last visited May 23, 2012).

Another study revealed that Asians admitted to the University of Michigan in 2005 scored a median 1400 out of 1600 on the SAT – 50, 140, and 240 points higher than the median scores for white, Hispanic, and black applicants, respectively. Althea K. Nagai, *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Michigan*, CENTER FOR EQUAL OPPORTUNITY (October 17, 2006), at 1, available at http://www.ceousa.org/attachments/article/548/UM_UGRAD_final.pdf (last visited May 21, 2012). While Michigan that year admitted 92 percent of black and 88 percent of Hispanic applicants bearing a 3.2 grade point average and 1240 SAT, only 10 percent of Asian and 14 percent of white applicants with such numbers were admitted. *Id.* at 21.

Unsurprisingly, Asian American enrollment rises dramatically when race-conscious admission standards are eliminated. When Californians ratified Calif. Const. art. I, § 31 ("Proposition 209"), barring *all* invidious racial discrimination in college admissions, Berkeley saw Asian freshman enrollment rise from 37.3 percent in 1995, to 43.57 percent in 2000, to 46.59 percent by 2005. David R. Colburn, Charles E. Young, and Victor M. Yellen, *Admissions and Public Higher Education in California, Texas and Florida: The Post-Affirmative Action Era*, 4(1) INTERACTIONS: UCLA JOURNAL OF EDUCATION AND INFORMATION STUDIES (2008), available at http://escholarship.org/uc/item/35n755gf (last visited May 20, 2012). "For UCSD, the number of Asian-American students continues to increase as both a number and percent of the student body, from 1,070 or 35.93 percent in 1995 to 1,133 or 36.33 percent in 2000 and to 1,684 or 46.88 percent in 2005." *Id.* Smaller improvements were also seen in Texas and Florida, which had eliminated "affirmative action" programs, but replaced them with geographic plans designed to have a disparate impact along racial lines. *Id.* at 18.

"Prompted by many complaints from parents whose high-scoring children were rejected by Berkeley," then-Chairman of the University of California's Board of Regents, John Moores, investigated whether his school system discriminated on the basis of race notwithstanding Proposition 209. Moores reported

> learn[ing] that 359 students with combined SAT scores of 1,000 or less were admitted to Berkeley in 2002, accounting for 3% of the 10,905 students admitted that year. (The national SAT average is about 1,000.) Of those 359 students, 231 were from underrepresented minorities – meaning blacks, Hispanics and Native Americans. Only 19 of the low scorers were white. Some 1,421 Californians with SAT scores above 1,400 applying to the same departments at Berkeley were not admitted. Of those, 662 were Asian-American, while 62 were from the underrepresented minorities.

John Moores, *College Capers* (March 29, 2004), FORBES, available at http://www.forbes.com/forbes/2004/0329/040.html (last visited May 19, 2012).[2]

Racial disparity in college admission is reflected not only by grades and SAT scores. "Asians comprise about 30 percent of winners and finalists for the most prestigious accolades given to high school seniors, about double their Ivy League enrollment. For example, of 8,091 students designated as AP National Scholars in 2006 . . . 2,602, or 32 percent, were Asian American." Golden at 305.

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[2] The terms "underrepresented" and "overrepresented," used throughout the debate, are loaded. These assume that individuals matriculate to "represent" racial or ethnic groups, rather than to learn based upon personal qualification for admission. The terms also assume that there exist correct numbers of students in each racial group.

As Princeton researcher Thomas Espenshade summed, "We're finding that there's consistently this Asian penalty." Golden at 305. "He added that the Asian penalty persists even after preferences for alumni children and recruited athletes are taken into account – contrary to the claims of Harvard and other elite colleges that [such edges] explain the disparity in credentials between successful white and Asian candidates." *Id.*

B. Asian American College Applicants Are Subjected to Restrictive Quotas, Implemented By Vague, Pretextual Standards.

Perhaps uncomfortable with the plain meaning of the data, Espenshade and Radford denied that their research necessarily proves "that elite college admission officers are necessarily giving extra weight to black and Hispanic candidates just because they belong to underrepresented minority groups." Espenshade at 94. While "this may occur from time to time . . . it is more likely . . . that the labels 'black' and 'hispanic' are proxies for a constellation of other factors. . . ." *Id.* "With the information at hand . . . we are not able to settle the question of whether Asian applicants experience discrimination in elite college admissions." *Id.* at 95.

Respectfully, that is not correct. The "information at hand" reveals that the "constellation of other factors" is merely a pretext for invidious discrimination. Admissions officers start with a racial ideal – whether hard or soft, a quota nonetheless – and then seek students possessing vague qualities that allegedly happen to be present within racial groups in proportions inverse to academic achievement.

Regrettably, many individuals casually accept the validity of quotas. Defending race-conscious admissions policies, President Clinton once remarked that "there are universities in California that could fill their entire freshman classes with nothing but Asian Americans." Leon Rennert, *President Embraces Minority Programs*, SACRAMENTO BEE, April 7, 1995, at A1. As early as 1985, one member of a Princeton graduate school admissions committee recounted, "We were going over the applicant list and we came to a clearly qualified Asian-American student . . . And one committee member said, 'We have enough of them.' And someone else turned to me and said, 'You have to admit, there are a lot.'" Michael Winerip, *Asian Americans Question Ivy League's Entry Policies*, NEW YORK TIMES, May 30, 1985, at B1.

Moores had no trouble identifying the root cause of persistent anti-Asian discrimination.

> How did the university get away with discriminating so blatantly against Asians? Through an admissions policy with the vague term "comprehensive review." The policy includes factors like disabilities, low family income, first generation to attend college, need to work, disadvantaged social or educational environment, difficult personal and family situations . . . Needless to say, there is no hard weighting system at Berkeley for any of the fuzzy factors mentioned above. The result is an admissions system that is impossible to audit and that offers a cover for university administrators who don't want the media hounding them over declining minority enrollment.

Moores, *supra*.

In 2006, UCLA adopted Berkeley's "comprehensive" approach to weighing undergraduate applications, in direct response to political pressure to admit more African Americans. The move's pretextual nature was documented in a lengthy public resignation statement by a member of the school's Committee on Undergraduate Admissions and Relations with Schools, the body charged with oversight of undergraduate admissions. To remain on the Committee, wrote the resigning member, "would condone and make me complicit in what appears to be illegal activity." Tim Groseclose, *Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Cover-Up* (August 28, 2008), available at http://

www.sscnet.ucla.edu/polisci/faculty/groseclose/CUARS.Resignation.Report.pdf (last visited May 18, 2012).

Defenders of discriminatory practices often assert that hard numbers demonstrating bias against Asian Americans merely reflect a reality that "[w]hile Asian Americans are slightly stronger than whites on academic criteria, they are slightly less strong on extracurricular criteria." Dana Y. Takagi, THE RETREAT FROM RACE 70 (1998) (citing Susie Chow and William Fitzsimmons, "Statement on Asian-American Admissions at Harvard and Radcliffe," at 1 (1988)). "Leadership qualities, extracurricular involvement, achievement outside of the classroom, and raw demographics are factors that are key in evaluating every applicant. When the numbers are tabulated, a few snapshots of the data will look extreme, but this is no reason to flee from a worthy process." *On Asian American Admissions*, HARVARD CRIMSON (November 20, 2006), available at http://www.thecrimson.com/article/2006/11/20/on-asian-american-admissions-a-nov-11/ (last visited May 18, 2012).

It is little comfort to Asian American students, and not more comforting than it would have been to Jews not long ago, to hear that their hard work is devalued because "[i]t is these other aspects of race and ethnicity that matter, not race itself." Espenshade at 94. And it would be difficult to believe that in today's political environment, blacks or Hispanics could be expected to walk away satisfied with that sort of answer to their protests against racially-discriminatory practices.

In any event, there is no reason why "holistic" criteria should disproportionately impact Asian Americans in the absence of bias. Asian Americas are not less likely than their peers to excel outside the classroom. The United States Presidential Scholars Program annually designates up to 141 high school students as "Presidential Scholars," among the most prestigious honor bestowed upon graduating high school seniors, "on the basis of outstanding scholarship, service, leadership, and creativity through a rigorous selection and review process administered by the White House Commission on Presidential Scholars and the US Department of Education." Presidential Scholars Foundation, http://www.presidentialscholars.org/history.htm (last visited May 19, 2012). In 2006, 27 percent of Presidential Scholars were Asian American. Golden at 305.

And indeed, discrimination patterns persist even in areas where one would expect less weight would be assigned to non-academic factors. Medical schools may be expected to base admissions decisions primarily upon assessment of applicants' future abilities to diagnose and treat illness, but their data reveals profound racial and ethnic differences in the odds of gaining admission. The Association of American Medical Colleges publishes admission rates for various racial groups at different objective grade and MCAT score levels. See Ass'n of Am. Medical Colleges, *Table 25: MCAT and GPA Grid for Applicants and Acceptees by Selected Race and Ethnicity, 2009-2011 (aggregated)*, available at https://www.aamc.org/data/facts/applicantmatriculant/157998/mcat-gpa-grid-by-selected-race-ethnicity.html (last visited May 19, 2012). The results are startling. As summed up by University of Michigan economist Mark Perry, black applicants with average grades and test scores (GPA 3.40-3.59, MCAT 27-29)

> were almost three times more likely to be admitted than their Asian counterparts (85.9% vs. 30%), and 2.4 times more likely than their white counterparts (85.9% vs. 35.9%). Likewise, Hispanic students with average GPAs and average MCAT scores were about twice as likely to be accepted as white applicants (68.7% vs. 35.9%), and more than twice as likely as Asian applicants (68.7% vs. 30%) . . . For students applying to medical school with slightly below average GPAs of 3.20-3.39 and slightly below average MCAT scores of 24-26 . . . black applicants were more than 8 times as likely to be admitted as Asians (67.3% vs. 7.7%), and more than 5 times as likely as whites.

Mark J. Perry, *Do Medical School Acceptance Rates Reflect Preferences for Preferred Minority Groups?* (February 11, 2012), CARPE DIEM, available at http://mjperry.blogspot.com/2012/02/do-medical-school-acceptance-rates-from.html (last visited May 19, 2012).

Contrary to the assertions of some school administrators, Asian Americans do not tend to score low on "holistic" assessments because they are disproportionately less "well-rounded." Asian Americans tend to score low on "holistic" assessments because "holistic" review is designed to reflect concerns about excessive numbers of them, and often incorporates negative racial stereotypes that outweigh any consideration of an Asian American applicant's actual extracurricular record.

> [W]hen I worked as a reader for Yale's Office of Undergraduate Admissions, it became immediately clear to me that Asians – who constitute 5 percent of the US population – faced an uphill slog. They tended to get excellent scores, take advantage of AP offerings, and shine in extracurricular activities. Frequently, they also had hard-knock stories: families that had immigrated to America under difficult circumstances, parents working as kitchen assistants and store clerks, and households in which no English was spoken.
>
> But would Yale be willing to make 50 percent of its freshman class Asian? Probably not.

Kara Miller, *Do colleges redline Asian-Americans?*, BOSTON GLOBE, February 8, 2010, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/02/08/do_colleges_redline_asian_americans/ (last visited May 18, 2012).

Asked why a particularly strong Asian American applicant was denied admission, an MIT dean of admissions speculated that the applicant "looked like a thousand other Korean kids with the exact same profile of grades and activities and temperament," and that the school would have preferred not to admit "yet another textureless math grind." Golden at 201. The situation is such that high school guidance counselors recommending Asian Americans for college admission offer statements such as, "Rachel, for an Asian, has many friends." Scott Jaschik, *Too Asian?* INSIDE HIGHER ED (Oct. 10, 2006), available at http://www.insidehighered.com/news/2006/10/10/asian (last visited May 19, 2012). "'We make those comparisons because we feel it's the only way we can get through and get our students looked at,' said the counselor, to knowing nods from others in the audience." *Id.* One college admissions officer offered "she hears lots of talk about admissions officers who complain about 'yet another Asian student who wants to major in math and science and who plays the violin' or people who say 'I don't want another boring Asian.'" *Id.*

In 1988, the Department of Education's Office of Civil Rights ("OCR") launched an investigation into Harvard's admissions practices, to determine whether the school was discriminating against Asian Americans. OCR concluded that "[o]ver the last ten years Asian American applicants have been admitted at a significantly lower rate than white applicants," but "the primary cause of the disparity was the preference given to children of alumni and recruited athletes . . . and that [the preferences] were legitimate and not a pretext for discrimination." *Civil Rights Issues Facing Asian Americans in the 1990s*, U.S. Comm'n on Civil Rights, February 1992, at 120 ("USCCR").

Nonetheless, "quite often" and "in a number of cases," Harvard admission officers labeled Asian

American applicants as "science/math oriented, quiet, shy, reserved, self-contained, and soft spoken" – and these attributes were assigned to Asian Americans more frequently than to whites. *Id.* at 126 (citing U.S. Dept. of Education, Office for Civil Rights, *Statement of Findings* (for Compliance Review No. 01-88-6009 on Harvard University), Oct. 4, 1990, at 24) ("OCR"). "[The applicant's] scores and application seem so typical of other Asian applications I've read: extraordinarily gifted in math with the opposite extreme in English." *Id.* at 126 (citing OCR at 25). "These comments suggest that Harvard's admissions staff may have been influenced by the stereotype of Asian Americans as achieving academic excellence at the expense of a balanced overall personal development." *Id.*

At one time, Brown University seriously investigated claims of discrimination against Asian American applicants for admission. Unsurprisingly, it appeared evaluation of non-objective, non-academic criteria was marred by bias.

> It was clearly stated by all admission staff to whom we spoke that Asian-American applicants receive comparatively low non-academic ratings. These unjustified low ratings are due to the cultural bias and stereotypes which prevail in the Admissions Office. Such bias and stereotypes prevent admission officers from appreciating and accurately evaluating the backgrounds and nuances of the Asian-American cultural experience . . . the admission practices used to implement

> these policies have resulted in . . . unfair treatment.

Jerome Karabel, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE AND PRINCETON 501 (2005) ("Karabel") (quoting Brown Univ. Corp. Comm'n on Minority Affairs, "Report to the Corporation Committee on Minority Affairs From Its Subcommittee on Asian American Admissions," February 10, 1984, at 4). While the school did not admit to having consciously engaged in discrimination, it nonetheless concluded that "[i]f left unrectified, the combination of policies and practices would make the resulting inequities intentional." USCCR at 112 (quoting Brown Report at 2).

Of course, as described *supra* by University of California officials, specific racial outcomes are, in fact, intended. And at some point, institutions seeking such specific racial outcomes drop the pretense that their decisions be made on account of vague factors correlated to race, and simply adopt direct quotas. A recent study found that 21% of competitive schools first weigh applicants based on "institutional fit" rather than academic qualifications, with "underrepresented race/ethnicity" tying "exceptional talent" as the most commonly offered top factor in the determination. Thus,

> When an applicant has an exceptional talent (e.g. music, athletics) *or is part of a severely underrepresented group* at the institution, the applicant may not compete for admission against the larger applicant pool. Instead,

> he/she may compete only among those with the same talent or within the same group. In these circumstances, sets of applications are considered separately based on a university's institutional needs. As a result, disparities may arise between the levels of academic merit of certain subgroups of students.

Scott Jaschik, *How They Really Get In*, INSIDE HIGHER ED (April 9, 2012), available at http://www.insidehighered.com/news/2012/04/09/new-research-how-elite-colleges-make-admissions-decisions (last visited May 18, 2012) (internal quotation marks and citation omitted) (emphasis added).

At least some advocates of race-conscious admissions tests concede their pursuit of "diversity" takes a human toll. "As disheartening as evidence of admissions discrimination against Asian Americans would be, the pursuit of diversity necessarily requires colleges to make some harsh decisions about whom to accept." *Affirmatives of Affirmative Action*, HARVARD CRIMSON (February 19, 2008), available at http://www.thecrimson.com/article/2008/2/19/affirmatives-of-affirmative-action-a-study/ (last visited May 18, 2012). *Amici* submit that in today's political environment, the Crimson's editors could not have published the foregoing statement with "blacks" or "Hispanics" substituted for "Asian Americans." But at least as far as the Equal Protection Clause is concerned, "discrimination against Asian Americans" by public institutions is not merely "disheartening" or regrettably "harsh" – it is illegal.

II. The Pretexts Employed to Limit Asian American School Enrollment Are Indistinguishable from those Utilized to Impose Quotas Against Jews Throughout Much of the Past Century.

The challenges facing Asian American students today are not new. The Equal Protection Clause itself is a response to the persistence of invidious discrimination in our society, a problem to which institutions of higher learning have never been immune. Every facet of the discrimination that Asian Americans face today in college admissions has been reflected in the Jewish experience.

Echoing modern day concerns about an excessive number of Asian Americans that might be admitted under purely academic standards, Dartmouth President Ernest Hopkins once warned that "any college which is going to base its admissions wholly on scholastic standing will find itself with an infinitesimal proportion of anything else than Jews eventually." David O. Levine, THE AMERICAN COLLEGE AND THE CULTURE OF ASPIRATION 1915-1940 156 (1986 ed.) ("Levine") (citation omitted). And as late as 1961-62, a member of Yale's Admissions Committee reported a reluctance to recruit academically-qualified students who would, in all likelihood, be Jews:

> One of the reasons nobody wanted to go to Brooklyn Tech or Bronx Science or Stuyvesant was because those schools were where the Jews were. And I would hear, "They all have 95 averages and 700 college boards. Do you want to get them stirred up to apply to Yale and then have to turn them down?"

Karabel at 331. "[W]e could fill all of Yale with them. But we can't, of course." *Id.* (citing Daniel Oren, JOINING THE CLUB: A HISTORY OF JEWS AND YALE 200-01 (1985)).

Indeed, the notion that a school can have "too many" members of a particular race, religion, or ethnicity long predates modern concerns about so-called underrepresented minorities. According to Robert Corwin, Chairman of Yale's Board of Admissions from 1920 to 1933, Yale would "become a different place when and if the proportion of Jews passes a certain as yet unknown limit." Karabel at 207 (citation omitted). At a May 1918 meeting of the Association of New England Deans, "the topic of the day was the rapid increase in the 'foreign element,' and the deans of Tufts, Bowdoin, Brown and MIT all expressed concern about the growing number of Jews." *Id.* at 75 (citation omitted). Yale Dean Frederick Scheetz offered:

> I think we shall have to change our views in regard to the Jewish element. We should do something to improve them. They are getting there rapidly. If we do not educate them, they will overrun us. We have got to change

> our policies and get them into shape. A few years ago every single scholarship of any value was won by a Jew. I took it up with the Committee and said that we could not allow that to go on. We must put a ban on the Jews. We decided not to give them any scholarships but to extend aid to them in the way of tuition.

Id. (citation omitted).

Just as schools today devise various mechanisms to increase some racial group representation at the expense of Asian American students, schools in the last century were not above manipulating their methods to achieve a desired demographic result reflecting fewer Jews. Presaging Respondents' "Top Ten" plan, Harvard sought to diversify its enrollment (and reduce its number of Jews) by adopting a policy of admitting the top seventh of qualifying school classes. *Id.* at 101, 105. When the plan backfired, Harvard suspended its operation in heavily Jewish areas as part of its restrictive program. Yale Dean Clarence Mendell left a meeting with Harvard's Admissions Committee Chairman with the understanding that "they are going to discontinue – for the East at least – the 'first seventh' arrangement which is bringing in as high as 40% Jews. They are also going to reduce their 25% Hebrew total to 15% or less by simply rejecting without detailed explanation. They are giving no details to any candidate any longer." *Id.* at 109 (citation omitted).

Throughout the era of restrictive anti-Semitic practices, there had never been any doubt of Jewish students' academic qualifications. To the contrary, as with Asian Americans today, Jews were viewed with disdain for being *too* academically successful, as it was their academic success that threatened to squeeze out the sons of the WASP establishment. According to Yale Dean Frederick Jones, "[u]ndergraduates would no longer compete for 'first honors,' because they did 'not care to be a minority in a group of men of higher scholarship record, most of whom are Jews." Marcia Graham Synnott, THE HALF OPENED DOOR: DISCRIMINATION AND ADMISSION AT HARVARD, YALE, AND PRINCETON, 1900-1970 15 (2010) ("Synnott") (citation omitted).

And as with Asian Americans today, the knock against Jews was that academic achievement allegedly came at the expense of sociability. As early as 1914, Columbia Dean Frederick Keppel wrote:

> One of the commonest references that one hears with regard to Columbia is that its position at the gateway of European immigration makes it socially uninviting to students who come from homes of refinement. The form which the inquiry takes in these days of slowly-dying race prejudice is, "Isn't Columbia overrun with European Jews, who are most unpleasant persons socially?"

Frederick Paul Keppel, COLUMBIA 179 (1914). One anonymous Columbia critic decried

> the complete lack of undergraduate atmosphere about any group of [Columbia students]. Singularly absent is the grace, the swagger the tall attractive sleekness which, if it does not always dominate the usual college group, at least always touches it importantly. These men, one senses at once, are not of the highest caste, nor have they among them an influential sprinkling of members of the highest caste for their models . . . Seen quickly, there is even a certain grubbiness about them. One somehow expects them all to be Jews, for it is usually the Jewish members of such a group who lower the communal easy handsomeness.

Karabel at 87 (quoting M.G. Torch, *The Spirit of Morningside*, MENORAH JOURNAL, March 1930, at 255).

Reflecting a common view of his day, Yale's Corwin believed that too many Jews lacked "manliness, uprightness, cleanliness, native refinement, etc.," *id.* at 111 (quoting Robert N. Corwin, *Memorandum on the Problems Arising from the Increase in the Enrollment of Students of Jewish Birth in the University*, May 12, 1922, Yale Univ. Archives), and that Yale had "about all of this race that it can well handle," beyond the "saturation point." *Id.*

The perpetrators of Jewish restrictions may not have had Asian Americans in mind, but they acknowledged that their discriminatory practices could effectively be used to target other groups, including Asian Americans. Harvard President A.

Lawrence Lowell, the driving force behind that school's restrictive Jewish quotas, viewed "sociability" as a pretext, proposing limitations upon

> any group of men who did not mingle indistinguishably with the general stream, – let us say *Orientals*, colored men, and perhaps . . . French Canadians, if they did not speak English and kept themselves apart; or we might limit them by making the fact that men do not so mingle one of the causes for rejection above a certain percentage. This would apply to almost all, but not all, Jews; possibly, but not probably, to other people.

Synnott at 21 (citation omitted) (emphasis added).

Today, Respondents and their supporters strenuously avoid any suggestion that they are implementing a quota system, but then, those who consciously restricted Jewish enrollment likewise rejected the language of hard quotas in favor of fuzzy criteria. Harvard's Lowell came to acknowledge the difficulty in enacting explicit quotas, which even in the 1920s could offend sensibilities. Fortunately for him, common prejudices and stereotypes allowed the attainment of discriminatory results by reference to facially-neutral criteria. When Lowell imposed a quota on the number of Jews receiving scholarships, instructing that the "percentage allotted to Jews in their first year at Harvard should not exceed the percentage of Jews in the Freshman class," Synnott at 59 (citation omitted), the school implemented the directive by adopting a character test. "While awards would continue to be made 'primarily on the basis of high scholarship,' holders also had to be 'men of approved character and promise.'" *Id.*

Accordingly, turning to the "problem" of allegedly excessive Jewish enrollment, Lowell noted that

> the Faculty, and probably the governing boards, would prefer to make a rule whose motive was less obvious on its face, by giving to the Committee on Admission authority to refuse admittance to persons who possessed qualities described with more or less distinctness and believed to be characteristic of the Jews.

Karabel at 89. Yet "the Faculty should understand perfectly well what they are doing, and that any vote passed with the intent of limiting the number of Jews should not be supposed by anyone to be passed as a measurement of character really applicable to Jews and Gentiles alike." *Id.* (citation omitted).

On June 2, 1922, Harvard faculty approved the formation of a special committee "to consider principles and methods for more effectively sifting candidates for admission." *Id.* at 93 (citation omitted). Lowell incorporated into the meeting's minutes the statement that "there could be no doubt that the primary object in appointing a special Committee was to consider the question of Jews." Synnott at 58 (citation omitted). He later described the meeting's outcome: "We . . . attained by far the most important object, which was that of making substantially every member of the Faculty understand that we had before us a problem, and that that problem was a Jew problem and not something else. We had also brought the faculty to the point of being ready to accept a limitation of the number of Jews, for their own benefit as well as that of the college. . . ." Karabel at 93-94 (citation omitted).

When the faculty committee nonetheless rejected measures to limit Jewish enrollment, *id.* at 100-01, Lowell formed a different, more accommodating committee to study the question of capping class size. If the size of the entering class was not limited merely by raising admissions standards, the school would require the adoption of discretionary admissions policies. Lowell did not believe that a cap was otherwise necessary. "[W]e are in no present danger of having more students in college that we can well take care of; nor, apart from the Jews, is there any real problem of selection, the present method of examination giving us, for the Gentile, a satisfactory result." *Id.* at 131 (citation omitted).

The latter committee recommended limiting class size, and using teacher recommendations and personal interviews to weigh applicants' "aptitude and character." *Id.* at 102 (citation omitted).

> To prevent a dangerous increase in the proportion of Jews, I know at present only one way which is at the same time straightforward and effective, and that is a selection by a personal estimate of character on the part of the Admission authorities, based upon the

> probable value to the candidate, to the college and to the community of his admission.

Id. at 107 (citation omitted).

Lowell's description of the "character" tests could easily describe the rationale for race-conscious admissions criteria today: the prevention of dangerous (or at least, undesirable) proportions of some ethnic groups relative to others, by estimating each admission decision's putative value not only to the candidate, but to the school and community as a whole. Once individual merit is made secondary to the alleged school or community interest in racial balance, anything is possible.

Echoing Espenshade and Radford's suggestion that "[i]t is these other aspects of race and ethnicity that matter, not race itself," Espenshade at 94, Lowell "insisted that he was not proposing discrimination against the Jews but rather 'discrimination among individuals in accordance with the probable value of a college education to themselves, to the University, and the community,' carefully adding that 'a very large proportion of the less desirable, upon this basis, are at the present time the Jews.'" Karabel at 107-08 (citation omitted).

Other schools likewise targeted vague characteristics with respect to which Jews allegedly tended to differ. Dartmouth's President Hopkins, denying a charge of discrimination, acknowledged that "[i]t probably is a fact that a boy of Jewish heritage has to have outstanding characteristics in general that are not required of racial stocks a little less aggressive." Levine at 154 (1988 ed.) (citation omitted). Yale's Corwin understood that "it would give us better publicity if we should speak of *selection* and of the rigid enforcement of high standards rather than of the limitations of numbers." Karabel at 113 (citation omitted). Thus, Yale capped enrollment in 1923, and announced that admission would in part be based upon "qualities of personality and character." *Id.* at 114 (citation omitted).

Yet even this did not suffice to achieve the desired quota, as in Corwin's words,

> No college or school seems to have discovered or devised any general criteria which will operate to exclude the undesirable and uneducable members of this race. All which have been successful in their purpose have had to avail themselves of some agency or means of discrimination based on certain non-intellectual requirements.

Id. (citation omitted).

Just as the student papers of today applaud "holistic" and "comprehensive" admissions policies, with little regard to the unfortunate but necessary-for-the-greater-good impact on individual Asian American applicants, so too did the student papers of yesteryear endorse the murky criteria that worked to limit Jewish enrollment.

The YALE DAILY NEWS endorsed the idea of greater admissions subjectivity, as "[c]ontinuing this same scholastic basis for admission, Yale will soon reach the sorry state where her sons will be mere brain specimens, where Yale graduates will find no room for what children of theirs are not abnormal." *Applicants Submit Photographs*, YALE DAILY NEWS, March 29, 1926, at 2. Yale's admission policy should include "more consideration of the character, personality, promise and background of the individual in question. Yale must institute an Ellis Island with immigration laws more prohibitive than those of the United States government." *An Ellis Island for Yale*, YALE DAILY NEWS, March 30, 1926, at 2. Clearly referencing Jews in the code of the day, the paper offered that

> [t]he survival of the fittest should yield men who are equipped to do more than pass scholastic examinations or earn money . . . If democracy must prevail in the University, it would be a purer form under the test of character and leadership than simply by open competition of book-learning. Those dropped on such a basis would gain access to other centers of culture.

Id. The DAILY PRINCETONIAN endorsed "vital factors as character, personality, physical ability, public spirit, and all that goes to make leadership of the highest type. It is our ambition for Princeton that it should develop, not mere scholars, but leaders – men of sound body, mind and spirit." *How Shall We Limit Our Enrollment?* THE DAILY PRINCETONIAN, January 27, 1922, at 2.

And finally, just as Asian Americans today sustain a disproportionate admissions burden in the name of "diversity," so too were Jews restricted at one time in the name of "diversity" and "balance." Harvard Provost Paul Buck declared that the school's goal of achieving admissions "balance" was threatened by the "large metropolitan public high schools of New York and New Jersey," from which "95 percent of the applicants for Harvard . . . are of one category – bright, precocious, intellectually over-stimulated boys," and the "larger private schools from these same states [which] are no better . . . weighted with the delicate, literary type boys who don't make the grade socially with their better balanced classmates who, in turn, head for Yale or Princeton." Karabel at 185 (quoting Paul H. Buck, *Balance in the College*, HARVARD ALUMNI BULLETIN, February 16, 1946, at 406). "In contrast to these 'floppy ducklings,' Harvard should seek out sturdy young men of 'the healthy extrovert kind . . . so much admired by the American public.'" *Id.* Notwithstanding their relative academic weakness, such applicants must be admitted to create "a student body balanced in its composition and its potentialities for later contribution to all phases of American life." *Id.* (quoting Paul H. Buck, *Who Comes to Harvard?* HARVARD ALUMNI BULLETIN, January 10, 1948, at 314).

Responding to a Jewish alumnus's letter pointing out apparent discrimination, Yale President Charles Seymour explained that to remain "a truly national institution, representative of the country as a whole may, in certain circumstances, involve some temporary restriction on the numbers selected from one or another of the nation's population groups in order to prevent distortion of the balanced character of the student body." Karabel at 209 (citation omitted). "[L]imitations on the number from particular groups would sometimes be necessary 'to keep the various elements in the incoming classes in some rough approximation to the proportions which obtain throughout the national population.'" *Id.* As Lowell had put it, Harvard could not accept more Jews than it could "effectively educate" in "the ideas and traditions of our people. Experience seems to place that proportion at about 15%." *Id.* at 89 (citation omitted).

Indeed, the under-qualified minorities that "diversity" was originally conceived to assist were not blacks or Hispanics, but Protestant prep school legacies. As late as 1960, a Harvard admissions report defended giving prep school candidates preferential admissions treatment on the theory that "'gifted students' obtain a better education 'by living in an undergraduate population representing a wide variety of school backgrounds.' Moreover, private school students 'contribute a great deal to the intellectual atmosphere of Harvard,' even though many of them are 'not oriented toward academic or professional training, and so are not interested in striving for degrees with honors.'" *Id.* at 276 (citation omitted). This rationale was, of course, contrary to the widely-held belief that Jews and Gentiles were socially incompatible, but little else could rationalize discriminatory intent.

Today, the notion that Harvard should loosen its academic standards to admit otherwise unqualified WASPs, so that high-achieving minorities might have the benefit of their interaction, would strike many university administrators as absurd. Yet that was the ultimate logic of limiting Jewish enrollment not long ago, and that rationale is identical to that advanced by proponents of race-conscious admission standards, only with different groups occupying the same variables.

Respondents may plead that unlike the "bad" discrimination of old, their more modern variety is wholesome and well-intentioned. But every government official who would violate the Constitution in any way can assure himself of the purity of his motives, just the restrictionists of the past believed themselves to be acting in the public interest. What matters here is that virtually every aspect of modern race-conscious admissions standards employs a mechanism or excuse for devaluing its victims that has already been honed for decades in targeting Jews for exclusion.

Someday, the practices and theories endorsed by Respondents will be held in regard equal to those of Lowell and Corwin. This Court should hasten that day by acknowledging that race-conscious admission standards are generally incompatible with the constitutional guarantee of equal protection.

III. This Court Should Not Defer to State Officials In Matters Relating to Racial Discrimination.

When Harvard's Lowell failed to convince the faculty that Jews should be restricted, he formed a committee that consciously utilized the discretion required by enrollment caps to implement his desired quota. When Texas and Florida officials sought to assuage concerns about facially discriminatory admissions policies, they implemented pretextual geographic selection standards that would boost the number of racially-desired students. When California voters ratified a constitutional amendment forbidding race-based university admissions, school officials created "holistic" review procedures designed to resist the people's will. And contrary to this Court's instructions in *Grutter*, 539 U.S. at 334, it now appears that elite institutions persist in race-norming.

The sad history of invidious discrimination in our Nation's institutions of higher learning teaches one overarching lesson: school administrators, as a class, are clever and persistent people. Utterly convinced of the righteousness of their cause, school administrators will invoke any excuse, and employ any mechanism, to keep discriminating on the basis of race. If this Court's opinions on the subject of equal protection in school admissions are to have any practical effect, if school officials are to be bound in any meaningful way by the Equal Protection Clause, the Court cannot defer to the judgment of school administrators on the subject. The culture of higher education simply does not accept that there is anything wrong with racial discrimination and, indeed, views racial discrimination as a moral imperative and public good.

Petitioner and several of the other *amici* effectively demonstrate that deferring to government officials with respect to racial classification is incompatible with strict scrutiny, a doctrine based upon presumptive unconstitutionality. "More than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification system." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (citation omitted).

Amici would add that the problem with deference reaches deeper than the four corners of the strict scrutiny doctrine, or this Court's specific pronouncements regarding race-conscious government action. The notion that this Court would defer to the alleged "expertise" of government officials whose conduct implicates the security of individual rights undermines the Court's basic constitutional function.

Alexander Hamilton warned in FEDERALIST NO. 78 that

> Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the

> other departments. . . [. F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches.

THE FEDERALIST NO. 78, at 402-03 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). Presumption of legislative constitutionality, at least, "is not to be collected from any particular provisions in the constitution." *Id.* at 403-04.

The question for Hamilton was not whether judges would be superior to the political branches, but whether the people's constitutionally-expressed will would bind recalcitrant government officials – a task that could only be carried out by independent and properly skeptical courts. Hamilton had little use for the argument that courts might supplant their will for that of the legislature. "The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body." *Id.* at 405.

Not surprisingly, the Framers placed a high value on truly independent judicial review. James Madison expressed his hope that federal courts "will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789) (statement of Rep. Madison). As Justice Patterson stressed, judicial review expressed popular sovereignty, the Constitution being "the work or will of the people themselves, in their original, sovereign, and unlimited capacity" to which political actors were subordinate. *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012, 1014 (C.C.D. Pa. 1795).

Deferring to mere assertions of legislative or executive expertise is incompatible with this Court's essential charter. When difficult technical or scientific questions arise that implicate individual rights, the Court does not defer to the government's regulatory expertise – it should defer to the people's constitutionally-secured values. To do otherwise would be to hold that the political branches may trump individual rights merely by conjuring an allegedly complex problem – an exceptionally easy task for most regulators. Here, the difficult task is the composition of a "balanced" and "diverse" student body, but the argument is mere bootstrapping. It is not at all hard to admit a freshman college class on the basis of objectively demonstrated academic merit.

Amici would welcome this Court's confirmation that hard-working students cannot have their achievements devalued on account of race. But the country can only be assured that racial double-standards are ended by this Court's unequivocal command that school officials may not use race in admitting students, period.

◆

CONCLUSION

When details of Harvard's debate regarding Jewish restrictions reached the pages of the NORTH CHINA STAR, an alumnus in Tientsin expressed his displeasure to Harvard's President. "'Articles like this will deter our Chinese students from coming to Harvard,' he wrote Lowell, 'and also make them feel that democracy is a failure in America.'" Synnott at 80 (citing Emmett Russell, Nan Kay College, Tientsin, China to A. Lawrence Lowell, August 15, 1922, Abbott Lawrence Lowell Papers, Harvard University; *Harvard Faces Problem of Cutting Down Number of Students Attending by Refusing Admission to Jews*, NORTH CHINA STAR, August 15, 1922, at 6) (other citation omitted).

Nearly a century later, the Asian Americans have arrived to face the same hurdles placed before earlier immigrants. Academia not having changed as much as it should, this Court should end invidious discrimination as a matter of law.

May 29, 2012 Respectfully submitted,

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AMICUS
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In The
Supreme Court of the United States

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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

BRIEF OF *AMICI CURIAE* MEMBERS OF ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE, ET AL. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

This brief is submitted by members of the Asian American Center for Advancing Justice ("Advancing Justice"), an affiliation of four nonprofit, nonpartisan organizations: the Asian American Institute from Chicago, the Asian American Justice Center from Washington, D.C., the Asian Law Caucus from San Francisco, and the Asian Pacific American Legal Center from Los Angeles. Through litigation, direct legal services, policy advocacy, community outreach and education, and organizing, Advancing Justice's mission is to promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. Members of Advancing Justice routinely file *amicus curiae* briefs in cases in this Court and other courts, including an *amicus curiae* brief in *Grutter v. Bollinger*.

Advancing Justice is joined on this brief by more than seventy civil rights groups, advocacy organizations, bar associations, business associations, academic institutions, and student organizations (collectively, "*Amici*"). For a list and description of the various *amici* joining this brief, see Appendix A.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Amici have longstanding histories of serving the interests of Asian Americans, Native Hawaiians, and Pacific Islanders.

Amici, like the majority of Asian American voters in California, Michigan, Washington, and other states who have opposed referenda to eliminate race-conscious programs, support the proper use of race-conscious programs.[2] National opinion polls consistently show that a majority of Asian Americans are in favor of race-conscious programs.[3] This support

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[2] One of Petitioner's *amici* asserts – based on responses to questions on its own website – that Asian Americans oppose the use of race-conscious programs. *See* Amicus Brief of the Louis D. Brandeis Center for Human Rights Under Law, the 80-20 National Asian American Educational Foundation, et al. ("80-20 Br.") at 1-2. This is not true. *See, e.g.*, *Los Angeles Times Exit Poll: The General Election, November 5, 1996*, L.A. Times, 1996, http://www.latimes.com/media/acrobat/ 2008-10/43120439.pdf; *Asian Americans for Affirmative Action*, The Nation (Jan. 8, 2007), *available at* http://www.thenation.com/blog/asian-americans-affirmative-action#; Doug Chin, *Affirmative Action Debate Heats Up in Washington State*, New America Media, Apr. 17, 2005, http://news.newamericamedia.org/news/view_article.html?article_id=e27f2dbeaaa6dd98e87b171d1cc5cbdc (noting "similar percentage" of Asian Americans voted against Initiative 200 in Washington State as against Proposition 209); Paul M. Ong, *The Affirmative Action Divide*, in *Asian American Politics – Law, Participation, and Policy* 377 n.65 (Don T. Nakanishi & James S. Lai eds., 2003).

[3] *See, e.g.*, Nat'l Comm'n on Asian Am. & Pac. Islander Research in Educ., *The Attitudes of Asian Americans Toward Affirmative Action* (2012), *available at* http://www.nyu.edu/projects/care/CARE-affirmative_action_polling-1v2.pdf; Asian Pac. Americans in Higher Education, *80-20's College Admissions Survey: Important Evidence or Junk Science?*, APAHE Policy

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continues today, as numerous organizations representing a wide swath of the Asian American community join this *amicus curiae* brief in support of Respondent and race-conscious programs designed to improve equal access for all. *Amici* recognize that Asian Americans and other minority groups have fought together against racial discrimination and for greater civil rights, protections, justice, and equality in this country. *Amici* recognize that Asian Americans have obtained greater rights and opportunities as a result of historic civil rights struggles led by other minority communities.[4]

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SUMMARY OF ARGUMENT

Amici Asian American advocacy organizations submit this brief in support of Respondent University of Texas at Austin ("UT Austin"), a state institution whose mission for many years has been to train leaders for the State of Texas. *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950); *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003). Petitioner and several of her supporting *amici* specifically assert that Asian American applicants to UT Austin are harmed by the

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Paper (June 2012), *available at* http://aaldef.org/APAHE%20Policy%20Brief.pdf.

[4] *See, e.g.*, Stewart Kwoh & Julie A. Su, *A Shared History And Vision*, New America Media, Mar. 27, 2007, http://news.newamericamedia.org/news/view_article.html?article_id=5865061e5e6d42458536481ade0be453.

challenged admissions program. *Amici* submitting this brief categorically reject that contention. Asian American applicants suffer no harm. To the contrary, UT Austin's Asian American students receive the educational benefits of a diverse student body, which is central to the educational goals of a public university in today's heterogeneous society.

Not unlike African Americans, Latinos, and Native Americans, the Asian American community has experienced a long history of racial discrimination, including *de jure* racial segregation in public education. Indeed, Asian Americans were initially included in race-conscious university admissions programs when few Asian Americans attended universities. Asian Americans' educational attainments, however, have not translated into commensurate gains in achieving leadership positions in business and other endeavors. As a result, Asian Americans continue to be included in race-conscious opportunity programs, particularly in public contracting.

As recognized by this Court, there is a compelling need for universities to prepare students for an increasingly diverse workforce, to promote cross-racial understanding, and to reduce stereotyping and isolation of minorities. Post-*Grutter* social science studies confirm substantial benefits for all students, including Asian Americans, from a diverse student body: Research shows that developing stronger cross-cultural competencies may better equip students with leadership skills for an increasingly diverse workplace, and also change other groups' potentially negative perceptions of Asian Americans. Increasing cross-racial interactions, particularly in the classroom, improves learning while promoting understanding and breaking down stereotypes. Asian American students share in these benefits as well as contribute to them. Recent research also confirms that diminishing the force of stereotypes cannot be accomplished with only token numbers of minority students and that all students, including Asian Americans, benefit from interracial interactions.

Petitioner's *amici* nevertheless contend that Asian Americans are discriminatorily punished by the holistic admissions program based on Asian Americans' higher SAT test scores. This argument has no factual support. A careful review of the data shows that admission rates and average SAT scores for Asian Americans remain constant whether or not race-conscious admissions programs like UT Austin's are in operation, which refutes any suggestion that such admissions programs impose a "penalty" on Asian Americans and are the "root cause" of a test score gap. Moreover, SAT scores are only one of several admissions criteria. There is no shortfall in the proportion of Asian Americans admitted or enrolled compared to the proportion of Asian Americans who applied. Asian Americans suffer no differential treatment, and there is no evidence of a rigid numerical quota at work. The "test score gap" is not specific to the holistic admissions program and exists in the Top Ten Percent admissions program as well. Test scores, in any event, are an inaccurate measure of past achievement and an incomplete predictor of future potential. Accordingly, UT Austin is well within the proper exercise of its First Amendment freedoms in choosing its students with a holistic admissions program that relies on more than SAT scores alone. *See Grutter*, 539 U.S. at 329.

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ARGUMENT

I. Asian Americans benefit from a variety of race-conscious programs justified by diversity or other compelling interests.

Asian Americans, Pacific Islanders, African Americans, Latinos, and Native Americans share a history of racial segregation in education. Despite this shared history, Petitioner and several *amici* argue that admissions programs that provide equal opportunity for African Americans and Latinos necessarily harm Asian Americans.[5] Worse, Petitioner and

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[5] *See, e.g.*, Petitioner's Brief ("Pet. Br.") at 7 (claiming that UT Austin's holistic admissions policy works "to the detriment of Asian Americans" and "subject[s] them to the same inequality as White applicants"); Amicus Brief of the Asian American Legal Foundation and the Judicial Education Project ("AALF Br.") at 6 (conflating race-conscious programs designed to benefit underrepresented groups with "invidious discrimination against Asian Americans"); 80-20 Brief at 3 (claiming that Asian Americans have been "[p]articularly hard-hit" in the "zero-sum" game of university admissions). *Amici* also note that Petitioner (who is white) lacks standing to challenge UT Austin's holistic admissions policy on the basis of its purported harm to Asian Americans, given that adopting Petitioner's rationale would not

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supporting *amici* seek to use Asian Americans as a wedge group to curtail opportunities for minorities.[6] These claims ignore the reality that Asian Americans directly benefit from the diversity achieved by race-conscious programs and suffer no harm.

This *amicus* brief, filed by those who have long served the interests of Asian Americans, aims to correct this revisionist history and explain why Asian Americans and other Americans benefit from the holistic consideration of race to achieve diversity and pathways to leadership that are "visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332.

A. Asian Americans benefit from race-conscious admissions programs in higher education.

Asian Americans, like African Americans, Latinos, and Native Americans, were subject to historic exclusion and *de jure* segregation in public education,

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necessarily have benefitted her admissions prospects because she is not Asian American.

[6] *See, e.g.*, Frank H. Wu, *Yellow: Race in America Beyond Black and White* 58 (2002); Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 Asian Pac. Am. L.J. 129, 151 (1996); Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Politics & Society 105, 122-23 (1999); Nellie Tran & Dina Birman, *Questioning the Model Minority: Studies of Asian American Academic Performance*, 1 Asian Am. J. Psychol. 106, 107 (2010).

particularly in California with its significant Asian American population.[7] Even after the California Supreme Court ruled in 1885 that the San Francisco School Board was required to provide Chinese students a public education, the California Legislature provided separate, segregated schools for "children of Mongolian or Chinese descent" until 1947.[8] Although *Brown v. Board of Education*, 347 U.S. 483 (1954), invalidated the "separate but equal" doctrine, it did not end racial discrimination in public education or its harms for Asian American communities.[9]

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[7] *See, e.g., Gong Lum v. Rice*, 275 U.S. 78 (1927); *see also* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 Asian L.J. 181, 190-200 (1998).

[8] *See Tape v. Hurley*, 66 Cal. 473, 474 (1885); Kuo, *supra* note 7, at 198 n.115.

[9] Indeed, educational inequalities for Asian Americans and other racial minorities continue to persist. Unfortunately, public K-12 schools are more segregated today than they were forty years ago. *See* Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, The Civil Rights Project, U.C.L.A. (2007). Some Asian American subgroups – Hmong, Cambodian, Laotian and Vietnamese Americans – have educational attainment rates similar to those of Latinos and African Americans. *See* Asian Am. Ctr. for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States: 2011* at 30-31 (2011), *available at* http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf; *see also* Robert T. Teranishi, *Southeast Asians, School Segregation, and Postsecondary Outcomes*, Comm'n on Asian Am. Research in Higher Educ., N.Y.U. (2004); Amicus Brief of the Asian American Legal Defense and Education Fund ("AALDEF Br.") at Parts II.B.-II.C.

Race-conscious admissions programs played a critical role in opening the doors of public and private universities to many Asian Americans in the 1960s and 1970s.[10] For example, in the 1960s, California instituted desegregation efforts for public higher education that included a variety of race-conscious programs, such as the University of California's Educational Opportunity Programs – community outreach, recruitment, and tutoring programs for low-income and minority students.[11] The programs considered applicants' racial background as supplemental admissions criteria. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 274-75 (1978) (including Asian Americans in UC Davis Medical School's race-conscious admissions program). As the number of some Asian American subgroups admitted to the UC system increased, these groups' inclusion as underrepresented groups under the race-conscious admissions programs ended.[12] However, race-conscious admissions programs at the UC's flagship schools continued to include Filipino Americans through the 1990s.[13] In addition to undergraduate admissions, Asian Americans were also identified beneficiaries of race-conscious admissions programs at graduate and professional schools, including law schools at UC Berkeley (formerly Boalt Hall), UCLA, and University of Washington.[14]

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[10] Sharon S. Lee, *The De-Minoritization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California*, 15 Asian Am. L.J. 129, 132 n.16 (2008) (citing historical inclusion of Asian Americans in minority recruitment efforts at selective schools such as Princeton and Yale).

[11] *See id.* at 132.

[12] *See, e.g.*, *id.* at 143. The fact that the UC system ended inclusion of some Asian American subgroups in these programs demonstrates that, contrary to the claims of Petitioner and her *amici*, colleges and universities are committed to meaningful durational limits on race-conscious admissions. *See Grutter*, 539 U.S. at 342.

Even when not formally identified as an underrepresented group, holistic race-conscious policies (like UT Austin's) allow for individualized consideration of how Asian Americans' personal and background characteristics, including race, may benefit the institution or organization. *See, e.g.*, Pet. for Writ. of Cert., App. A at 46a. For example, universities may determine the need to improve equal access for Asian Americans in majors or fields where they continue to be underrepresented. And not only do Asian

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[13] *See* Gwendolyn Yip & Karen Narasaki, *Affirming the California Experience with Affirmative Action*, 1 Nexus J. Op. 22, 28 (1996) (noting the decline in undergraduate admissions rate of Filipino Americans to Berkeley from 32% to 18% after they were no longer included in race-conscious admissions programs in the 1990s); Lee, *supra* note 10, at 143 n.64 (noting that Filipino Americans continued to be included in UCLA's undergraduate race-conscious admissions programs until mid-1980s).

[14] William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 Asian L.J. 29, 30 (2000); Lee, *supra* note 10, at 136; *Smith v. Univ. of Washington*, 392 F.3d 367, 379 (9th Cir. 2004).

Americans contribute to the diversity of those institutions, they directly benefit from those diverse environments. *See* Part II *infra*.

B. Asian Americans continue to face barriers to equal opportunity in other sectors of American life, and are appropriately included in race-conscious programs to improve opportunity.

Historically, Asian Americans have benefitted from race-conscious programs in their workplaces. For example, in the 1980s, Asian American construction firms in San Francisco received approximately 5% of the contracts for school district construction, despite making up over 20% of the available and fully qualified construction firms; it was not until after the school district implemented a race-conscious plan that Asian American participation in contracting with the district increased.[15]

Today, even for Asian Americans who have obtained higher education, those gains have not necessarily translated to commensurate advances in other sectors of American life. For example, Asian American men are less likely to hold leadership positions as managers in private businesses than are similarly qualified non-Latino white men.[16] Asian Americans are less likely to hold leadership positions in government, compared to their peers with the same credentials.[17] Asian Americans also hold few positions on corporate boards of directors or in elected office.[18] Studies suggest that "glass ceilings" prevent their advancement into higher management and leadership positions in the workplace.[19] Likewise, there are few Asian American federal judges.[20]

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[15] Angelo N. Ancheta, *Race, Rights, and the Asian American Experience* 160 (2d ed. 2006).

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[16] *See* Asian Am. Institute, *Asian Americans and Public Contracting: Equal Opportunities, Laws, and Politics* 19-20 (2008); U.S. Comm'n on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s* (1992); Asian Am. Justice Ctr., *Equal Access: Unlocking Government Doors for Asian American Businesses: Public Contracting Affirmative Action Laws and Policies* 19 (2008), *available at* http://www.advancingequality.org/attachments/files/342/ Equal_Access.pdf.

[17] *See generally* Jeremy S. Wu & Carson K. Eoyang, *Asian Pacific American Senior Executives in the Federal Government*, 4 AAPI Nexus 39 (2006).

[18] *See, e.g.*, Committee of 100, *The Committee of 100's Asian Pacific American (APA) Corporate Board Report Card* (2004); Leadership Educ. for Asian Pacifics, Inc., *2011 Fortune 500 API Executive Officers and Top Earners* 4 (2012), *available at* http://www.leap.org/docs/2012_LEAP_EOFORTUNE500_Full Report.pdf; Jeremy S. Wu, *supra* note 17.

[19] *Equal Access*, *supra* note 16, at 19-20; Deborah Woo, U.S. Dep't of Labor, Glass Ceiling Comm'n, *Glass Ceiling and Asian Americans* (1994); *see also Chin v. Runnels*, 343 F. Supp. 2d 891, 907 (N.D. Cal. 2004) (reviewing Federal Glass Ceiling Commission's report and other sources).

[20] *Who's Sitting on the Federal Bench*, Wash. Post, Aug. 26, 2009 (covering Russell Wheeler's study for the Brookings Institution and noting "Asian American judges have been so rare

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In Texas, fully 54% of Asian Americans over the age of 25 have at least a bachelor's degree, compared to 34% of non-Hispanic whites.[21] Nevertheless, in Texas, 13% of white employees are managers compared to 9% of Asian Americans.[22] The per-capita income of Asian Americans in Texas is three-quarters of the non-Hispanic white per-capita income.[23]

Studies consistently find that Asian American businesses, like other minority-owned businesses, receive few public contracts because of explicit discrimination, lack of requests for bids from minority-owned businesses, difficulty obtaining funding, and

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on the federal bench that Wheeler did not account for them in his historical survey"); *see also* Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Cal. L. Rev. 1109 (2003) (reviewing data, associated challenges, and importance of a diverse judiciary).

[21] Jonathan Ong, UCLA School of Public Affairs, Data Tabulated from *2006-2010 5-year American Community Survey* (Tables B15002, C15002D, C15002H) (downloaded on June 22, 2012 from http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml) (on file with author).

[22] Paul Ong, UCLA School of Public Affairs, Data Tabulated from *2006-2010 American Community Service Public Use Microdata Sample* (downloaded on June 7, 2012 from http://www.census.gov/acs/www/data_documentation/data_via_ftp/) (on file with author).

[23] Jonathan Ong, UCLA School of Public Affairs, Data Tabulated from *2006-2010 American Community Survey 5-year ACS Estimates* (Tables B19301, B19301D, B19301H) (downloaded on June 25, 2012 from http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml) (on file with author) (showing average per capita income for non-Hispanic whites of $34,826 and for Asian Americans of $28,253 in Texas).

relationship advantages of white-owned businesses.[24] Accordingly, governmental agencies include Asian American-owned businesses in race-conscious programs.[25]

Therefore, the need for race-conscious programs that include Asian Americans continues where they are denied equal opportunity. Asian Americans, like other racial minorities, would be harmed by a ruling that takes away an institution's ability to consider the compelling need for such race-conscious programs.

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[24] *See* Asian Am. Ctr. for Advancing Justice, *Overlooked: The Asian American Contractor Experience*, at ii-iii, 34 (2012), *available at* http://www.advancingequality.org/files/Minority_Contracting_Full_layout_ Singles-Final.pdf (describing discrimination and other barriers to participating in government contracting); Oiyan A. Poon et al., *Accurate Data: Next Step in Giving Asian Pacific Americans Equal Access to Public Contracts* 7-9, 52-60 (2010), *available at* http://www.advancingequality.org/attachments/files/470/Accurate%20Data_Next%20Step%20in%20Giving%20Asian%20Pacific%20Americans%20Equal%20Access%20to%20Public%20Contracts.pdf (conducting empirical research on under-utilization of Asian American firms in local government contracting programs in construction, architecture, civil engineering, and technology); *Equal Access*, *supra* note 16, at 28-29 (analyzing census data showing that Asian American firms are underrepresented in construction and professional/scientific/technical services, two key sectors for government contracting).

[25] *Equal Access*, *supra* note 16, at 26; Ancheta, *supra* note 15.

II. Asian Americans benefit from and contribute to the diverse learning environments fostered by UT Austin's holistic admissions program.

Asian American students also benefit from and contribute to the diversity produced by holistic admissions decisions. "[T]he educational benefits that diversity is designed to produce . . . are substantial," *Grutter*, 539 U.S. at 330, including: training for a diverse workplace, increasing cross-racial interactions, and reducing isolation of racial groups. Recent social science research confirms these benefits.

A. Diverse learning environments train students for a diverse workforce.

In *Grutter*, the Court cited social science research that diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." 539 U.S. at 330-31 (citing sources and amicus materials of business groups and military leaders). "These benefits are not theoretical but real." *Id.*

Recent social science research confirms *Grutter* in this respect. As high levels of residential segregation reduce the likelihood that elementary and high school students will learn in integrated environments, colleges and universities play an increasingly critical role in exposing students to diversity necessary for career advancement.[26] In particular, these institutions provide students with "pluralistic orientations" "essential for graduates in the twenty-first century" in the global economy.[27] "[W]hile there is great value in exposure to diversity in high school, the power of collegial interactions across race is most influential with regard to developing cross-cultural workforce competencies."[28]

As noted above, higher educational attainment has not translated into commensurate leadership positions for Asian Americans.[29] Research demonstrates that developing stronger cross-cultural competencies may better equip all students, including Asian Americans, in developing leadership skills, as well as change other groups' perceptions of Asian

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[26] *See* Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society?: Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615, 643 (2008) ("Cumulative exposure to racial diversity throughout the educational pipeline and particularly in higher education is likely to facilitate the development of cross-culturally competent citizens."); Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 360 (2002).

[27] Mark E. Engberg & Sylvia Hurtado, *Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences*, 82 J. Higher Educ. 416, 434, 436 (2011).

[28] Jayakumar, *supra* note 26, at 642-43.

[29] *See* Part I.B *supra*. For example, Asian Americans only make up one percent of college and university presidents in the United States. *See* Jacqueline E. King & Gigi G. Gomez, Am. Council on Educ., *On the Pathway to the Presidency: Characteristics of Higher Education's Senior Leadership* 20 (2008).

Americans and create greater professional opportunities for Asian Americans.[30]

Research shows that "[i]f Asian Americans are minimally engaged in exploring cross-racial friendships during [college], they may be even less likely to do so in the future."[31] However, one study found that Asian American students with the greatest racial and ethnic diversity in their intimate social network enjoyed a significantly higher sense of efficacy and competence than those with less racially and ethnically mixed networks.[32] In another national study of students from ten universities, researchers found that Asian Americans who experienced positive interactions with students of other races and participated in campus activities designed to expose students to diverse groups had significantly higher pluralistic orientations, a trait that includes the ability to see an issue from multiple perspectives, discuss controversial issues, and be open to having one's views challenged.[33]

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[30] *See infra.*

[31] Yu-Wen Ying et al., *Asian American College Students as Model Minorities: An Examination of Their Overall Competence*, 7 Cultural Diversity & Ethnic Minority Psychol. 59, 69 (2001); *see also* Victor B. Saenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 Research in Higher Educ. 1, 27 (2007) (noting that intergroup anxiety of Asian American students is ameliorated by increased classroom opportunities for intensive dialogue with diverse peers).

[32] Ying, *supra* note 31, at 69.

B. Race-conscious admissions programs lead to increased cross-racial interactions and understanding.

In addition to training future leaders, *Grutter* recognized the compelling need for universities to generally promote "cross-racial understanding," "break down racial stereotypes," and help students "better understand persons of different races." 539 U.S. at 330. Social science research since *Grutter* has affirmed that race-conscious admissions policies have a positive effect on campus-wide diversity and, consequently, cross-racial interactions.[34] Enrollment of students of color in meaningful numbers improves "structural diversity" at an institution, a precondition for "interactional diversity" among its students.[35]

Research also supports UT Austin's educational judgment that racial diversity is especially important in the classroom, where meaningful interactions between diverse groups are more likely to enhance cross-racial understanding.[36] Asian American students share in these benefits. A 2007 longitudinal study of 4,757 freshmen at nine universities, including 686 Asian American students, found that "having increased classroom opportunities for intensive dialogue with diverse peers" is "a positive influence on the quality of cross-racial contact for Asian students."[37] A post-*Grutter* study of the University of Michigan Law School also found that students, including Asian American students, "strongly believe[d] that increased diversity leads to improved learning in the classroom."[38]

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[33] Engberg, *supra* note 27, at 434.

[34] For a more detailed discussion of these benefits on students in general, see the *amicus* brief filed by the American Educational Research Ass'n, et al.

[35] *See* Engberg, *supra* note 27, at 420; Meera E. Deo, *The Promise of* Grutter*: Diverse Interactions at the University of Michigan Law School*, 17 Mich. J. Race & L. 63, 94 (2011).

C. Campus and classroom diversity is important to reduce stereotyping and isolation of minorities.

"[D]iminishing the force of . . . stereotypes is both a crucial part of [an educational institution's] mission, and one that it cannot accomplish with only token numbers of minority students." *Grutter*, 539 U.S. at 333. Post-*Grutter* social science research confirms that Asian American students are disadvantaged at institutions in which they are isolated from other racial groups. "[S]everal studies have found that [Asian American and other minority students] typically hold negative perceptions of their campus racial climates and that these perceptions are associated with lower retention and greater alienation among minority students."[39]

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[36] *See* Gurin, *supra* note 26, at 360.

[37] Saenz, *supra* note 31, at 27.

[38] Deo, *supra* note 35, at 97.

Lack of student diversity can result in strained race relations and an unwelcoming environment for minority students, including Asian American students.[40] Racial harassment, bias-motivated incidents, and hate crimes targeted at minority students,[41] including Asian Americans,[42] are common throughout

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[39] Karen Kurotsuchi Inkelas, *Diversity's Missing Minority: Asian Pacific American Undergraduates' Attitudes Toward Affirmative Action*, 74 J. Higher Educ. 601, 628 (2003) (citations omitted).

[40] *See* Samuel D. Museus et al., *Racial Differences in the Effects of Campus Racial Climate on Degree Completion: A Structural Equation Model*, 32 Review of Higher Educ. 107, 127 (2008); *see also* Deo, *supra* note 35, at 79.

[41] *See, e.g.*, Oliver Libaw, *How Are Colleges Handling Hate Crimes?*, ABC News, May 11, 2012 (threatening letters sent to black students saying a black man's body would be found near campus); Liz Camuti, *CUPD Investigating Whether Reported Assault was Hate Crime*, Cornell Daily Sun, June 9, 2011 (Asian student was target of racial epithets and an assault by four men); Elaine Ejigu, *UC Hate Crimes: Where Are We Now?*, City on a Hill Press, Mar. 3, 2011 (UC San Diego students held a party that mocked Black History Month, leading to a series of racial harassment incidents, including the finding of a noose hanging from a building on campus); CNN Wire Staff, *California College's Student President Stabbed: Hate Crime Alleged*, CNN, Apr. 19, 2010 (student body president was called a number of racial slurs, then stabbed four times).

[42] *See, e.g.*, Associated Press, *Student Quits At U.C.L.A. Over Rant*, N.Y. Times, Mar. 19, 2011 (white student posted an Internet video of her tirade against "these hordes of Asian people that UCLA accepts into our school every single year");

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college campuses. Studies show that colleges and universities that reach the highest levels of diversity see fewer hate crimes.[43]

Asian Americans face a unique form of stereotyping: the "model minority" myth portrays Asian Americans as a uniformly successful minority group that has succeeded by dint of its own hard work, which can isolate and pit Asian Americans against other minority groups.[44] Although Petitioner's *amici* acknowledge this inaccurate perception of Asian Americans, *see* AALF Br. at 29-31, they nonetheless perpetuate the stereotype by lumping all Asian Americans together as purported victims of race-conscious programs. This ignores the aforementioned examples where Asian Americans have been specifically included in such programs, overlooks demographic realities that help explain the progress made by some subgroups, and obscures the continuing challenges faced

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Nat'l Asian Pac. Am. Legal Consortium, *2000 Audit of Violence Against Asian Pacific Americans: Responding to Hate Crimes: A Special Focus on College Campuses* 22, 27 (2000) (finding that 28% of the 260 Asian American respondents at UC Berkeley had been subjected to racial harassment and describing incidents of hate crimes on campuses, including when 10-15 members of a predominantly white fraternity at UC Davis physically assaulted members of a Pan-Asian American fraternity).

[43] Rebecca L. Stotzer & Emily Hossellman, *Hate Crimes on Campus: Racial/Ethnic Diversity and Campus Safety*, 27 J. Interpersonal Violence 644 (2012).

[44] *See, e.g.*, Ying, *supra* note 31, at 60-61; *Model Minority Myth Revisited: An Interdisciplinary Approach to Demystifying Asian American Educational Experiences* 2 (Guofang Li & Lihshing Wang eds., 2008); Lee, *supra* note 10, at 135.

by other subgroups.[45] Such reductive depictions of Asian Americans are precisely why admissions programs designed to increase diversity are necessary – to combat stereotyping of Asian Americans or other groups.[46]

Greater opportunity to interact with students of other races is associated with greater overall college satisfaction and preparedness for Asian American college students. Indeed, in a study of students at 28 selective colleges and universities, researchers studying the role of diversity in reducing cross-racial anxiety and increasing interpersonal connections found that Asian American students benefitted particularly from interracial interactions.[47] In another analysis, Asian American students who interacted more frequently with students of other races exhibited more positive attitudes toward African American and Latinos in their senior year of college, even when controlling for prior attitudes and experiences.[48] Conversely, African American and Latino students who interacted with students of different races also had more favorable attitudes toward Asian Americans as college seniors.[49]

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[45] In particular, the model minority myth obscures the needs of the Asian American and Pacific Islander ethnic groups – such as the Vietnamese, Laotian, Hmong, Tongan, and Native Hawaiian populations – who tend to be more economically disadvantaged and have less access to educational resources. For a fuller discussion, see AALDEF Br. at Part II (explaining, for example, that unique immigration histories of Asian American and Pacific Islander subgroups help explain socioeconomic differences among them).

[46] *See* Gurin, *supra* note 26, at 360 ("Diversity enables students to perceive differences both within groups and between groups and is the primary reason why significant numbers of students of various groups are needed in the classroom.").

[47] Nicholas A. Bowman, *The Conditional Effects of Interracial Interactions on College Student Outcomes*, J. of College Student Dev., *available at* http://www.bgsu.edu/downloads/edhd/file116272.pdf (forthcoming).

Undermining the efforts of universities to achieve critical masses of minority students will retrench racial stereotypes because of the detrimental effects of learning environments in which isolated minorities are viewed as tokens.[50] Asian Americans are harmed when they are viewed as tokens, and they are harmed when they view members of other groups as tokens, which is why Asian Americans benefit from the reduction of isolation from other racial groups. Indeed, in determining that race-conscious admissions were a necessary supplement to the Top Ten Percent Plan, UT Austin sought to address such harms, relying on student surveys reporting that "[m]inority students reported feeling isolated, and a majority of all students felt there was 'insufficient minority representation' in classrooms for 'the full benefits of diversity to occur.'" *See* Pet. for Writ of Cert., App. A at 22a.

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[48] Nicholas A. Bowman & Tiffany M. Griffin, *Secondary Transfer Effects of Interracial Contact: The Moderating Role of Social Status*, 18 Cultural Diversity & Ethnic Minority Psychol. 35, 38 (2012).

[49] *Id.*

[50] *See, e.g.*, Gurin, *supra* note 26, at 360 ("The worst consequence of the lack of diversity arises when a minority student is a token in a classroom.").

III. Contrary to the assertions of *amici* for Petitioner, Asian Americans benefit from UT Austin's holistic admissions program and suffer no harm.

Given how much Asian Americans stand to gain from holistic admissions programs, such as UT Austin's, designed to diversify their campuses and improve access to pathways to leadership, there is no basis to suggest that Asian Americans are harmed by those programs. Yet Petitioner's *amici* contend that "an admissions penalty on Asian Americans equivalent to hundreds of SAT points" is the latest chapter in a continuing legacy of discrimination against Asian Americans. AALF Br. at 2; *see also* 80-20 Br. at 6. Notably, *amici* repeatedly conflate the constitutionally permitted consideration of race in programs designed to include certain groups for a compelling purpose under *Grutter* with impermissible programs to exclude or otherwise take "negative action" against members of a racial group solely because of their race.[51] The suggestion that all considerations of race

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[51] "Affirmative action," by its nature, considers race as a "plus factor" to improve access to underrepresented minorities. Affirmative action should not be confused with "negative action," which has been described in social science literature as *unfavorable* treatment based on race, such as the application of negative

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are uniformly invidious has no basis in the Court's jurisprudence. *See Grutter,* 539 U.S. at 334 (rejecting zero sum arguments that using race as a "plus factor" is "the functional equivalent of a quota"); *Bakke*, 438 U.S. at 317-18 (Powell, J.). Indeed, some of Petitioner's *amici* re-argue claims implicitly rejected by the Court in *Grutter*. *Compare, e.g.*, Amicus Brief filed by AALF in *Grutter* at 8-20 (analogizing University of Michigan Law School's holistic admissions program to

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group stereotypes, to reduce admissions of underrepresented minorities. "In functional terms, negative action against Asian Americans is in force if a university denies admission to an Asian American who would have been admitted had that person been White." Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 3 (1996). And because whites outnumber African Americans and Latinos three-to-one in the applicant pool, "when an [Asian Pacific American] applicant . . . is denied admission because of negative action despite a strong transcript and say a 1510 or 1430 or 1360 on the SAT, it is exceedingly more likely that the student admitted instead was a White applicant with slightly lower academic credentials, not a Black or Latino applicant given an affirmative action plus factor." *See* William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans are Still Caught in the Crossfire*, 11 Mich. J. Race & L. 605, 615-16 (2006). Any suggestion that all race-conscious programs reward other minority groups by "penalizing" Asian Americans is based on a false equivalency that ignores this recognized distinction between "affirmative action" and "negative action" and, worse, incorrectly assumes that only "a finite number of minorities can be admitted" and that "spots for certain minorities must come at the expense of other minorities." Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 Mich. J. Race & L. 391, 421 (2008). For a more detailed discussion, see AALDEF Br. at Part I.C.1.

historical *exclusion* policies against Asian Americans) *with* AALF Br. in *Fisher* at 13-23 (similar).

These arguments represent an unapologetic attempt to roll back this Court's jurisprudence. *See, e.g.*, 80-20 Br. at 5. Yet the claim that UT Austin's race-conscious admissions program punishes Asian American students, *see, e.g.*, Pet. Br. at 7, assumes a causal relationship between an institution's use of race-conscious admission policies and a subsequent "test score gap" between students of different races in service of a purported quota. The data simply do not support this assumption.

A. Admissions data demonstrate that Asian American students were not harmed by UT Austin's holistic admissions program.

UT Austin uses SAT scores as one of several factors in its holistic admissions process. Other non-racial factors include grades, academic rank, demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances, such as socioeconomic status, family responsibilities, whether the applicant lives in a single-family home, and whether languages other than English are spoken at home. *See* Pet. for Writ of Cert., App. B at 133a-134a. Admission decisions are not made on the basis of test scores alone. The actual admissions UT Austin made in its holistic review process indicate no discrimination.

Contrary to the arguments of Petitioner's *amici*, there is no evidence in the record of discrimination against Asian Americans. No overall shortfall exists between Asian American applications on the one hand, and admissions or enrollment under the holistic admissions program on the other hand, that would support a claim of discrimination against Asian Americans. *See* Supplemental Joint Appendix ("SJA") at 43a, 156a. Between 1996 and 2008, Asian American students consistently comprised 14-15% of all freshman applicants at UT Austin. *See id.* Asian American students comprised 14-18% of all freshmen admits, with the highest percentages in that range occurring *after* UT Austin began considering race in 2005 and allegedly began "punishing" Asian Americans. *Id.* During that same period, Asian American students comprised 15-20% of all enrolled freshmen. *Id.* Because admission and enrollment of Asian Americans did not drop after the introduction of UT Austin's race-conscious admissions program in 2005, there is no support for the claim that holistic admissions criteria in particular "disproportionately impact Asian Americans." 80-20 Br. at 13.

Nor is there differential treatment of Asian American students or evidence of a quota. The fact that admission and enrollment rates of Asian Americans, like those of other groups, can fluctuate by several percentage points over time, even after the introduction of UT Austin's race-conscious program, contravenes any suggestion that the program operates as a rigid numerical quota. *See* SJA at 43a, 156a (demonstrating that percentages of applicants, admits, and enrollees for all groups fluctuate between 1996 and 2008); *see also Grutter*, 539 U.S. at 389-90 (Kennedy, J., dissenting (noting "narrow fluctuation band" of 0.3% over four years as suggestive of a quota)).

B. Test score differences do not show that Asian Americans are "penalized" by UT Austin's holistic admissions programs.

Furthermore, the record demonstrates that any "test score gap" existed well before UT Austin began considering race as one of several factors in 2005, and also has existed in Top Ten Percent admissions, which does not consider race as a factor in admission decisions. *See, e.g.*, SJA at 49a-53a (showing differential test score averages between Asian American, white, Latino, and African American students from 1996 through 2005 in both Top Ten Percent and Non-Top Ten Percent admissions); *see also* AALDEF Br. at Part I.C.2.[52] If holistic consideration of race required Asian Americans to earn higher test scores than other groups, one would expect this test score gap to be limited to the period after the implementation of the holistic admissions program and to be limited to admissions in which race was a consideration, the Non-Top Ten Percent admissions. No such limitations exist. *See id.*

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[52] *See also* William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for Fisher Case* 29-36 (2012), *available at* http://ssrn.com/abstract=2123653.

This record is consistent with nationwide data, which indicates that Asian American *applicants* as a group generally have higher average SAT scores than applicants from other racial groups.[53] Any "test score gap" begins with the starting applicant pool, before any admission decision is made. While the structural forces contributing to differences in the applicant pool are complex, *see* Section III.C *infra*, it cannot be said that "the root cause" of any disparities lies in any subsequent admissions process. *See* 80-20 Br. at 10.

C. Test scores, in any event, are incomplete and inaccurate predictors of academic success.

The focus of Petitioner's *amici* on a "test score gap" assumes that standardized test scores are race-neutral and the *sine qua non* of merit. Standardized tests like the SAT, however, are not designed to measure innate "mental capacity nor mastery of a specified curriculum."[54] Further, SAT scores provide

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[53] *See* The College Board, *2008 College-Bound Seniors State Profile Report – Texas*, Table 9 (2008), *available at* http:// professionals.collegeboard.com/ profdownload/Texas_CBS_08.pdf.

[54] *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 Mich. J. Race & L. 243, 253 (1999) (citing Expert Report of

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at best an incomplete measure of academic achievement and potential. It is therefore appropriate for UT Austin to utilize a variety of other admissions criteria, of which race is only one of many, in addition to SAT scores.

Studies show that scores on the SAT have low predictive powers beyond first-year college grades.[55] Some studies have found that SAT test scores' predictive value is limited even for first-year college grades. One study concluded that SAT scores explain less than 3% of the variance in first-year grades, once students' social backgrounds are taken into account.[56] Were test scores an accurate measure of merit, they would correspond with other measures of achievement. However, the correlation between SAT test scores and high-school grades, both at UT and nationwide, is low.[57] Students

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Claude M. Steele, *Grutter v. Bollinger*, No. 97CV75928, 137 F. Supp. 2d 821 (E.D. Mich. 2001)).

[55] *See* Sigal Alon & Marta Tienda, *Diversity, Opportunity and the Shifting Meritocracy in Higher Education*, 72 Am. Soc. Rev. 487, 506 (2007); Marta Tienda & Sunny Xinchun Niu, *Flagships, Feeders, and the Texas Top 10% Law: A Test of the "Brain Drain" Hypothesis*, 77 J. Higher Educ. 712, 732 (2006).

[56] Jessie M. Rothstein, *College Performance Predictions and the SAT*, 121 J. Econometrics 297 (2004); *see also* Tienda, *supra* note 55; Alon, *supra* note 55.

[57] *See* Mark C. Long & Marta Tienda, *Changes in Texas Universities' Applicant Pools After the* Hopwood *Decision*, 39 Soc. Sci. Research 48, 55 Figure 1 (2010); Alon, *supra* note 55, at 490, 497 Table 3.

with high test scores but low class rank tend to underperform.[58]

Because test scores can be increased significantly by participation in intensive and expensive test-preparation courses,[59] they are socioeconomically skewed in favor of wealthier students who have access to test preparation courses.[60] Social science research demonstrates that enduring gaps in scores on standardized tests, such as the SAT, reflect a combination of complex structural factors that break down along racial (and sometimes ethnic) lines, a fact that is even more apparent in the limited number of studies of standardized test performance providing disaggregated data on the diverse communities under the umbrella category of Asian American and Pacific Islander.[61] African American, Latino, Native American,

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[58] Alon, *supra* note 55. In fact, the impact of a one standard deviation change in high school GPA on the probability of college degree attainment and college GPA was 1.5 to 3 times as large as a one standard deviation change in test scores. *See* William T. Dickens & Thomas J. Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye*, 38 Indus. Relations 331, 340 n.11 (1999).

[59] Jay Rosner, *Disparate Outcomes by Design: University Admissions Tests*, 12 Berkeley La Raza L.J. 377, 383-84 (2001).

[60] *See id.*; Alon, *supra* note 55, at 490-91; *see also, e.g.*, The Princeton Review, *SAT Test Preparation* (2012), *available at* http://www.princetonreview.com/college/sat-test-preparation.aspx (charging from $1,000 to $2,000 for an intensive SAT test preparation course and $600 and up for a non-intensive course).

[61] *See, e.g.*, Valerie Ooka Pang et al., *Asian American and Pacific Islander Students: Equity and the Achievement Gap*, 40

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and certain Asian American ethnic groups are overrepresented among low-income students, and are significantly more likely to attend resource-poor schools and less likely to hold a high-school diploma or graduate from college.[62] They are also more likely to be unfairly assigned to lower academic tracks throughout their elementary and high-school years, to be taught by less-skilled or less-experienced teachers, and to attend schools in distressed neighborhoods or in suburban areas where they are socially isolated, all factors which contribute to poor test-readiness and lower performance on standardized tests.[63] In addition, studies have consistently demonstrated that the standardized test performance of highly motivated and qualified minority students is artificially depressed because of test-taking pressures related to internalized fears based on false and stereotyped

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Educ. Researcher 378, 382 Table 2 (2011) (documenting that seventh graders from the following Asian American and Pacific Islander ethnic groups scored lower than white students in *both* reading and math on California's CAT-6 test: Lao, Cambodian, Native Hawaiian, Guamanian, Samoan, Other Pacific Islander, and Filipino).

[62] *See* Barbara Schneider et al., *Barriers to Educational Opportunities for Hispanics in the United States*, in *Hispanics and the Future of America* 179 (Marta Tienda & Faith Mitchell eds., 2006); Robert T. Teranishi, *Asians in the Ivory Tower: Dilemmas of Racial Inequality in American Higher Education* 82-83 (2010).

[63] *See Reports Submitted on Behalf of Univ. of Mich.*, *supra* note 54, at 247-48.

perceptions that they are less intellectually capable, an influence known as "stereotype threat."[64]

Such structural and sociological barriers, while they may result in differences in test scores between racial groups, do not reflect differences in innate abilities or intelligence between racial groups.[65] Yet those artificial differences are perpetuated over time, because "test-norming" procedures are designed to produce the *same* statistical outcomes as prior results.[66]

Consideration of criteria in addition to SAT scores may be necessary in an admissions process to ensure a "fair appraisal of each individual's academic promise in the light of some cultural bias or testing procedures." *Bakke*, 438 U.S. at 306 n.43 (Powell, J.). Indeed, educational institutions have a compelling interest in identifying qualified minority candidates who are "likely to have experiences of particular importance" to their academic missions but who may be "less likely to be admitted in meaningful numbers on criteria that ignore those experiences." *Grutter*, 539 U.S. at 338. Recognizing that test scores are an imperfect measure that often results in generally lower scores correlated to race, a university may appropriately consider race in a holistic review to conduct a fair appraisal of each individual and view these test scores in context. Social science research and this Court's own jurisprudence, therefore, support UT Austin's exercise of its First Amendment academic freedom and "complex educational judgments" to rely on admissions criteria in addition to the SAT in its individualized review process for students not admitted through the Top Ten Percent Plan.[67] *See Grutter*, 539 U.S. at 328-29.

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[64] For a general discussion of "stereotype threat," see Claude M. Steele, *Whistling Vivaldi: And Other Clues How Stereotypes Affect Us* (2010).

[65] *See, e.g.*, William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 Cal. L. Rev. 1055, 1076-79 (2001); Tran, *supra* note 6, at 109.

[66] *See* Maria Veronica Santelices & Mark Wilson, *Unfair Treatment?: The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 Harv. Educ. Rev. 106 (2010); Martin Shapiro, *A Psychometric Model for Preserving Discrimination*, 12 Berkeley La Raza L.J. 387 (2001) (Expert Report, *Grutter v. Bollinger*, No. 97CV75928, 137 F. Supp. 2d 821 (E.D. Mich. 2001)).

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[67] As recognized by the Fifth Circuit below, students admitted through UT Austin's holistic admissions program, regardless of race, have tended to have "even higher SAT scores than those granted automatic admission under the Top Ten Percent Law." Pet. for Writ of Cert., App. A at 59a. Given that SAT scores may receive even more emphasis under the highly competitive holistic admissions program, any biases associated with SAT scores will be more pronounced. Thus, it is important that the holistic admissions program be permitted to situate those SAT scores in the proper context.

CONCLUSION

Amici submitting this brief have a long history of representing the interests of a wide swath of the Asian American community on a variety of issues. That breadth of experience leads to the inescapable conclusion that, despite the progress made by some Asian Americans, there continue to be challenges to equal access and opportunity for all. *Amici* stand by the promise of integrated and equal public education set out in *Brown v. Board of Education*. Race-conscious programs have played an important role in desegregating and diversifying colleges and universities, and *amici* support race-conscious programs for Asian Americans and communities of color, even when Asian Americans are not specifically included.

Therefore, *amici* affirm the importance of race-conscious policies, such as UT Austin's holistic admissions program, that are designed to open doors to underrepresented groups and improve the diversity and quality of experience for all who pass through those doors. And *amici* reject any attempt to use Asian Americans as a wedge group to curtail opportunities for racial minorities, given that all such groups share a history of discrimination and a legacy of working together to overcome those barriers to equality. For the foregoing reasons, *amici* support a renewal of the Court's commitment in *Grutter v.*

Bollinger and an affirmance of the judgment of the Fifth Circuit in favor of Respondents.

Respectfully submitted,

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APPENDIX

List of *Amici Curiae*

American Citizens for Justice, Inc./Asian American Center for Justice ("ACJ") is devoted to civil rights education and advocacy on behalf of Asian American communities and all people of color in Michigan. ACJ believes that race or ethnicity can be used as a factor in admissions that remediates historical discrimination, but condemns the use of race or ethnicity for any institution's negative action that disadvantages Asian Americans and Pacific Islanders.

Asian American Bar Association of the Greater Bay Area ("AABA"). From its inception in 1976, AABA, one of the largest minority bar associations in California, has been actively involved in civil rights issues regarding minority communities, diversity, and equal protection. AABA filed an amicus brief in the *Bakke* affirmative action case in the United States Supreme Court in 1977.

Asian American Business Roundtable ("AABR") has fought all forms of discrimination, overt or disguised, whether in employment, education, and other areas of pursuit where race, gender, religion or national origin plays a role.

Asian-American Resource Center ("AARC") is a non-profit community-based organization and direct service agency in San Bernardino and Riverside Counties, California, that provides services and programs to improve overall health and educational well-being by providing informational and developmental programs to Asian-Americans and other ethnic groups who are low-income, isolated, vulnerable, and underserved.

Asian Law Alliance ("ALA"), founded in 1977, is a non-profit public interest legal organization with the mission of providing equal access to the justice system to the Asian/Pacific Islander and low income communities in Santa Clara County, California. ALA has provided community education and legal services on affirmative action and discrimination issues for over 35 years.

Asian Pacific American Bar Association of Los Angeles County ("APABA") is an organization comprised of attorneys, judges, and law students that serves as a voice for issues of concern to the Asian Pacific American community and other underrepresented groups in the legal profession. APABA provides legal education and assistance to underserved communities and sponsors programs that promote professional development, community education, and mentorship.

Asian Pacific American Labor Alliance, AFL-CIO ("APALA"), founded in 1992 with the strong support of the AFL-CIO, is the first national organization of Asian Pacific American (APA) union members. With over 600,000 APA union members, APALA has 11 chapters and pre-chapters and a national office in Washington, D.C. APALA is committed to organizing the unorganized, mobilizing the Asian

American and Pacific Islander community for political action, advocating for workers' rights, civil rights, and immigrant rights, and building alliances between labor and community.

Asian Pacific American Labor Alliance ("APALA") – Los Angeles Chapter works with student and community groups in support of the Dream Act and related outreach initiatives, through media and coalition efforts to educate and mobilize for civic participation to empower API workers and communities.

Asian Pacific American Legal Resource Center ("APALRC"). APALRC's mission is to advocate for equal justice for Asian immigrants with limited English proficiency in Metro-DC through providing linguistically accessible and culturally appropriate legal services that enable these individuals to defend and protect their rights and seek full participation in American society.

Asian Pacific American Women Lawyers Alliance ("APAWLA") is a membership organization comprised of attorneys, judges, and law students throughout California. Since its inception in 1993, APAWLA has been devoted to the inclusion, advancement, and empowerment of Asian Pacific American women by advocating, mentoring, and developing leadership within the legal profession and the larger community.

Asian Pacific Americans for Progress ("APAP") is the national network of progressive Asian Americans, Pacific Islanders, and allies. Our programs include town halls, activist trainings, workshops, documentary films, and Dem Sums.

Asian & Pacific Islander American Health Forum ("APIAHF") has influenced policy, mobilized communities, and strengthened programs and organizations to improve the health of Asian Americans, Native Hawaiians, and Pacific Islanders, since 1986. APIAHF's national policy work focuses on expanding access to health care, improving the quality of health care through cultural competency and language access, increasing research, and improving the collection, reporting, and analysis of data.

Asian Pacific Islander Equality – Los Angeles ("API Equality – LA") is a coalition of organizations and individuals who are committed to working in the Asian/Pacific Islander community in the greater Los Angeles area for equal marriage rights and the recognition and fair treatment of LGBT families through community education and advocacy. API Equality-LA advocates for racial justice and supports policies that promote a diverse community.

Asian Pacific Islander Legal Outreach ("API Legal Outreach") is a community-based, social justice organization serving the Asian and Pacific Islander (API) communities of the Greater Bay Area. Since its founding in 1975, API Legal Outreach has advocated for the rights of API youth and immigrants and their equal access to education. API Legal Outreach's work focuses on providing direct legal representation, community outreach and education, and working with the community to create comprehensive, holistic services.

Asian Pacific Policy & Planning Council ("A3PCON") is an association of forty nonprofit, community-based organizations in Los Angeles County, established in 1976. A3PCON serves as a voice, convener, and clearinghouse for Asian American and Pacific Islander communities, with an emphasis on the needs and rights of low income, immigrants, refugees and other disadvantaged populations, including the multiple barriers to accessing higher education faced by Pacific Islanders.

Asian Services in Action, Inc. ("ASIA"). Founded in 1995, the mission of ASIA is to empower and advocate for Asian Americans and Pacific Islanders, and to provide AAPIs access to quality, linguistically and culturally appropriate information and services. Stemming from the Midwest AAPI experience, ASIA believes Asian Americans continue to face barriers, discrimination, and other inequities.

Association of Asian Pacific Community Health Organizations ("AAPCHO") is a national association of community health organizations serving medically underserved Asian Americans, Native Hawaiians, and other Pacific Islanders. AAPCHO is dedicated to promoting advocacy, collaboration, leadership and access to improve the health status of these groups. As a unified voice of its membership, AAPCHO shares its collective knowledge and experiences with policy makers at the national, state, and local levels.

Austin Asian American Bar Association ("AAABA") is the only attorney bar organization devoted to and serving the APA community in the Austin, Texas area. The mission of the AAABA is to support and promote the social, professional, and legal interests of Asian American attorneys in Central Texas. AAABA seeks to accomplish its mission through regular forums, meetings, community service events, seminars, professional development, and social activities with Central Texas attorneys and other bar groups throughout Texas.

The Cambodian Family is a community based nonprofit organization that was founded in 1980 to provide refugee and immigrant families the opportunities to develop their knowledge, skills, and desire for creating health and well-being in their lives. The Cambodian Family promotes equal access to quality health care, civic engagement through leadership training, citizenship workshops and naturalization services, and voter registration and participation.

Council of Korean Americans ("CKA") is a national, nonpartisan, nonprofit organization of Korean American leaders. Its mission is to assert a strong, clear voice on issues of critical importance to Korean Americans and to support their full participation in all aspects of American life. CKA believes that race-conscious admissions policies are critical to achieving a future in which all Americans, regardless of their origin, are well-equipped to serve their country, lead their communities, and work proactively to create a better world.

East Coast Asian American Student Union ("ECAASU") is a non-profit organization that serves to inspire, educate, and empower those interested in Asian American issues. ECAASU was originally founded after the *Bakke* decision in 1978 by the Supreme Court, as Asian American students recognized the need for an advocacy network capable of fostering mutual support and solidarity. ECAASU works to increase social equality for all minorities and to ensure equal opportunity for these communities.

Empowering Pacific Islander Communities ("EPIC"), a non-profit organization based in Los Angeles, California, strives for the empowerment of Pacific Islander communities. The persistence of institutional discrimination in higher education presents a significant barrier to Native Hawaiians and Pacific Islanders. EPIC's mission is to mobilize Pacific Islander communities to foster culturally relevant opportunities for achieving social justice through advocacy, research and development.

Filipino Advocates for Justice ("FAJ") since 1973 has sought to build a strong and empowered Filipino community by organizing constituents, developing leaders, providing services, and advocating for policies that promote social and economic justice and equity. FAJ's vision is for a Filipino community with the power to advance social and economic justice and to realize democratic and human rights for everyone.

Filipino American Service Group, Inc. ("FASGI") is a non-profit, community-based human service agency founded in 1981 and located in the heart of Filipinotown, Los Angeles, California. FASGI is guided by its value statement of: Service – providing community-based structure that is responsive to constituents; Sensitivity – ensuring our services are consistent with community needs; and Empowerment – bringing the influence of the community to positively impact quality of life. FASGI advocates for the needs of the low-income Filipino American immigrants and others.

Filipino Bar Association of Northern California ("FBANC"). FBANC's mission is to guard against injustices targeting the Filipino community by supporting, educating, and empowering its members, and providing free legal clinics, scholarships, and other events of interest to the community at large.

Japanese American Bar Association ("JABA") was founded over 30 years ago in Los Angeles, California. Over the years, JABA has provided a special forum for members of the legal profession with interests and ties to the Japanese American community to discuss issues, network, and serve their community.

Kizuna's mission is to build a vibrant Nikkei community by creating an empowering culture and environment, igniting the passion of young Japanese Americans, and building collective identity through multi-generational and multi-ethnic collaborations. Kizuna, headquartered in Los Angeles, California, is keenly aware that the Japanese American and Asian American community has greatly benefited from race-conscious university admissions programs and that many Native Hawaiian, Pacific Islander, and Southeast Asian students continue to face barriers and unequal access to higher education.

Korean American Bar Association of Southern California ("KABA"), founded in 1981, is an association of attorneys and law students that serves the Korean American community and promotes the interests of Korean-American attorneys throughout Southern California. KABA assists the Korean-American community in gaining access to the legal system through such services as monthly pro bono legal clinics, publicizes issues important to the Korean-American community at large, promotes the advancement of Korean attorneys in the judiciary and the political arena, assists law students through the funding of scholarships and career panels, and promotes networking among Korean-American attorneys and law students.

Korean American Coalition – Los Angeles ("KAC") is a nonprofit, non-partisan organization established in 1983 to promote the civil and civic rights interests of Korean Americans, increasing civic and legislative awareness and the general social consciousness of the Korean American community.

KAC endeavors to achieve these goals through education, community organizing, leadership development, and coalition-building with diverse communities.

Korean Resource Center ("KRC"), founded in 1983 in Los Angeles, California, empowers the Korean American, low-income, immigrant and people of color communities through social services, education, culture, advocacy, and grassroots organizing. KRC is guided by the principles Live Rightly, Know Our Roots, Empower Ourselves, and Live in Harmony. KRC has organized and successfully advocated on behalf of immigrant students and their families to promote access to education.

Koreatown Immigrant Workers Alliance ("KIWA") is a multiracial worker center, founded in 1992, dedicated to empowering low-wage workers and their families to collectively shape the conditions of their jobs, homes, neighborhoods, and cities. KIWA combines organizing, activism, education, services, and policy advocacy, and engages thousands of individuals and families in Koreatown and throughout Los Angeles County. KIWA's interest in this case is rooted in its two decades of work to overcome racial and other forms of bias and structural inequity.

Koreatown Youth and Community Center ("KYCC"). Founded in 1975, KYCC's mission is to serve the evolving needs of the Korean American population in the greater Los Angeles area as well as the multi-ethnic Koreatown community. KYCC's programs and services are directed toward recently immigrated, economically disadvantaged youth and families, and promote community socioeconomic empowerment.

K.W. Lee Center for Leadership was founded in 2003, and is a nonprofit organization dedicated to providing youth with the tools and opportunities necessary to become future leaders. Based in the Koreatown area of Los Angeles, the Center offers youth leadership training and educational programs that encourage community organizing. The mission of the Center is to teach and train youth to take proactive steps towards improving and enriching the quality of life in their community. The Center advocates for equal access to educational opportunities for all youth, especially the Asian Pacific American community.

Laotian American National Alliance, Inc. ("LANA"), a 501(c)(3), is the oldest and only national advocacy organization in the United States dedicated to advancing the social and economic well-being of Laotian Americans in the United States through civic participation and public policy advocacy. LANA represents the interests of Southeast Asian American students and stands with the greater AAPI community to support affirmative action in higher education to ensure access and equal opportunity for all students of color.

Leadership Education for Asian Pacifics, Inc. ("LEAP") is a national organization founded in 1982 with a mission to achieve full participation and equality for Asians and Pacific Islanders through leadership, empowerment, and policy. With original programs in leadership training, public policy research, and community education, LEAP advocates for diversity and inclusion in all sectors and segments of society.

National Asian Pacific American Law Student Association ("NAPALSA") represents the interests of Asian Pacific American law students and provides advocacy, support, and career development opportunities for its members throughout the United States. Established in 1981, NAPALSA links affiliated Asian Pacific American law student organizations and law students across the country, and promotes their interests. NAPALSA also serves as an advocate and representative for all Asian Pacific Americans.

National Asian Pacific American Women's Forum ("NAPAWF") is a grassroots organization dedicated to forging a progressive movement for social and economic justice and the political empowerment of Asian and Pacific American women and girls. NAPAWF believes that affirmative action programs are necessary to address the myriad educational and economic obstacles facing APA women and girls.

National Coalition for Asian Pacific American Community Development ("National CAPACD") is an advocacy organization dedicated to addressing the community development needs of lower income Asian Americans, Pacific Islanders, Native Hawaiians, refugees, and immigrants. National CAPACD implements programs that address the disproportionate impact of the foreclosure crisis and economic downturn on low-income families and communities of color.

National Council of Asian Pacific Islander Physicians ("NCAPIP") is a national policy organization that represents physicians committed to the advancement of the health and well-being of Asian American, Native Hawaiian, and Pacific Islander ("AANHPI") patients. Within AANHPI communities many subgroups continue to be under-represented and NCAPIP aims to expand efforts to develop the health professions pipeline for these subgroups.

National Federation of Filipino American Associations ("NaFFAA") is a national, nonprofit, nonpartisan civil rights organization dedicated to promoting the interests and betterment of Filipinos and Filipino Americans in the United States. Founded in 1997, NaFFAA represents over 300 Filipino American community organizations and institutions. NaFFAA works in coalition with other civil rights organizations to ensure that Asian Pacific Americans enjoy equal opportunities in education, employment, and industry.

National Queer Asian Pacific Islander Alliance ("NQAPIA") is a federation of Asian American, South Asian, Southeast Asian, and Pacific Islander lesbian, gay, bisexual, and transgender organizations around the country. The communities it serves know the sting of discrimination and exclusion from public institutions based on both racism and homophobia, and we strongly support measures that increase access for marginalized communities.

Nikkei For Civil Rights & Redress ("NCRR") is an all-volunteer, grassroots, community organization based in Los Angeles and formed in 1980 to seek individual monetary reparations for Japanese Americans who were forcibly removed from the West Coast and incarcerated in America's concentration camps during World War II. Dedicated to the principles of educating the broadest community about the issues surrounding this unconstitutional incarceration, NCRR supports other ethnic and religious communities that have been similarly targeted. NCRR strongly supports maintaining racially diverse, multicultural college campuses that reflect the diversity of the people that make up this country.

OCA, founded as Organization of Chinese Americans in 1973, is a national pan-Asian social justice organization dedicated to advancing the political, social, and economic well-being of all Asian Pacific Americans. OCA supports race-conscious programs in higher education as well as in the work place. Moreover, diversity – a critical societal and institutional value – promotes our individual as well as collective competitiveness with the rest of the world, within and beyond the bounds of academia.

Orange County Asian and Pacific Islander Community Alliance, Inc. ("OCAPICA") was established in 1997 with the mission to build a healthier and stronger community by enhancing the well-being of Asians and Pacific Islanders through inclusive partnerships in the areas of service, education, advocacy, organizing, and research. OCAPICA is a social justice organization focused upon eliminating disparities and improving equity for underserved communities.

Philippine American Bar Association ("PABA") was formed to address legal issues confronting the Filipino American community as well as to meet the professional concerns of Filipino American lawyers in Southern California. PABA sponsors community legal clinics focusing on various areas of the law and provides pro bono legal services. In addition, PABA provides continuing legal education seminars and professional development opportunities for its members and assists Filipino American law students through its scholarship fund and mentorship program.

Pilipino Workers' Center ("PWC") was formed in 1997, to promote safe working conditions, living wages, decent living conditions, access to quality healthcare and basic human dignity. PWC provides services and resources that help meet the immediate needs of Pilipino workers and their families while organizing for long-term change. PWC advocates in the areas of employment, immigration, healthcare, housing and youth empowerment.

Search to Involve Pilipino Americans ("SIPA") provides health and human services as well as community economic development and arts/cultural programs to the diverse, multi-ethnic youth and families residing in the Filipinotown area as well as Filipino Americans all over Los Angeles County. SIPA advocates on behalf of Filipino Americans and those impacted by policies and legislation that negatively affect recent immigrants and all diverse communities.

Self-Help for the Elderly, established in 1966, is committed to affirmative action, diversity and anti-discrimination programs both in education and other sectors – including employment and public contracting – as a means to ensure a more just and equitable society.

South Asian Americans Leading Together ("SAALT") is a national non-profit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. SAALT is committed to addressing discrimination and disparities that have affected, both historically and currently, the South Asian community and other communities of color.

South Asian Bar Association of Northern California ("SABA-NC"), founded in 1993, provides a voice to South Asian lawyers and law students and seeks to ensure that they are provided with an avenue to develop professionally. SABA-NC also seeks to protect the rights of South Asians. SABA-NC's interest is to ensure that our nation's schools have a diverse student body which results in a diverse workforce benefiting all members of our communities.

South Asian Bar Association of Southern California ("SABA-SC") is a group of over 600 attorneys in Southern California dedicated to the advancement and development of South Asian law students and attorneys and the South Asian community at large. SABA-SC strives to educate its community about relevant legal issues, expand and enhance business and professional opportunities for South Asians, increase the participation of South Asians in civic affairs and government, facilitate the exchange of ideas and information, and foster goodwill, fellowship and unity among its community.

South Asian Network ("SAN") is a grassroots, community based organization dedicated to advancing the health, empowerment and solidarity of persons of South Asian origin in Southern California. SAN's overall goal is to inform and empower South Asian communities by acting as an agent of change in eliminating biases, discrimination and injustices targeted against persons of South Asian origin and by providing linkages amongst communities through shared experiences. SAN strongly supports open pathways to higher education for undocumented youth because access to education is a human right that should be accorded to all individuals, regardless of immigration status.

Southeast Asian Community Alliance ("SEACA"), created in 2002 in response to the lack of resources for Southeast Asians in Los Angeles, works with multi-ethnic teens in Echo Park, Chinatown, and Lincoln Heights. Our mission is to build an empowered Southeast Asian community through leadership development, education, advocacy, and community organizing.

Taiwanese American Citizens League ("TACL"). Founded in 1985, Taiwanese American Citizens League is a 501(c)(3) non-profit, non-partisan organization run completely by volunteers. TACL's mission is to enhance the quality of life for Taiwanese Americans. Our variety of programs for youth and young professionals are devoted to enhancing leadership, identity, networking, and citizenship among Taiwanese Americans. We also strive to build partnerships with the greater Asian Pacific Islander American communities.

Thai Community Development Center was founded in 1994 to address the multifaceted needs of Thai and other disadvantaged individuals. Its mission is to advance the social and economic well-being of low and moderate income individuals in the greater Los Angeles area through advocacy for human rights, affordable housing, access to healthcare, promotion of small businesses, neighborhood empowerment, and social enterprise.

TOFA (To'utupu'o e 'Otu Felenite Association), Inc. is a non-profit organization founded in 2000 whose mission is to preserve and enhance the overall health and wellness of the Pacific Islander Community in the Greater Sacramento, California area by providing resources that support and promote higher education, community leadership opportunities, civil rights awareness, and cultural arts.

UC Berkeley, Asian American Studies Program of the Ethnic Studies Department. Founded in 1969, the members of the Asian American Studies program and the Ethnic Studies Department at University of California, Berkeley have been dedicated to social justice and racial equality, particularly in education.

UC Berkeley School of Law, Asian American Law Journal ("AALJ") is one of two law journals in the United States focusing on Asian American communities. AALJ sets a scholarly foundation for exploring the unique legal concerns of Asian Pacific Americans and seeks to open the dialogue between those who study law and those who are affected by it. In pursuit of these goals, AALJ strives to provide a forum for the many voices and opinions of the Asian Pacific American community – particularly those who, because of gender, class, immigration status or sexual orientation, may have less of a platform to do so.

UC Berkeley School of Law, Asian Pacific American Law Student Association ("APALSA"), established in the 1970s, is a political, community service, academic, professional and social law student organization dedicated to serving the Asian and

Pacific Islander American community at Berkeley Law and the APA community at large. APALSA's goal is to promote a greater awareness of the diverse culture, rich history, and current struggle of Asian Pacific Americans.

UC Berkeley School of Law, Pilipino Association of Law Students' purpose is to unite Pilipino students at Berkeley Law so that we can support one another as we go through these challenging and exciting years. We also hope to help each other inform our experience with an understanding and/or remembering of our heritage.

UC Hastings College of the Law, Asian/Pacific American Law Students Association ("APALSA") informs members as well as the general Hastings community about the legal needs and issues confronting Asian/Pacific Americans and other historically disadvantaged communities.

UC Irvine, Asian Pacific Student Association ("APSA") is a progressive network of constituent organizations that empower the Asian American and Pacific Islander community at the University of California, Irvine. Through a commitment to education, advocacy, community outreach, and active political participation, APSA promotes diversity throughout the community at large.

UCLA, Asian American Studies Center ("UCLA AASC"), founded in 1969, is a leading national research center on Asian Americans and Pacific Islanders. Its mission includes multidisciplinary interpretation and analysis of AAPI historical and contemporary issues. The UCLA AASC has produced over 100 articles, reports, and books examining AAPI topics such as admissions, educational attainment, and access to higher education.

UCLA, Samahang Pilipino. Samahang Pilipino is a progressive student organization that seeks to meet the needs of the Pilipin@ community on UCLA's campus and in the Los Angeles community. As an organization, we believe that the needs of the Pilipin@ community are met with affirmative action programs and the inclusion of race in admissions and in the learning environment on college campus.

UCLA, Vietnamese Student Union ("VSU"), established in 1977, is the official voice of all Vietnamese students at UCLA through its advocacy for the cultural, educational, political, and social welfare of the Vietnamese community at large. With this foundation, VSU seeks to promote cultural awareness in order to bridge the gap between generations that have been influenced by their Southeast Asian experiences.

UCLA School of Law, Asian Pacific Islander Law Students Association ("APILSA") is a Pan-Asian and multi-ethnic student-run organization at the UCLA School of Law dedicated to promoting the study and practice of law by Asian and Pacific Islander students in order to address the legal and political needs of these communities. APILSA was founded in 1969 to advance the need for greater Asian and Pacific Islander representation in the legal system.

UCLA School of Law, South Asian Law Students Association ("SALSA") represents the South Asian law students on the campus of the University of California, Los Angeles. In solidarity with other minority communities, we support affirmative action at University of Texas to promote diversity in higher education.

UC San Diego, Kaibigang Pilipino ("KP"). KP is a non-profit student organization at the University of California at San Diego that seeks to educate the UCSD and San Diego communities about the many aspects of Pilipin@ culture, as well as to preserve and promote positive images of Pilipin@s. As a part of the Student Affirmative Action Committee ("SAAC") at UC San Diego, KP works with our allies to fight for education equality and other issues concerning underrepresented communities.

United Cambodian Community ("UCC") is a nonprofit organization founded in 1977 to serve Cambodian Americans and other residents of the greater Long Beach area. UCC's mission is to assist the refugee and immigrant population in making adjustments and to help bridge the gap between cultures. UCC has led a coalition of Cambodian American groups to work with Cambodian residents to address public policy issues affecting the health of the community.

University of Illinois at Chicago, Asian American Studies Program ("ASAM Program at UIC") promotes engaged scholarship and research that advances social justice and equity for Asian American and other minority communities. Located on one of the most diverse campuses in the nation, ASAM Program at UIC is committed to providing access to higher education for all students, especially those who are the least privileged and have historically been excluded.

University of Southern California, Asian Pacific American Law Students Association ("APALSA"). APALSA is dedicated to promoting the interests of Asian Pacific Americans at the University of Southern California Law School and in the greater legal community. While primarily representing student interests on campus, APALSA advocates and supports greater equality and opportunity in the legal community, particularly equality in education and employment for Asian Americans.

University of Southern California, Asian Pacific American Student Services ("APASS"). APASS has a two-fold mission: to facilitate Asian Pacific American participation, dialogue, community-building, and empowerment, while at the same time, to serve as a source of cross-cultural educational programming for the entire University of Southern California campus. APASS programs include orientation, leadership development, service-learning and community immersion, career and peer mentoring, cross-cultural and educational programs, academic collaborations, and individual and collective advocacy.

Yale University, Asian American Cultural Center ("AACC") hosts programs that promote Asian American culture and explore the social and political experiences of Asian Americans and Asians living in the U.S. The AACC encourages the student community to explore issues of identity, leadership and community development.

Yale University, Asian American Students Alliance ("AASA"). Founded in 1969, AASA was the first Asian American undergraduate student organization at Yale. It serves to act as the political voice for the Asian Americans on campus and the greater community and facilitate pan-Asian American unity.

AMICUS
CURIAE
BRIEF

No. 11-345

In The
Supreme Court of the United States

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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

◆

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QUESTION PRESENTED

Whether *Grutter v. Bollinger*, 539 U.S. 306 (2003), so radically departed from this Court's longstanding equal protection jurisprudence that it should be overruled.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

◆

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF has litigated for the equality of all persons, regardless of race, and for the application of strict scrutiny to all governmental racial classifications. For example, MSLF attorneys represented the plaintiffs in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); and *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). MSLF has also actively participated as amicus curiae in a number of similar cases challenging racial classifications, most recently in *Ricci v. Stefano*, 557 U.S. 557 (2009).

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[1] The parties have consented to the filing of this amicus curiae brief by filing blanket consents with this Court. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

MSLF can bring a unique perspective to bear in this case by examining the nature and requirements of strict scrutiny to demonstrate that *Grutter*, on which the Fifth Circuit relied, abandoned the concept of strict scrutiny developed by the longstanding precedent of this Court and should be overruled. Therefore, the Fifth Circuit's decision upholding the racially discriminatory admissions policies of the University of Texas should be reversed.

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STATEMENT OF THE CASE

MSLF adopts Petitioner's thorough Statement of the Case.

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SUMMARY OF ARGUMENT

This case involves the level of judicial scrutiny a court should apply when reviewing a university's racially discriminatory admissions policy, an issue of extraordinary and fundamental importance to the Nation: "Racial classifications of any sort pose the risk of lasting harm to our society," which "may balkanize us into competing racial factions [and] carry us further from the goal of a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Here, the Fifth Circuit, relying on *Grutter*, approved the racially discriminatory admissions practices of the University of Texas at Austin ("UT" or the "University"). But *Grutter* itself abandoned this Court's longstanding equal protection precedent, and held that achieving the supposed educational benefits that flow from diversity in a law school constitutes a compelling interest, permitting a law school to racially discriminate in its admissions policies. The law school was permitted to do so until it had achieved a so-called "critical mass" of preferred minority students, which the law school represented was necessary to achieve diversity.

In so holding, this Court abandoned strict scrutiny of the racially discriminatory admissions policy of the law school and ruled that the law school's "good faith" must be presumed when it decided that achieving diversity was a compelling interest and that a "critical mass" of minority students was necessary to achieve that diversity. *Grutter* also deferred to the law school's judgment that such a "critical mass" could be achieved only through racially discriminatory admissions policies.

But a "critical mass," like societal discrimination, is such an amorphous and indefinable concept that no narrowly tailored remedy to achieve it can be identified. In other words, the *Grutter* majority simply deferred to the decision of the discriminator to justify its discrimination. In doing so, the *Grutter* majority turned equal protection principles on their head and adopted the equivalent of rational basis review, or something even less demanding, thus giving universities carte blanche to engage in racially discriminatory admission decisions so long as they, in their sole, presumptively "good faith" judgment, determined necessary. The holding of the *Grutter* majority was tantamount to disclaiming any judicial role in reviewing racially discriminatory admissions policies of law schools.

MSLF agrees with Petitioner and its arguments that the Fifth Circuit's decision goes beyond the holding of the *Grutter* majority and that this Court could reverse the Fifth Circuit for that reason, without *necessarily* overruling *Grutter*. But the Fifth Circuit relied on *Grutter*, which itself abandoned all prior equal protection precedent of this Court. Without any meaningful standards on which to rely, other courts will make the same mistakes as the Fifth Circuit. The only solution to the problem is to overrule *Grutter*.

Accordingly, this Court should revisit and overrule *Grutter*, thereby returning to this Court's longstanding equal protection precedent by applying strict scrutiny to racially discriminatory university admissions policies. In so doing, this Court should also reverse the decision of the Fifth Circuit.

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ARGUMENT

I. THE EQUAL PROTECTION CLAUSE PROHIBITS CLASSIFICATIONS OF INDIVIDUALS BASED ON RACE EXCEPT IN THE RAREST OF CIRCUMSTANCES.

A. Racial Classifications Pose A Danger Of Lasting Harm To Society.

"Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw*, 509 U.S. at 657. Indeed, "[p]referment by race . . . can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality," *Grutter*, 539 U.S. at 388, (Kennedy, J., dissenting), and may "balkanize us into competing racial factions carry[ing] us further from the goal of a political system in which race no longer matters. *Shaw*, 509 U.S. at 657. Thus, "[t]he equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand Constrs., Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring); *see also City of Richmond v. Croson*, 488 U.S. 469, 521 (1988) ("*Croson*"), 488 U.S. at 521 (Scalia, J., concurring) (discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society").

Furthermore, "[c]lassifications based on race carry a danger of stigmatic harm" to the individuals benefitted by racial preferment. *Croson*, 488 U.S. at 493. And such racial classifications "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* Thus, a racial classification:

> [I]nevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become truly irrelevant[.]

Adarand, 515 U.S. at 229 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); *see also Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) ("The dangers of such classifications are clear [–] [t]hey endorse race-based reasoning and the conception of a nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."). Indeed, "[s]uch policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution." *Id.* at 604 (O'Connor, J., dissenting). In fact, "[r]acial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit." *Id.*

In short, the "central purpose [of the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV § 1] is to prevent the states from purposefully discriminating between individuals on the basis of race," *Shaw*, 509 U.S. at 642 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)), and thereby "do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

B. A Governmental Racial Classification Is Presumptively Invalid And May Be Upheld Only Upon A Showing Of Extraordinary Justification.

The essence of strict scrutiny is that a court may not defer to the judgment of the governmental discriminator, or its professions of good faith: "Blind judicial deference to legislative or executive pronouncements, of necessity, has no place in equal protection analysis." *Croson*, 488 U.S. at 501. "The presumption [of statutory validity] is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently 'suspect.'" *Parham v. Hughes*, 441 U.S. 347, 351 (1979). Therefore, "[a] racial classification, regardless of purported motivation, is *presumptively invalid* and will be upheld only upon an *extraordinary justification*." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (emphasis added).

Consequently, no governmental entity may institute a race-conscious policy for any reason unless it has a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 (1986) (plurality opinion); *Croson*, 488 U.S. at 510. Thus, a court must subject a governmental entity's race-conscious policy to a "most searching examination," approaching the policy with "skepticism." *Adarand*, 515 U.S. at 223, 237. The use of racial preferences is "subject to the most exacting judicial scrutiny [and] it is . . . [the discriminator's] burden to satisfy the demands of the extraordinary justification." *Hunter v. Regents of the University of California*, 190 F.3d 1061, 1069 (9th Cir. 1999).[2] In fact, even in cases subject only to intermediate scrutiny, such as gender discrimination, "the burden of justification is demanding and it rests entirely on the state." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

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[2] *See also Johnson v. California*, 543 U.S. 499, 505 (2005) ("the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests") (quotations omitted); *Wessman v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) (the government bears "a heavy burden of justification [for] their use," because "*Croson* . . . leaves no doubt that only solid evidence will justify allowing race-conscious actions."); *Association of Gen'l Contr., Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) ("[T]he state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action is necessary."); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government.").

C. So-Called "Benign" Racial Classifications Require The Same Showing Of An Extraordinary Justification.

In *Croson*, this Court ruled that "recitation of a 'benign' or legitimate purpose for a racial classification[, such as racial diversity in education,] is entitled to little or no weight" because "racial classifications are suspect and . . . simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. Later, this Court departed radically from *Croson*, holding that racial classifications to achieve broadcast diversity are "benign" and, therefore, subject only to intermediate scrutiny. *Metro Broadcasting*, 497 U.S. at 566-69. Five years later, this Court emphatically repudiated the holding in *Metro Broadcasting* and returned to the teachings of *Croson*. *Adarand*, 515 U.S. at 233-34 ("*Metro Broadcasting*, itself departed from our prior cases, [so] by refusing to follow *Metro Broadcasting*, . . . we do not depart from the fabric of the law; we restore it.") (emphasis in original).

Like *Croson*, *Adarand* ruled that "good intentions alone are not enough to sustain supposedly 'benign' racial classification[s,]" because such classifications would "inevitably [be] perceived by many as resting on the assumption that those who are granted this special preference are less qualified . . . purely by their race." *Id.* at 228-29. "Benign" racial classifications serve only to "exacerbate rather than reduce racial prejudice" and "will delay the time when race will become . . . truly irrelevant." *Id.* Consequently, "*all* racial classifications, imposed by *whatever* federal, state or local governmental actor, must be analyzed . . . under strict scrutiny." *Id.* at 227 (emphasis added).

Indeed, "[u]nder our Constitution, there can be no such thing as either a creditor or a debtor race . . . [a] concept [that] is alien to the Constitution's focus on the individual." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in judgment). Therefore, "[i]n the eyes of government, we are just one race here [–] American[.]" *Id.* In other words, there is no "racial paternalism exception to the principal of equal protection" because "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law." *Id.* at 240 (Thomas, J., concurring in part and in judgment). Furthermore, "[t]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." *Id.* at 241. "These [benign] programs stamp minorities with a badge of inferiority[.]" *Id.* Thus, "government-sponsored [benign] racial discrimination . . . is just as noxious as discrimination inspired by malicious prejudice[;] each . . . is racial discrimination, plain and simple." *Id.*

D. Any Justification For A Racially Discriminatory Admissions Policy Must Be Extraordinary, And The Remedy Clearly Identified And Specific.

In *Croson*, this Court made it clear that, without defining a sufficiently detailed and specific compelling interest, it is impossible to craft a narrowly tailored remedy:

> Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be *clearly identified and unquestionably legitimate*.

Croson, 488 U.S. at 505 (emphasis added). "[P]roper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects," and "[s]uch findings . . . assure all citizens that the deviation from the norm of equal treatment . . . is a temporary measure." *Id.* at 510. Thus:

> Unless [the governmental body] *clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the court should not uphold this kind of statute. . . . "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Croson*, 488 U.S. at 516-17.

Adarand, 115 U.S. at 229 (emphasis in original). An interest so amorphous or indistinct that its scope and nature cannot be defined and identified with particularity is neither "clearly articulated" nor "narrowly tailored," and, therefore, not compelling.

Instead, a compelling interest must be sufficiently concrete to "define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510. Societal discrimination is an example of an interest that does not meet this test: "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 497. "Relief for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority contractors] mirrored the percentage of minorities in the population as a whole." *Id.* "Societal discrimination is insufficient and over expansive [and] . . . could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 497; *Wygant*, 476 U.S. at 276.

As demonstrated below, a majority of this Court in *Grutter* failed to apply these longstanding principles of strict scrutiny analysis to the racially discriminatory admissions policies of the law school. Instead, it created the concept of "critical mass," a concept as amorphous and indefinable as societal discrimination.

II. *GRUTTER* RADICALLY DEPARTED FROM THIS COURT'S LONGSTANDING EQUAL PROTECTION PRECEDENT.

The Fifth Circuit based its ruling upholding the racially discriminatory admission practices of UT on *Grutter*. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231-47 (5th Cir. 2011). In *Grutter*, a majority of this Court held that achieving the ostensible educational benefits that flow from diversity constitutes a compelling interest, permitting the University of Michigan Law School to racially discriminate in its admissions policies to achieve a so-called "critical mass" of preferred minority students, which is necessary to achieve diversity. *Grutter*, 539 U.S. at 333, 343.

In so holding, a majority of this Court abandoned strict scrutiny analysis and presumed the law school's good faith. In other words, a majority of this Court deferred to the judgment of the law school personnel that diversity was necessary and that a "critical mass" of minority students was necessary to achieve diversity, but was lacking, and that only discriminatory admissions policies could achieve that "critical mass." *Id.* at 328-29. But a "critical mass," like societal discrimination, is such an amorphous and indefinable concept that a narrowly tailored remedy cannot address it and it may not serve as a compelling interest.

A. *Grutter* Did Not Require An Extraordinary Justification, But Instead, Simply Deferred To The Judgment Of The Law School.

In *Grutter*, the law school argued that its racially discriminatory admissions policy was needed to obtain "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. The law school asserted that such diversity could be achieved only when a "critical mass" of underrepresented minority students had been admitted. *Id.* at 329. But the law school could neither describe nor quantify "critical mass":

> "[C]ritical mass" means "meaningful numbers" or "meaningful representation," which . . . [is] a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. . . . [T]here *is no number, percentage, or range of numbers . . . that constitute critical mass.*

Id. at 318 (emphasis added). The law school further elaborated that "critical mass" means numbers such that "underrepresented minority students do not feel . . . like spokespersons for their race." *Id.* at 319. The law school did not supply a meaningful, quantifiable standard by which a court could judge when "critical mass" did or did not exist.

This Court, however, did not engage in a searching and skeptical examination of the nature, details, and scope of the claimed compelling interest. *See Adarand*, 115 U.S. at 229. Nor did this Court require the law school to bear the substantial burden of identifying "critical mass" with sufficient clarity so that this Court or another could determine whether the law school had made the most exact connection between justification and remedy. *Id.* Instead, a majority of this Court deferred to the law school's judgment: "The Law School's educational judgment that such diversity [and the measure thereof] is essential to its educational mission is *one to which we defer*."

Grutter, 539 U.S. at 328 (emphasis added). Indeed, the *Grutter* majority seemed to suggest that this Court lacked competence to strictly scrutinize the law school's racially discriminatory admissions policy, ruling that such "complex educational judgments . . . lie primarily within the expertise of the university." *Id.*

Thus, a majority of this Court in *Grutter* ignored the teachings of *Adarand* and *Croson* that a court should not defer to, but critically and skeptically analyze, any justifications offered for racial classifications. Contrary to *Adarand* and *Croson*, this Court's majority in *Grutter* ruled that " 'good faith' on the part of a university is 'presumed' [in the absence of] 'a showing to the contrary' " by the injured party against whom the law school discriminated. *Id.* at 329. But "more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." *Adarand*, 515 U.S. at 226 (internal quotation omitted). In contrast, the *Grutter* majority just "t[ook] the Law School at its word[.]" *Id.* at 343.

The *Grutter* majority's deferral to the judgment and presumed good faith motive of the discriminator is antithetical to the concept of strict scrutiny and constitutes the "blind judicial deference" so emphatically condemned by this Court in *Croson*. 488 U.S. at 501. The presumption of validity afforded to the law school's racially discriminatory admissions policy violates the longstanding principle that any racial classification is "presumptively invalid." *Pers. Adm'r of Mass.*, 442 U.S. at 272. Indeed, the "most searching examination" with "skepticism" required by *Adarand*, 515 U.S. at 223, 227, was replaced by the *Grutter* majority with trust in the pronouncements of the law school, a standard less than rational basis scrutiny.[3]

In short, the majority's analysis in *Grutter* bears a resemblance to rational basis scrutiny or something even less than that. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) ("The Court . . . does not apply strict scrutiny [and] undermines both the test and its own controlling precedents.") Indeed, the *Grutter* majority's decision violated well-established equal protection jurisprudence, including *Adarand* and *Croson*. Therefore, this Court should overrule *Grutter* and correct its departure from the longstanding equal protection jurisprudence of this Court. *See Adarand*, 515 U.S. at 233-34 (overruling *Metro Broadcasting*).

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[3] Under this standard, a university might determine, based on its expertise in educational matters, that classes should be segregated by race because it would enhance learning opportunities for minority students, who felt more free to express themselves and participate in single-race classes than in classes with non-minorities, resulting in greater achievement and career opportunity. Under the *Grutter* majority's new standard, the courts would be obligated to defer to the university's "complex educational judgment" and presume that the university acted in good faith. Indeed, under the *Grutter* majority's reasoning, a university might determine that it could best serve the educational needs of its students by providing a separate, but equal, higher education system and not run afoul of equal protection principles. *But see Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

B. "Critical Mass," Like Societal Discrimination, Is An Amorphous And Indefinable Concept That Cannot Be Addressed By A Narrowly Tailored Remedy.

An "exact connection between justification and classification," as required by *Adarand*, 115 U.S. at 229, is impossible when utilizing the concept of "critical mass." Indeed, "[t]here is no number that constitutes 'critical mass.'" *Grutter*, 539 U.S. at 318. Thus, "critical mass" is an indefinable pedagogical concept, created out of thin air by educators who can't define it, but apparently "know it when they see it." *Cf. Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing pornography). To make matters worse, under the majority's holding in *Grutter*, this Court must presume that judgment correct. Yet, because "[t]here is no number that constitutes 'critical mass,'" *Grutter*, 539 U.S. at 318, no court is able to determine whether a "critical mass" of minority students is present or lacking and whether racially discriminatory admissions policies are required. The inevitable result is the decision of the Fifth Circuit here.

The concept of "critical mass," like that of societal discrimination, is insufficiently particular in its scope or nature to determine "the extent of the remedy necessary to cure its effects," as required by *Croson*. 488 U.S. at 510. Also, like societal discrimination, the concept of "critical mass" "is too amorphous a basis for imposing a racially classified remedy . . . [and] has little probative value in supporting a race-conscious measure." *Id.* at 497.

Moreover, attempts to achieve "such an ill-defined [goal] could extend until [university admissions of minority students] mirrored the percentage of minorities in the population as a whole," a measure also forbidden by *Croson*. *Id.* at 498. Indeed, achieving a "critical mass" of certain minorities may require admitting even more such minority students than the percentage they represent of the total population in Texas. Indeed, it is probable that even admitting more than such a number would not be sufficient to acquire "critical mass." Thus, the attempt to achieve "critical mass" is "timeless in [its] ability to affect the future" and has no end in sight, a situation categorically prohibited by *Croson*. *Id.* at 497.

Consequently, an "exact connection between justification and classification," as required by *Adarand*, 115 U.S. at 229, is impossible for the concept of "critical mass." That is, if lack of diversity is the absence of a "critical mass" of minority students, and "critical mass" cannot be defined, it is impossible to know whether it is present or absent in a particular situation, or when it has been achieved. Thus, diversity cannot constitute a compelling interest because its presence or absence ("critical mass") is impossible to ascertain. Nor, for the same reason, can there be a narrowly tailored remedy to achieve "critical mass," if it were absent. Therefore, this Court should overrule *Grutter* to correct its radical, and misguided departure from this Court's longstanding precedent.

III. THE FIFTH CIRCUIT'S DECISION DEMONSTRATES WHY THIS COURT SHOULD OVERRULE *GRUTTER*.

A. Relying on *Grutter*, The Fifth Circuit Concluded That Diversity Does Not Exist Until A "Critical Mass" Exists In All Major Fields Of Study.

The Fifth Circuit found that "minority students remain clustered in certain programs limiting the beneficial effects of educational diversity." *Fisher*, 631 F.3d at 240. Therefore, the Fifth Circuit ruled that if "UT is to have diverse interactions for a greater variety of colleges, not more students disproportionately enrolled in certain programs," it must racially discriminate in admissions. *Id.* (without a racially discriminatory admissions policy, UT cannot "achieve the maximum educational benefits of a truly diverse student body.") In other words, the Fifth Circuit believed that diversity is not achieved until a "critical mass" of minority students has enrolled in all the major areas of study offered by UT. It is highly unlikely that such a result could be achieved even if the favored minorities enrolled in direct proportion to their numbers in the general population or even greater numbers.

Importantly, this Court has rejected the concept that, in the absence of discrimination, minorities will be equally likely to choose any particular profession or field of study as non-minorities. Such an assertion "rests on the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population[.]" *Croson*, 488 U.S. at 507. Indeed, it is "'completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination.'" *Id.* (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)); *see Eng'g Contr. Ass'n of S. Fla. v. Metro. Dade County*, 122 F.3d 895, 922 (11th Cir. 1997) ("In a pluralistic and diverse society, it is unreasonable to assume that equality of opportunity will inevitably lead different groups with similar human and financial capital characteristics to make similar career choices.").

It is equally unrealistic for the Fifth Circuit to predict that racial preferences in university admissions will result in an equal distribution of all minority candidates throughout all major areas of study offered by UT, much less that they will ever achieve the ethereal and illusive "critical mass," in each such area of study. Nothing in *Grutter* purported to require diversity not only at the university level, but also in all major fields of study. Thus, the Fifth Circuit greatly expanded *Grutter*. This is not surprising considering that the *Grutter* majority abandoned strict scrutiny analysis and adopted a new compelling interest that it could not define, which made it impossible to ascertain whether it had been narrowly tailored.

B. Because of *Grutter*, The Fifth Circuit Erroneously Concluded That Diversity Does Not Exist Until A "Critical Mass" Exists In Each Classroom.

The district court, relying on the unsupported assertions of UT, held that diversity requires the presence of a "critical mass" of minority students in *each classroom*. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 602 (W.D. Tex. 2009) (emphasis added).[4] However, UT is a very large university, with 5,631 class sections as of 2002. Supp. Jnt. App. 70a. Thus, UT has admitted that its minority students were more spread out, and, while UT's minority enrollment grew steadily, the number of classes deemed to have a "critical mass" of minority students decreased. Supp. Jnt. App. 71a, 73a.

The Fifth Circuit affirmed this remarkable proposition that an indefinable "critical mass" of minority students must be in every one of the 5,631 classes at UT because there was "no reason to doubt UT's considered, good faith conclusion that the university still has not reached a critical mass at the *classroom level.*" *Fisher*, 631 F.2d at 244. This is an even more radical proposition than the unrealistic determination that diversity requires a "critical mass" of minorities across every major field of study. *See id.* at 240. In short, the Fifth Circuit approved limitless racial discrimination in university admissions that are "timeless in their ability to affect the future," contrary to the teachings of this Court. *Croson*, 488 U.S. at 497.

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[4] UT relied for its assessment of classroom diversity on a survey it had completed of minority representation in classes containing from 5 to 24 students. *Id.* at 593, 602-03. The University did not explain how it chose this class size and why it did not look at *all* classes, including large classes that might have a significant, perhaps disproportionate, enrollment of minority students. There was no examination of the distribution of these classes throughout major areas of study, or distribution of these classes in upper or lower division levels. It appears that UT may have tried to skew the study to find underrepresentation of minority students.

There is absolutely no support in *Grutter* for the proposition that a "critical mass" of minority students is needed in every classroom to achieve educational diversity at UT, and that it can be achieved only through racially preferential admissions policies. Instead, the *Grutter* majority ruled that the proper base for measuring "critical mass" is the "student body," not the classroom. *Grutter*, 539 U.S. at 325. But it is not surprising, that, given the *Grutter* majority's departure from strict scrutiny analysis, its deference to the unbridled discretion of university personnel, and its failure to define any meaningful standards on which to measure the presence or absence of diversity, that the Fifth Circuit reached the erroneous conclusion it did.[5] This Court should overrule *Grutter* to

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[5] Judge Garza, even though he strongly disagreed with the majority holding in *Grutter*, voted to uphold the University's racially discriminatory policy because he believed he was compelled to do so by *Grutter*. *Fisher v. Univ. of Tex. at Austin*, 631

(Continued on following page)

bring it into conformance with longstanding equal protection precedent.

◆

CONCLUSION

For the foregoing reasons, this Court should overrule *Grutter* and reverse the decision of the Fifth Circuit. In the alternative, this Court should reverse the decision of the Fifth Circuit because it misinterpreted and/or misapplied *Grutter*.

Respectfully submitted,

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F.2d 213, 247 (5th Cir. 2011) (Garza, J., specially concurring). He demonstrates the far reach and potential of *Grutter* due to the majority's failure to establish any meaningful standards.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, TEXAS STATE CONFERENCE OF NAACP BRANCHES AND BARBARA BADER ALDAVE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The following *amici* submit this brief, with the consent of the parties, in support of Respondents' argument that the lower courts' decisions were correct in upholding the actions taken by Respondents.

Founded in 1909, the National Association for the Advancement of Colored People (hereinafter "NAACP" or the "Association") is the nation's oldest and largest civil rights organization. The principal objectives of NAACP are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof. The Texas State Conference of NAACP Branches implements the mission of the Association at the state level or at other levels if requested by the national office. The fundamental goal of NAACP's education advocacy agenda is to ensure that all students have access to a quality, integrated public education. NAACP has been at the forefront of every major advance in ensuring integration at every level of the nation's public schools.

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund such preparation or submission. The parties have filed blanket consents with the Court consenting to the filing of all *amicus* briefs.

Barbara Bader Aldave is currently the Loran L. Stewart Professor at the University of Oregon School of Law. She served as a Professor at the University of Texas School of Law from 1974-1989, and throughout most of that period directed the School's efforts to increase minority enrollment. She ultimately resigned from the School's Admissions Committee when it rejected her advice that it should continue to adhere to the guidelines of the *Regents of the University of California v. Bakke* decision. Subsequently, as Dean of St. Mary's University School of Law in San Antonio, she increased the enrollment of students of color from 11% to 38%, and spoke and wrote extensively in support of her opinion that the decision of the Fifth Circuit Court of Appeals in *Hopwood v. State of Texas* could not and did not overrule this Court's decision in *Bakke*.

SUMMARY OF ARGUMENT

The University of Texas (UT) at Austin's admission policy has no racial preference and caused no injury in fact to Petitioner. More than 90% of 10,200 admission slots available to Texas residents are awarded without any consideration of race. For the remaining admissions slots, UT considers academic index (AI) (a calculation including class rank and ACT/SAT scores) and personal achievement index (PAI). PAI considers: scores on two essays; leadership; extracurricular activities; awards/honors; work experience; service to school or community; and seven special circumstances, one of which is race. Race is merely a factor of a factor which can positively impact applicants of all races, including white applicants. Moreover, Petitioner's AI was not within the required range. Regardless of her race, she would not have been admitted to UT. Therefore, Petitioner suffered no injury in fact. Accordingly, there is no basis for this Court to exercise jurisdiction.

Texas's long history of state-sponsored discrimination justifies its actions to remedy the lasting effects. Prior to 1955, the Texas Constitution expressly required segregated schools for white and African American children. For several years, in violation of Title VI of the Civil Rights Act of 1964, Texas failed to eliminate the vestiges of *de jure* segregation in public higher education and in all other levels of public education. Texas also failed to reach its goals of integrating the State's predominantly white colleges and universities. Because the duty to desegregate is affirmative in nature, the mere adoption of racially neutral policies for prospective application is not an adequate remedy to the consequences of past discriminatory conduct.

UT's admission program is constitutional because it is narrowly tailored to eradicate the vestiges of Texas's prior official policy of discrimination. UT's admissions program provides a modest remedy for the lingering injury which black Texans have suffered from a century or more of *de jure* educational segregation, and several decades more of a *de facto* segregated university system. It serves one of the most compelling of state interests: undoing the scarring damage of state-imposed and encouraged discrimination in higher education. The program considers race as only one factor among many, in the context of "truly individualized" evaluation of each applicant for admission to UT. UT's program withstands strict constitutional scrutiny because it was adopted after careful consideration, and is narrowly tailored to accomplish the state's interest in remedying the effects of intentional discrimination.

Finally, forcing UT to ignore race would force UT to ignore the accomplishments of racial minorities. Petitioner's request is that applicants effectively be dissected by UT, and their races removed and discarded. Granting Petitioner's request would negatively affect individuals whose life experiences were most influenced by their race, while positively impacting those for whom their race presented no obstacle or played little to no perceived role in their development.

ARGUMENT

I. UT'S ADMISSION POLICY HAS NO RACIAL PREFERENCE, AND CAUSED NO INJURY IN FACT TO PETITIONER

Pursuant to the Texas Top Ten Percent Law, admission to UT is offered automatically to Texas residents graduating in the top 10% of their high school classes. Petitioner, a Texas resident, applied to the schools of Business Administration and Liberal Arts, but was unqualified for automatic admission. *Fisher*, 556 F. Supp.2d at 605; JA 405a. The admissions office also establishes "A" group and "C" group parameters for some UT schools based solely on an applicant's academic index (AI). JA 410a. The AI is derived from an applicant's predicated G.P.A. (which includes ACT/SAT scores and class rank) and any curriculum-based bonus points, *i.e.*, race plays no part whatsoever in the calculation of the AI. JA 406a. "A" group applicants have high AIs, and are offered admission based solely thereon. JA 410a. Remaining admissions decisions are based upon a combination of each applicant's AI and personal achievement index (PAI).

The PAI considers: scores on two essays; leadership; extracurricular activities; awards/honors; work experience; service to school or community; and seven special circumstances, one of which is race. SJA 152a. "None of the elements of the personal achievement score—including race—are considered individually or given separate numerical values to be added together." *Fisher*, 631 F.3d at 228. Moreover, race "can positively impact applicants of all races, including Caucasian[s]. . . ." *Id.* For example, "both a white student who is president of his or her majority African American high school and an African American student who is president of his or her majority white high school bring an additional aspect of diversity when one considers the relative rarity of being a student leader who can reach across racial lines." JA 435a. Put succinctly, UT's policy has no racial preferences and considers race as one of many factors to assess every applicant.[2]

For Fall 2008, the relevant term, 92% of 10,200 admissions slots available to Texas residents were awarded to top 10% and "A" group applicants, *i.e.*, with no consideration of PAIs. JA 414a. Due to the limited amount of remaining admission slots, a minimum AI of 3.5 was necessary for Petitioner to be offered admission, regardless of her PAI.[3] JA 416a. Petitioner's AIs were only 3.1. In short, Petitioner would not have been offered admission for Fall 2008 had she been Caucasian, African American, Hispanic, or otherwise. *See id.* Accordingly, even if race had been a factor considered in calculating her PAI, Petitioner cannot show any injury in fact. Although this is not a putative class action, the same would hold true for all similarly-situated applicants whose AIs precluded their admission. A petitioner who cannot show injury from a policy – even theoretically – has no standing to challenge the policy. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 (1977).

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[2] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007).

II. TEXAS'S LONG HISTORY OF STATE-SPONSORED DISCRIMINATION NECESSITATES ITS ACTIONS TO REMEDY THE LASTING EFFECTS

Texas has a long history of racial discrimination in its public higher education and public elementary and secondary school systems.[4] This dual elementary and secondary public school system has lowered the number of Texas high school graduates eligible to attend the public higher education system, including the State's flagship campus and programs.[5] Amici offer this as context to the environment in which the public higher education system operates.

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[3] Relevant admissions statistics were not finalized until October 2008, after the District Court's May 29, 2008 opinion regarding Petitioner's motion for preliminary injunction, and thus may contradict any preliminary data reflected therein. JA 405a.

[4] Lupe S. Salinas & Robert H. Kimball, *The Equal Treatment of Unequals: Barriers Facing Latinos and the Poor in Texas Public Schools*, 14 Geo. J. on Poverty L. & Pol'y 215 (2007).

In 1970, the United States brought suit in the Eastern District of Texas against various Texas school districts, the governing county boards of education of each such district and their respective officials, and the Texas Education Agency ("TEA") to achieve meaningful school desegregation. Each of the school districts named as a defendant in the original suit was either an all-white district or an all-black district that had taken no steps to comply with the Supreme Court's desegregation precedent. The district court, Judge William Wayne Justice presiding, found that the named school districts were responsible for creating and maintaining dual school systems and that systemically, "the vestiges of racially segregated public education" had not been eliminated. Accordingly, Judge Justice entered Order 5281, a far-reaching desegregation decree applicable to the named school districts and the TEA, which directs funding to the State's public schools. *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex.1970). The Order contains two parts, the first directed at desegregating the named school districts and the second directed at correcting systemic segregation. Specifically, with respect to transfers, the Order enjoined TEA and any person acting in concert with TEA from permitting, approving or supporting by any means the inter-district transfer of students within the state of Texas which will

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5. Kevin T. Leicht & Teresa A. Sullivan, Minority student pipelines before and after the challenges to affirmative action (Ford Foundation, May 25, 2000).

reduce or impede desegregation or which will reinforce, renew or encourage the continuation of acts and practices resulting in discriminatory treatment of students on the ground of race, color, or national origin. *Id.* at 1060. The Order was later modified by the district court, *United States v. Texas*, 330 F. Supp. 235 (E.D. Tex. 1971), and subsequently by the Fifth Circuit, *United States v. Texas*, 447 F.2d 441 (5th Cir. 1971), but the text of the transfer provision remained largely the same.

Throughout the 1980s, many black and Hispanic students in Texas lived in school districts that courts and the U.S. Department of Justice (DOJ) had determined were unconstitutionally segregated.[6] In fact, more than 70% of blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans.[7]

Nevertheless, Texas adopted an official policy of resistance to integration of its public schools throughout the 1980s.[8] In 1983, the Fifth Circuit found that schools in numerous counties throughout Texas still suffered from unconstitutional segregation.[9] In *Tasby v. Wright*, the Fifth Circuit found that Dallas public schools were still segregated and had "opposed any student desegregation, no matter how feasible or how minimal." Similarly, in *Ross v. Houston Indep. Sch. Dist.*, the court found that, although Houston had been declared unitary, "70% of the black students in HISD still attend[ed] schools that [we]re 90% minority, including as minorities black and Hispanic students."[10]

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[6] *Hopwood v. State of Tex.*, 861 F. Supp. 551, 554 (W.D. Tex. 1994); *see e.g. Hous. Indep. Sch. Dist. v. Ross*, 282 F.2d 95, 96 (5th Cir. 1960); *Borders v. Rippy*, 247 F.2d 268 (5th Cir. 1957); *U.S. v. Texas Ed. Agency* , 467 F.2d 848 (5th Cir. 1972); *Flax v. Potts*, 204 F. Supp. 458 (N.D. Tex. 1962), *aff'd*, 313 F.2d 284 (5th Cir. 1963) ; *U.S. v. State of Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex. 1971*), aff'd with modifications*, 447 F.2d 441 (5th Cir. 1971)

[7] *Cheryl J. HOPWOOD, Plaintiff-Appellant-Cross-Appellee, v. STATE OF TEXAS, et al.*, Brief of the State of Texas 1999 WL 33619061, (5th Cir. April 20, 1999).

[8] *Id.*

Texas's policy of resistance resulted in numerous lawsuits and court-imposed desegregation plans throughout the 1980s and 1990s.[11] Moreover, the Office of Civil Rights (OCR) found that many of the school districts operating dual systems of education were practicing "official" discrimination against black and Mexican American students.[12] Segregation continued between 1989 and 1994. In fact, in May 1994, desegregation lawsuits were pending against more than forty Texas school districts.[13]

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[9] *U.S. v. Crucial*, 722 F.2d 1182, 1184-85, 1188 (5th Cir. 1983) (finding that Echor County suffered from unconstitutional segregation); *Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983); *Flax v. Potts*, 567 F. Supp. 859, 861 (N.D. Tex. 1983) (holding that Fort Worth still was not a unitary school system); *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 226-27 (5th Cir. 1983) (noting that racial segregation in schools continued until 1967).

[10] *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218,226-27 (5th Cir. 1983).

[11] *Hopwood v. State of Tex.* 861 F. Supp. 551, 556 (1994).

[12] *Id.* at 554.

[13] *Id.*

On December 19, 2010, the Texas State Conference of NAACP and Texas League of United Latin American Citizens (LULAC) requested that OCR conduct a compliance review of the State with respect to African American and Latino K-12th grade public school students in the state of Texas (State of Texas, the Texas Education Agency (TEA), and the State Board of Education (SBOE)) pursuant to Title VI and its implementing regulations, and the Thirteenth and Fourteenth Amendments to the United States Constitution. This request concerned:

- the miseducation of minority students
- recent SBOE curriculum changes which negatively impact all students, but disparately greater harm of minority students
- disparate discipline for minority students[14]
- the use of accountability standards to impose sanctions on schools with high populations of minority students
- the underrepresentation of Latinos and African Americans in Gifted and Talented Programs and the rules relating to the operation of such programs that lead to and/or contribute to the discriminatory result

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[14] Fabelo et al., Breaking Schools' Rules: A Statewide Study of How School Discipline Related to Students' Success and Juvenile Justice Involvement ix (Council of State Governments Justice Center 2011).

The Texas State Conference of NAACP Branches and LULAC contended that the Texas State Board of Education (SBOE) curriculum changes were made with the intention to discriminate, and that the SBOE curriculum and other areas raised in the request to OCR were either the result of unnecessary policies that have a disparate or stigmatizing impact on African Americans and Latinos, or reflect disparate treatment or neglect. NAACP and LULAC remain concerned that historically, the State has not only failed to provide the basic education that its laws require to all its citizens' children, but it has adopted standards to ensure that the status quo of disproportionately poor performing and negatively impacted minority students does not change. Racially segregated elementary and secondary public schools throughout the State have denied many black students and other students of color meaningful opportunities to attend institutions of higher education.

Under Title VI of the Civil Rights Act of 1964, the constitutionally-mandated affirmative duty to eliminate all vestiges of a previously dual higher education system is a condition of receipt of federal financial assistance.[15] Because the duty to desegregate is affirmative in nature, this Court has held that the mere adoption of racially neutral policies for prospective application is not adequate to remedy the consequences of past discriminatory conduct.[16]

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[15] *Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968).

[16] *Davis v. Sch. Comm'rs of Mobile Cnty.*, 402 U.S. 33, 35 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

The dual system of public higher education in Texas, like that in several other Southern and border states, reflects a long history of state-sponsored discrimination. Indeed, prior to 1955, the Texas Constitution specifically required separate schools for white and colored children.[17] Heman Marion Sweatt, an African American, applied to the University of Texas Law School for admission in its February 1946 class.[18] On February 26, 1946, President T.S. Painter of the University of Texas requested an opinion from the Texas Attorney General on the question of "whether a person of negro ancestry, otherwise qualified for admission into the University of Texas, may be legally admitted to that institution." The Texas Attorney General's response lauded the segregation of races as a wise policy. The opinion concluded that Texas is not required to admit any African American applicant until the applicant in good faith makes a demand for legal training at the segregated institution, gives the authorities reasonable notice, and is unlawfully refused. The Attorney General, Grover Sellers, then advised President Painter to refuse Mr. Sweatt's admission to the University of Texas.[19] NAACP and the Texas State Conference of NAACP assisted Mr. Sweatt in his challenge to the State's policies of segregated educational institutions. This work ultimately led to *Sweatt v. Painter*, in which this Court held "that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School."[20]

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[17] Tex. Const. art. VII, §7 (1925, repealed 1969).

[18] *Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

[19] Op. Att'y Gen. No. 0-7126 (Mar. 16, 1946); *see also Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

[20] *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

Despite the elusiveness of Fourteenth Amendment guarantees for African Americans and other persons of color, two effective litigation strategies finally bore fruit in the 1950s. First, *Brown v. Board of Education* held that the Constitution demands the dismantling of dual school systems intentionally segregated by race.[21] Second, *Cooper v. Aaron* and related cases barred governmental support of unconstitutionally discriminatory institutions.[22]

Both concepts were incorporated in one of the first sweeping federal commitments to civil rights enforcement, the Civil Rights Act of 1964 (the Act). Title VI of the Act prohibits discrimination on the ground of race, color, or national origin under any program receiving federal financial assistance.[23] Each federal department may ensure compliance by (1) refusing financial assistance to any recipient found violating the prohibition after a finding on the record, with an opportunity for a hearing; or (2) "by any other means authorized by law."[24] The Act specifically provides that enforcement efforts should not begin until the non-complying party has been notified and given an opportunity to comply voluntarily.[25] Thus, the Act permits the Executive to deny financial support to non-complying public educational bodies, and to use the threat of fund-termination to persuade recipients of federal funds to dismantle vestiges of segregation. Enforcement of the Act, however, had to overcome a ninety-year pattern of conduct by Texas and its institutions that had blocked or frustrated black entry into Texas's historically white institutions of public higher education and inadequately funded historically black institutions of public higher education.[26]

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[21] 347 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II).

[22] 358 U.S. 1 (1958).

[23] Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (hereinafter cited as Title VI).

[24] Title VI, § 602. 42 U.S.C. § 2000d-1. HEW regulations specified referral to the Department of Justice as the primary other means authorized under law. 45 C.F.R. § 80.8(a) (1979).

[25] *Id.*

Through agreement with other executive departments, the Department of Health, Education and Welfare (HEW) assumed responsibility for Title VI enforcement with respect to most federal financial assistance to elementary, secondary and higher education and other specified health and social welfare activities.[27] In 1969, black students were still facing a wall of state-sponsored discrimination despite the mandate of Title VI, and HEW, through its OCR, determined that ten Southern states were operating dual systems of higher education in violation of Title VI.[28] Nevertheless, HEW took no administrative enforcement actions and referred no states to the DOJ for litigation, preferring to follow an approach of voluntary negotiation and consensus in achieving desegregation.[29]

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[26] 26. David E. Kendall, *The Affirmative Duty to Integrate in Higher Education*, 79 Yale L.J. 666, note 7 (1970).

[27] 27. Exec. Order No. 11,247, 30 C.F.R. 12327 (1965), *reprinted in* 42 U.S.C. § 2000d-1 (1976). President Lyndon Johnson directed the Attorney General to coordinate enforcement of Title VI and directed each department to cooperate in the enforcement.

[28] 28. *Adams v. Richardson*, 351 F. Supp. 636, 637-38 (D.D.C. 1972), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973)

[29] 29. *Id.* at 638.

In 1970, parents of school-age children filed *Adams v. Richardson*, 351 F. Supp. 636 (D.D.C. 1972), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973), against the Secretary of HEW. This action charged that HEW had failed to enforce Title VI in state colleges and universities. The District Court found that between January 1969 and February 1970, HEW concluded that ten states were operating segregated systems of higher education in violation of Title VI. Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia were the states in question and are known as the original *Adams* states.

The District Court ruled that HEW had abused its discretionary authority under Title VI, and ordered the ten states to file plans for desegregating their public colleges and universities. For several years, HEW and the states bickered about the adequacy and appropriateness of the various plans.[30] In April 1977, the District of Columbia Circuit, in *Adams v. Califano*, 430 F. Supp. 118 (D.C. Cir. 1977), ordered HEW to publish criteria specifying the ingredients of acceptable plans to desegregate systems of public higher education. "These criteria require states to create a unitary system out of the present racially unbalanced, dual system, and to desegregate student enrollment, academic and non-academic personnel, and administrative and governing boards in each institution."[31]

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[30] DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW, 459 n.10 (6th ed. 2008).

[31] *Id.* The responsibility for conducting this Title VI review was transferred to the U.S. Department of Education by authority of the Department of Education Organization Act, 20 U.S.C. Section 3441 (1980).

Although Texas was not an original *Adams* state, and thus was not subject to the *Adams* court's original order, as a result of Texas's status as a state that had historically maintained a segregated public education system, the Court entered an unpublished supplemental order that directed HEW to include Texas in its enforcement proceedings.[32] During the spring of 1978 and the summer of 1979, OCR staff in HEW conducted a statewide review of higher education in Texas.[33] OCR concluded in 1981 that Texas had failed to eliminate the vestiges of its former *de jure* segregation in public higher education.[34] Because vestiges of that dual system still existed, OCR found that the State's public higher education system was not in compliance with Title VI.[35] OCR specifically noted that the racial composition of student enrollments, faculties, staffs, and governing boards continued to reflect the racial identity assigned by law to Texas public institutions prior to 1954.[36] In response, Texas made commitments to OCR which, in turn, granted provisional approval to a Texas state-wide desegregation plan.[37]

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[32] *Hopwood v. Texas*, 861 F. Supp. 551, 555-56 (W.D. Tex. 1994).

[33] Victor Goode, *Texas Plan: Public Law School Education, Title VI, and the Settlement Monitoring Process*, 12 S.U. L. Rev. 157, 171 (1985-1986), citing a letter from Cynthia Brown, Assistant Secretary for Civil Rights, Department of Education, to Mark White, Texas Attorney General (Jan. 15, 1981) (discussing compliance by Texas with Title VI) (hereinafter cited as "Brown Letter").

[34] *Id.*

[35] *Id.*

[36] *Id.* OCR also noted that additional vestiges of the formerly dual system were evident in inequities in resource allocations to traditionally black and traditionally white schools (such as resources for physical facilities and for faculty salaries)

In the early 1980s, OCR and Texas officials negotiated for appropriate measures that would improve the status of minorities in state institutions of higher education and bring Texas into compliance with Title VI.[36] In 1982, Texas submitted the Texas Equal Education Opportunity Plan for Higher Education ("Texas Plan") which included a state commitment to the goal of equal educational opportunity and student body desegregation for both black and Hispanic students.[39] Assistant Secretary of Education Clarence Thomas reviewed the Texas Plan and informed the State that the Texas Plan was deficient. He found that the numeric goals of black and Hispanic enrollment in graduate and professional programs were insufficient to meet Texas's commitment to enroll those minority students in proportion to the number of minorities graduating from undergraduate institutions statewide.[40] Texas then submitted a revised Texas Plan, which OCR found deficient because it did not set targets

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and the duplication of programs between traditionally black institutions and traditionally white institutions sharing service areas. *Id.* at 2.

[37] Letter from Mark White to Cynthia Brown (Jan. 14, 1981) (discussing compliance by Texas with Title VI).

[38] *Hopwood v. Tex.*, 861 F. Supp. 551, 569 (W.D. Tex. 1994) *rev'd*, 78 F.3d 932 (5th Cir. 1996) *abrogated* by *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003); Scanlan, Laura C., *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. Rev. 1580, 1596-97 (1996).

[39] *Id.*

[40] *Id.*

for increasing minority enrollment for each institution, and did not project achievement dates for the targeted goals.[41]

In March 1983, the District Court for the District of Columbia entered an order in the ongoing Title VI enforcement suit, finding that "Texas has still not committed itself to the elements of a desegregation plan which in defendants' judgment complies with Title VI."[42] The court ordered DOE to begin enforcement proceedings against Texas unless Texas submitted a plan that fully complied with Title VI within forty-five days.[43] OCR provided Texas with a list of thirty-seven steps that would improve the Texas Plan, including the consideration of an applicant's complete record in admission decisions and the selection of "[minority] students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements."[44] Texas amended its plan to address the deficiencies identified by OCR.[45] In June 1983, OCR accepted the Texas Plan as being in compliance with Title VI.[46] The revised Texas Plan included a commitment to "seek to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs."[47] The Texas Plan was subject to monitoring for compliance until 1988.[48] In 1988, the Texas Higher Education Coordinating Board (the "Board") officials evaluated the results of the Texas Plan and determined that Texas had not met the goals and objectives of the plan.[49] As a result, the Board developed and adopted a successor plan (Plan II) to avoid a mandate from the federal government to negotiate a second plan.[50] Plan II did not contain any specific numeric enrollment goals but stated a commitment to increase black and Hispanic student enrollment.[51] Plan II was effective from September 1989 to August 1994.[52] OCR continued to monitor the Texas system to determine whether the vestiges of *de jure* segregation had been eliminated, in light of *United States v. Fordice*, 505 U.S. 717 (1992). *Hopwood*, 861 F. Supp. at 557.

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[41] *Hopwood v. Tex.*, 861 F. Supp. 551, 556 (W.D. Tex. 1994) *rev'd*, 78 F.3d 932 (5th Cir. 1996) *abrogated* by *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[42] *Id.*

[43] *Id.*

[44] *Id.*; Scanlan, Laura C., *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. Rev. 1580, 1596-97 (1996).

[45] *Id.*

[46] *Hopwood v. Tex.*, 861 F. Supp. 551, 556 (W.D. Tex. 1994)

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rev'd, 78 F.3d 932 (5th Cir. 1996) *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 557.

[50] *Id.*

[51] *Id.*

[52] *Id.*

In 1996, the Fifth Circuit halted the state's ongoing efforts to address the continuing *de facto* segregation in its institutions of higher education. In *Hopwood v. Texas*, four white plaintiffs who had been rejected from The University of Texas School of Law challenged the institution's admissions policy on equal protection grounds and prevailed.[53] The Fifth Circuit panel in *Hopwood* rejected the history of segregation contained in the district court opinion and declared the use of race-based criteria in admissions decisions at the law school to be unconstitutional.[54] Following the *Hopwood* decision, the Texas Attorney General issued an opinion prohibiting the use of race as a factor in admissions by any undergraduate or graduate program in Texas state higher education. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 222 (5th Cir. 2011). Thereafter, Texas institutions of higher education ceased all race-conscious admissions policies. The Texas Legislature responded to the *Hopwood* decision by enacting the Top Ten Percent Law.[55] The law altered UT's preexisting policy and mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university.[56] The Top Ten Percent Law was not only ineffective in addressing the vestiges of segregation; it allowed the gains made in previous years to evaporate. In 1997, the number of minority applicants to the UT dropped by nearly 25%, while the total number of applicants to the university decreased by only 13% as compared to 1995.[57] African American enrollment for 1997 dropped almost 40% from the 1995 level (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen).[58] In 1999, the Houston Chronicle reported that black students made up only 3 percent of overall enrollment at Texas colleges, with 32 percent of those students attending historically black colleges.[59] Moreover, black students made up less than 5 percent of enrollment at more than half of the majority-white colleges.[60]

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[53] 78 F.3d 932 (5th Cir. 1996).

[54] *Id.*

[55] *Fisher v. U. Tex. at Austin*, 631 F.3d 213, 224 (5th Cir. 2011).

[56] *Id.*

OCR continued its efforts to address Texas's long history of segregation in schools. In February 1997, DOE wrote to Governor George W. Bush to renew OCR's dialogue with Texas, asking "to augment our information in the areas of the [desegregation] plan where OCR has concerns, and to address information indicating possible problems with higher education opportunities for blacks and Hispanics in Texas."[61] Also in 1999, just nine years before Petitioner applied to UT, OCR officials met with representatives from the Board, the Governor's Office and the Attorney General's Office and informed those representatives that OCR had found that disparities traceable to *de jure* segregation continued to exist in

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[57] *Id.*

[58] *Id.*

[59] Lydia Lum, *Duplication at UH, TSU Seen Impeding Diversity*, Houston Chron., Nov. 10, 1999.

[60] *Id.*

[61] *Cheryl J. HOPWOOD, Plaintiff-Appellant-Cross-Appellee, v. STATE OF TEXAS, et al.*, Brief of the State of Texas 1999 WL 33619061.

Texas higher education.[62] The Board agreed to prepare a revised Texas Plan for consideration by OCR in July 2000.

In 2000, OCR again found that "the racial identifiability of the State's higher education institutions continued to reflect their former *de jure* segregated status."[63] On May 11, 2000, Governor Bush and OCR officials signed the "Texas Commitment" that would form the basis for the state's implementation plan "to address issues of concern identified to the State regarding its higher education system, consistent with Title VI of the Civil Rights Act of 1964 and *United States v. Fordice*, 505 U.S. 717 (1992)."[64] The "Texas Commitment" consisted of five areas of focused action, and one of the five areas was to "improve the recruitment, retention, and participation rates of African American and Hispanic students at the State's historically white institutions."[65] Following the "Texas Commitment," the State developed the Closing the Gaps by 2015 Plan. Texas has submitted progress reports every year since reporting began in 2003 regarding its progress in meeting the goals outlined in the Closing the Gaps by 2015 Plan.

In 2003, the U.S. Supreme Court rejected the *Hopwood* holding in *Grutter v. Bollinger*, 539 U.S. 306

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[62] Texas Higher Education Coordinating Board, The Texas Plan for Equal Opportunity: History and Synopsis, November 24, 1999 (on file with the amici).

[63] Letter from OCR to Mr. Clay Johnson, Office of the Governor (October 11, 2000) (on file with the amici).

[64] Letter from OCR, Taylor D. August, to the Office of the Governor. (May 23, 2000) (on file with the amici).

[65] *Texas Commitment*, George W. Bush and Office of Civil Rights 3 (May 11, 2000).

(2003). This re-opened the door for the State to reconsider race-conscious measures as a part of its remedial strategies. In 2010, Texas initiated its Accelerated Plan for Closing the Gaps by 2015. Although Texas has made some gains in achieving its Closing the Gaps by 2015 goals, the State recognized that "historically low participation and success rates [for African American and Hispanic students] warrant sustained focus and efforts from the Coordinating Board and stakeholders to consolidate these gains and move further towards 2015 Closing the Gap goals."[66] The affirmative duty to desegregate, recognized in the elementary and secondary school desegregation cases is equally applicable to state systems of higher education.[67]

III. EVEN IF THIS COURT HELD THAT DIVERSITY IS NOT A COMPELLING STATE INTEREST, UT'S ADMISSION POLICY WOULD BE CONSTITUTIONAL BECAUSE IT IS NARROWLY TAILORED TO ERADICATE THE VESTIGES OF TEXAS'S PRIOR OFFICIAL POLICY OF DISCRIMINATION

Respondent argues that the UT admissions program passes constitutional scrutiny because it is narrowly tailored, evaluates each applicant individually and holistically, and because race is only one of many factors that UT weighs in carrying out the compelling state interest of building a diverse student body. NAACP agrees that even under a narrow reading of *Grutter v. Bollinger*, 539 U.S. 306 (2003), UT's program does not violate the Fourteenth Amendment's guarantee of equal protection.

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[66] Texas Higher Education Coordinating Board, Accelerated Plan for Closing the Gaps by 2015 5 (April 29, 2010).

[67] *United States v. Fordice*, 505 U.S. 717 (1992); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd by Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979). As described in *Norris v. State Council of Higher Education*, 327 F. Supp. 1368, 1373 (E.D. Va. 1971), *aff'd*, 404 U.S. 907 (1971), a state duty is to "convert its white colleges and black colleges into just colleges."

Moreover, UT's admissions policy is also constitutional for a second reason, one that was not considered in the lower court opinions or in Respondent's brief. UT's policy, adopted by a state agency (the Board of Regents of the University of Texas System), is a remedial measure which is aimed at, and has the effect, of lessening or eliminating remaining vestiges of *de jure* segregation in the Texas higher educational system. This Court has consistently held that government entities that consider the race of applicants for purposes of remedying past racial discrimination do not violate equal protection.

The Court has identified the following four factors that, when present, permit race to be considered as a factor in government-sponsored remedial programs: (1) a past history of *de jure* segregation; (2) whether the race-conscious plan ameliorates the disabling effects of the discrimination; (3) whether the injury from discrimination remains when the policy is in effect; and (4) whether the program imposes quotas or a fixed percentage of admission of minority students. All four are fully satisfied on the record of this case, and support the constitutionality of the UT admissions program.

First, there must be a "judicial, administrative, or legislative finding," *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J., concurring), that the state or governmental unit at issue previously had a system of *de jure* segregation or other type of racial discrimination, in violation of the Constitution or statute. Even in decisions that have restricted the use of racial considerations, this Court has always taken pains to distinguish the facts of the immediate appeal from those situations where race has been used to implement a remedy for proven state-sponsored discrimination. For example, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), involved admission to medical school in California, a state which had never adopted discriminatory measures against African Americans. *Bakke* distinguished the facts of that case from school desegregation cases which "involved remedies for clearly determined constitutional violations," and in which "[r]acial classifications. . . were designed as remedies for the vindication of constitutional entitlement." *Bakke*, 438 U.S. at 265. The majority in *Bakke* recognized that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Id.* at 307.

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court affirmed the position that remedying past discrimination is a permissible justification for race-based governmental action. *Id.* at 328. While *Grutter* divided the Court over whether "attaining a diverse student body" alone was a compelling governmental interest that justified a race-conscious admissions policy, not one Justice found that a race-conscious admissions policy would be impermissible as a remedy for proven past discrimination in college admissions. *See also Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007) (referring to the "compelling interest of remedying the effects of past intentional discrimination.").

The Court's rulings dealing with affirmative action in the fields of employment and government contracting also accept the use of race in government action to remedy past discrimination. Even where the Court has invalidated affirmative action laws or ordinances, it has noted that racial discrimination in employment or contracting may continue after the end of a *de jure* segregation regime, and that government retains the power to combat these effects through race-aware remedial measures. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) ("Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.").[68]

This first factor – a past history of *de jure* segregation – is satisfied on the undisputed historical record. Until 1969, Texas's own constitution and statutes required segregated schools at every level of education. Moreover, as shown above, for years after the formal end of segregation, Texas failed to implement any significant measures to eradicate the devastating effects of a century of legal segregation.

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[68] This Court has not endorsed the dictum, stated in *Hopwood v. State of Texas*, 78 F.3d 932, 954 (5th Cir. 1996) that only the specific state unit that originally adopted discriminatory measures in education is permitted to adopt remedial measures that take race into account. Indeed, *Grutter* rejected the Fifth Circuit's conclusion in *Hopwood* outright. *See* 539 U.S. at 322, 325 (noting that *Hopwood* rejected diversity as a compelling state interest).

Until 1947, the Prairie View State Normal & Industrial College for Colored Teachers (now Prairie View A&M University) was the only state-supported institution of higher education which black students in Texas could attend. In 1947, to avoid the integration of the University of Texas, the State created a second all-black college, the Texas State University for Negroes (now Texas Southern University). *Hopwood v. Texas*, 861 F. Supp. 551, 555 n. 4 (W.D. Tex. 1994). Even after the end of legal education, Texas continued a discriminatory policy through all levels of education, *i.e.*, from kindergarten until effectively allowing black high school students only to attend its historically black colleges, then allocating money and other resources in a manner that strongly disfavored those colleges.

Second, this Court has upheld as constitutional race-conscious plans adopted by government bodies or educational systems in order to remedy the effects of past intentional discrimination. There is a legitimate government interest in "ameliorating the disabling effects of identified discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980). The body or system may voluntarily adopt a remedial plan; there is no requirement that only court-imposed plans are constitutional. *Parents Involved*, 551 U.S. at 737. The current process used by UT to admit students is the direct product of a plan adopted to remedy past *de jure* segregation.

Following the end of the Texas Plan, UT saw an immediate and precipitate drop in minority enrollment. *Fisher v. Univ. of Texas at Austin*, 631 F. 3d 213, 222 (5th Cir. 2011). Texas responded to this situation in two ways. First, in 1997, the Texas Legislature enacted the Top Ten

Percent Law, which stabilized the entering percentages of African American undergraduates, but at a significantly lower level than when the Texas Plan was in effect. Second, following this Court's decision in *Grutter,* UT undertook a study to determine whether it could remedy the disparity in enrollment (which, it will be recalled, came from abandoning the remedial plan adopted to address the effects of *de jure* segregation) through race-conscious policies. It ultimately adopted the policy at issue in this appeal, which permits UT to consider race as one of the many factors that may be evaluated in admissions. *Id.* at 226.

The Texas Plan, as it was in effect before 1997, attempted to remediate the effects of a long-segregated state educational system. It had a clear positive effect on enrollment of minorities who had been the traditional targets of discrimination: 4.5% of the 1993 entering class at UT were African American and 15.6% were Hispanic. However, once that remedial program was ended in 1997, the remaining effects of *de jure* segregation reasserted themselves at once. "Minority presence at UT decreased immediately." *Id.* at 223. African American enrollment in 1997 was almost 40% lower than in 1995 falling from 309 to 190. *Id.*

The current UT plan has returned African American enrollment at UT to the situation prevailing before the abolition of the Texas Plan (or better). In 1995, there were 309 entering African American freshmen; in 1998, during the purportedly "race-neutral" era, only 165 entered; but in 2008, 335 African Americans enrolled at UT. Even if the publicity surrounding *Hopwood* in 1996-97 negatively affected the number of African American applications to UT in that period, the effect was minor and transitory. What cannot be disputed is that African American admissions to UT stayed depressed throughout the so-called "race-neutral" era, long after the publicity from *Hopwood* dissipated. The Fifth Circuit found that "significantly fewer" African Americans were enrolled at UT in 2004 (309) than in 1989 (380). 631 F. 3d at 244.

This data suggests the major contributor to depressed African American enrollment throughout the "race-neutral" period was the disappearance of the remedial measures adopted in the Texas Plan. UT's current "race-conscious" admissions policy is serving the same remedial end – undoing the pernicious effects of long years of state-sponsored segregation – that the Texas Plan served before 1997.

UT has justified its race-conscious policy on the basis of the compelling state interest in diversity recognized in *Grutter*. Even if this Court chooses to modify or limit *Grutter*'s holding in some respect, it should uphold the constitutionality of UT's policy. Under this Court's precedents, UT's policy is fully justified as a reinstatement of Texas's original, proper remedy for the effects of past intentional discrimination by the state and its higher education system.

The third factor for a constitutional race-conscious remedial policy is that the policy can last only as long as the injury from discrimination remains. Thus, the policy must end when there has been a judicial determination, supported by evidence, that the effects of past state discrimination on educational opportunity have been fully remedied. This Court has distinguished between systems which have been judicially determined to have fully eliminated the effects of *de jure* segregation, and those which have not. In *Parents Involved*, one of the two school systems that employed a race-conscious school assignment system was Jefferson County, Kentucky, which had been previously segregated by law and, in 1975, was made subject to a desegregation decree. However, the district court dissolved that decree in 2000, after hearing "eight full days of evidence" and concluding that the county had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects." *Hampton v. Jefferson County Board of Ed.*, 102 F. Supp. 2d 358, 360, 377 (W.D. Ky. 2000). *Parents Involved* noted that Jefferson County was not trying to justify its student assignment plan as a remedy for past intentional discrimination. 551 U.S. at 721.

However, in the absence of proof that the evil has indeed been cured, the presumption is that the effects of state-imposed *de jure* discrimination in higher education continue. If a state wishes to be relieved of the measures that have been imposed to remedy that discrimination, it "has the burden to prove that it has undone its prior segregation." *Fordice*, 505 U.S. 717, 744 (O'Connor, J., concurring). This is because "discriminatory intent does tend to persist through time." *Id.*, 505 U.S. at 747 (Thomas, J. concurring). It follows necessarily that if private parties sue to invalidate a race-conscious state program, which remedies the effects of past discrimination in higher education, those parties bear the same burden as the state would: they must prove that the discriminatory system and its aftereffects have been fully eliminated. *See Green, et al. v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968).

Here, unlike *Parents Involved*, there has never been a judicial finding, based on evidentiary proof, that the vestiges of the segregated system of Texas higher education have been eliminated. Moreover, Petitioners never even attempted to make such a showing. Thus, the third factor is satisfied on this record.

The fourth and final factor for a constitutional "race-conscious" remedial program is that the program may not impose quotas or a fixed percentage of admission of minority students. While there is a compelling state interest in remedying past discrimination, the means chosen by government "'must be specifically and narrowly framed to accomplish that purpose.'" *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)). The narrow-tailoring requirement means that "a race-conscious admissions program cannot use a quota system," *Grutter*, 539 U.S. at 334, undertake racial balancing, or use a system that adds a fixed amount of bonus points to an applicant based on race. *Id.* at 337. A university may, however, consider race or ethnicity as a "plus factor," if it provides "truly individualized consideration" to applicants and is flexible enough to consider the whole person. *Id.* at 336-37. "There is no constitutional objection to the goal of considering race as one modest factor among many others," provided that race "does not become a predominant factor in the admissions decisionmaking." *Id.* at 392-93 (Kennedy, J., dissenting).

In summary, UT's admissions program provides a modest remedy for the lingering injury which black Texans have suffered from slavery, a century or more of *de jure* educational segregation, and several decades more of malign state neglect in a *de facto* segregated university system. Accordingly, UT's admissions program serves one of the most compelling of state interests: undoing the scarring damage of state-imposed and encouraged discrimination in higher education. The program considers race as only one factor among many, in the context of "truly individualized" evaluation of each applicant for admission to UT. UT's program withstands strict constitutional scrutiny because it was adopted after careful consideration, and is narrowly tailored to accomplish the state's interest in remedying the effects of intentional discrimination.

IV. FORCING UT TO IGNORE RACE IN ADMISSIONS WOULD FORCE IT TO IGNORE THE ACCOMPLISHMENTS OF INDIVIDUAL STUDENT APPLICANTS IN OVERCOMING RACIAL BARRIERS

UT, like many other universities, requires applicants to submit personal essays. For example, in 2008, UT asked applicants to respond to the following in essay form: "Choose an issue of importance to you—the issue could be personal, school related, local, political, or international in scope—and write an essay in which you explain the significance of that issue to yourself, your family, your community, or your generation." JA 417a. If the Petitioner prevailed here, UT would be required to ignore the personal essays of African Americans that revealed how they overcame racial barriers and achieved success in grade and high school, or at work. Such accomplishments may be the best indicator of how a student will deal with the challenges of an elite educational institution, and what individual contributions that student can make to the UT experience. They are thus directly relevant to UT's core mission of recruiting a distinguished and motivated student body.

Petitioner's argument runs contrary to what this Court has long recognized: African Americans enhance a group effort by contributing their personal experience with racial issues. For example, this Court ruled that African Americans may not be barred from jury service, because they possess "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable" and that such jurors contribute to the deliberations of juries a "perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972). In 2003, this Court approvingly cited Harvard's admission policy which recognized that "critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it." *Gratz v. Bollinger*, 539 U.S. 244, 272-73 (2003).

What Petitioner seeks is to deny African Americans and other racial minorities an admissions system that is "designed to consider each applicant as an individual." *Grutter v. Bollinger*, 539 U.S. 306, (Kennedy, J., dissenting). Under her position, every applicant would be "holistically" considered except African Americans and other racial minorities, whose personal essays would have to be censored (or self-censored) to remove any mention of experience with race. Important achievements by these students would thereby be deemed meaningless and worthless. UT would have to treat extraordinary applicants as though they were commonplace. For example, UT would have to pretend that the first African American member of a traditionally all-white organization, who tore down barriers and rose to become president of the organization, had not done anything of historical significance. Even if an applicant had triumphed over direct, personalized, *de facto* racism, UT would be barred from considering that triumph. Thus, granting Petitioner's request would deny individuals who had overcome racial adversity the opportunity to demonstrate important accomplishments. Other students, for whom race presented no obstacle, would effectively have an unfair advantage. Many racial minority applicants have pulled themselves up by their bootstraps, and the Court should reject Petitioner's attempt to take away their boots.

CONCLUSION

The University of Texas at Austin's admission policy has no racial preference and caused no injury in fact to Petitioner. Indeed, the long history of state-sponsored discrimination necessitates Texas's actions to remedy the lasting effects. UT's admission program is constitutional because it is narrowly tailored to eradicate the vestiges of Texas's prior official policy of discrimination. Forcing UT to ignore race would force UT to ignore the accomplishments of racial minorities. For these reasons, *amici* urge the Court to uphold the lower court rulings.

Respectfully submitted,

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AMICUS
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BRIEF

RECORD
AND
BRIEFS

No. 11-345

In the Supreme Court of the United States

ABIGAIL N. FISHER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION OF BASKETBALL COACHES, WOMEN'S BASKETBALL COACHES ASSOCIATION, BLACK COACHES & ADMINISTRATORS, BETH BURNS, JOHNNY DAWKINS, JAMIE DIXON, PAUL HEWITT, BEN HOWLAND, TOM IZZO, PHIL MARTELLI, JOANNE P. MCCALLIE, MIKE MONTGOMERY, SUE SEMRAU, ORLANDO "TUBBY" SMITH, CHARLI TURNER THORNE, COQUESE WASHINGTON AND ADDITIONAL INDIVIDUALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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The individual amici listed on this page and the prior page are participating in their individual capacity and not on behalf of any affiliated college or university.

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INTEREST OF AMICI[1]

Amici are organizations representing over 12,000 current and former collegiate basketball coaches and collegiate athletic administrators at the NCAA, NAIA, and community college levels, as well as forty-three current and former coaches and administrators who have signed in their individual capacity.[2] Collectively the amici organizations and individual coaches represent hundreds of years of experience working with tens of thousands of student-athletes. In this long experience we have seen firsthand the dramatic and lifelong benefits that our team members derive from working and competing alongside individuals of diverse backgrounds. We are also keenly aware of the importance of not isolating diversity at our university within the athletic department or other subsets of the whole institution. Our student-athletes, and all of the students who attend our institutions, receive the best education when they are able to interact with others within a university community that is broadly diverse across its entire scope. We file this brief to underscore these points and to urge this Court to permit our institutions to continue to use individualized discretion in forming student bodies that reflect university judgment on how to foster such broader and more nuanced diversity on campus.

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[1] The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Individual signatories are expressing their own views, and are not signing on behalf of the institutions where they work or have worked.

Each of the amici organizations has a history of seeking to foster conditions at our institutions that enhance the experiences of athletes, coaches and administrators far beyond the basketball court. The National Association of Basketball Coaches (NABC), originally founded in 1927 by University of Kansas coach Phog Allen, has sought in recent years to ensure that our own coaching ranks and the leadership of our athletic departments better reflect the diversity of our athletic teams. The Women's Basketball Coaches Association (WBCA) has for the past three decades worked to promote opportunities for collegiate academic and athletic success to female basketball players from a wide range of racial and socioeconomic backgrounds. The Black Coaches & Administrators (BCA) organization, formed in 1987, with a membership of 4,000 plus, has worked to generate an atmosphere of diversity and inclusion in all sports from high school to college, including the professional leagues. The BCA is considered to be the current leading advocacy group for ethnic minorities in collegiate sports.

Amici's interest in this case aligns with efforts taken in past years to build and maintain pathways of opportunity for collegiate success and future leadership to the broadest possible range of individuals, including those traditionally underrepresented in our colleges and universities. Intercollegiate athletics, which less than a lifetime ago was among the most exclusionary domains of American life, has since become a portal of opportunity to many young men and women to receive a higher education, in some cases the first in their families to do so. Most of these individuals go on to professional careers in areas other than sports, in many cases becoming leaders in their fields. Many of them will aspire to go on to graduate school at the same institutions where they competed as undergraduates. Amici organizations and their members have witnessed the enduring benefits – for nonminority and minority students alike – that this increased diversity has produced, and have a deep interest in allowing our institutions to continue furthering this goal unfettered by external restraints. We have publicly voiced our opposition in recent years to ballot initiatives in various states that would categorically disable our institutions from holistically considering each of our applicants as entire persons, and similarly urge this Court to avoid imposing new categorical restrictions on our institutional discretion.

SUMMARY OF THE ARGUMENT

Less than a decade ago this Court affirmed the bedrock principle that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter* v. *Bollinger*, 539 U.S. 306, 332 (2003). Institutions of higher education have a particularly crucial role to play in working toward this compelling national aspiration. The Court has long recognized the "special niche" of the university in our constitutional jurisprudence and granted substantial deference to its academic judgment as to the optimal composition of its student body. *Id.* at 329;

Univ. of Cal. Regents v. *Bakke*, 438 US 265, 312 (1978) (Powell, J.). In assessing such academic discretion, the Court has noted the "substantial" benefits that campus diversity produces, in "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races." *Grutter*, 539 U.S. at 330. These benefits from diversity are "not theoretical but real," and they reverberate through time far beyond the college years as graduates learn to work, interact and lead within an increasingly diverse national and global society. *Ibid.*

Amici fully endorse these judicial affirmations of the compelling importance of campus diversity, and are in a unique position to attest to the transformative function that a diverse collegiate atmosphere serves in creating the next generation of leaders. Collectively we have coached and taught tens of thousands of student-athletes over the past several decades. Few university officials come to know their students as well as we do our team members. Often we first meet our student-athletes while they are still in high school, and even more often our relationship with them continues for many years after they leave college. Our long-term interaction with our student-athletes affords us a unique perspective and allows us to see with crystal clarity the transformative effect that their time on campus has on their future development: the lessons they learn at our institutions echo throughout their lifetimes and contribute to their success as leaders in the workplace and in their communities.

Among the most important of these enduring lessons is the ability to work with, learn from, and interact with individuals from diverse backgrounds. At one time not long ago the realm of intercollegiate sports was among the most segregated areas of American life; today our teams reflect a high degree of racial and socioeconomic diversity. Today 45.6% of all NCAA men's basketball players are African-American, as are 32.8% of women's basketball players, and an additional eight to ten percent of players on men's and women's teams are from other minority backgrounds. NCAA, *2009-2010 Student-Athlete Ethnicity Report* 112 (2010), *available at* http://tinyurl.com/3y9btlh.

This diversity is more than just a number: each day in practices and games we witness, and aim to foster, the positive dynamic of student-athletes working together toward a common purpose. Many of our athletes come to college without having had meaningful opportunities for close interaction with individuals of different races, and the chance to do so while in college broadens their understandings in ways that are both significant and enduring. And this perspectival benefit accrues to all student-athletes – nonminority as well as minority – who have the opportunity to train and compete alongside teammates from different backgrounds.

But the positive impact of the diversity we see on our teams is merely one part of a larger picture. While we are well aware of the tangible benefits our student-athletes reap from practicing and competing with teammates from different backgrounds, these benefits are undercut and stifled if they do not similarly interact with students from diverse backgrounds away from the basketball court. Our athletes do not, and should not, exist on an athletic department island segregated from the rest of the university. The more interaction they have with the broader campus community, the greater their achievements and contributions to the whole university. Many of them will go on to graduate or professional schools once their playing days are over, and it is important that these pathways of opportunity remain open. Our colleagues across the university also see, in different contexts, the substantial value that students gain from interaction within a diverse community, and it is important that the entire university have the discretion to work toward this broader vision through a nuanced consideration of individual applicants unfettered by categorical restrictions.

We have also witnessed the unfortunate consequences that follow when, by either judicial decree or change in policy, a university no longer has the discretion to build a diverse community. Many times after such policies have been implemented, minority athletes are a substantial proportion of all the minorities remaining on campus. Minority student-athletes, deprived of peers and role models who share similar backgrounds, find integrating into the college community difficult and achieving academic success more challenging. Moreover, the benefits of campus diversity are almost entirely lost since, because many of the minorities on campus are athletes, they for a large part share similar talents, interests, and extra-curricular activities – and a true diversity of opinions, perspectives, and life experiences is largely absent on the broader campus.

In such circumstances, minorities may even be a numerically substantial proportion of the students on campus. These raw statistics, however, obscure the fact that many of the minorities are student-athletes, and so the university community lacks true diversity, despite appearances based on numbers alone. This was in fact the case at the University of Texas at Austin under the Top 10% Law before the University implemented its current race-conscious admissions policy: although the University had a sizable number of African-Americans on campus, many of the University's African-American students were athletes. Petitioner contends that universities have no compelling interest in implementing a race-conscious admissions program where some arbitrary percentage of minorities enroll, but this fails to take into account this experience and so threatens to act like a straightjacket on universities, preventing them from crafting policies to promote a more broadly diverse campus community.

In this brief we amplify all of these points in greater detail. First, we use the history of intercollegiate sport over the past half-century to illustrate the challenges of opening opportunity to all individuals, and some successes we have achieved. Second, we describe the tangible and durable benefits to our students as a result of their time spent as student-athletes at our institutions, and in sharing those experiences with a range of teammates from a variety of backgrounds. Next, we emphasize the importance of diversity within the broader university, and discuss the importance of permitting institutions of higher learning the discretion to frame their own goals and individualized methods toward furthering the compelling goal of a pluralistic campus.

ARGUMENT

I. THE PAST AND PRESENT OF INTERCOLLEGIATE ATHLETICS YIELDS LESSONS ABOUT THE ONGOING RELATIONSHIP BETWEEN ATHLETIC PARTICIPATION AND LEARNING FOR ALL ATHLETES

Sport in the United States is firmly situated within the broader currents of American culture, and over time has served to illustrate the complex challenges associated with opening doors of opportunity to individuals of all races, and to men and women alike. Many observers have noted the manner in which dynamics of inclusion and exclusion in athletic competition yield lessons for our broader consideration of diversity and discrimination in society at large. Judge Patrick Higginbotham in the panel opinion below made express reference to this fact, noting that "the role of black athletes in the southern universities forty years ago presents diversity's potential better than can we." *Fisher* v. *Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).

Judge Higginbotham's words ring true for our sport as for others. Less than a lifetime ago, many of the institutions where we now coach had basketball teams that were open only to white male athletes. To take one high profile example, as late as 1967 no African-American had ever donned the uniform of a Southeastern Conference varsity athletic team. When Vanderbilt sophomore basketball player Perry Wallace Jr. became the first to do so in the fall of that year, he was regularly greeted with vicious taunts and death threats by fans in opposing venues. Even decades later

Wallace has spoken of the extreme psychological distress he felt from playing under such circumstances and the toll that his college experience placed on him. Linda T. Wynn, *Perry E. Wallace Jr., in The Tennessee Encyclopedia of History and Culture* (2010), *available at* http://tinyurl.com/clhqtsc; Antonya English, *Former Vanderbilt Star Perry Wallace Learned to Overcome Hatred as Southeastern Conference's First Black Basketball Player*, Tampa Bay Times, Jan. 25, 2009, *available at* http://tinyurl.com/8ntky5r.

Yet Wallace's pathbreaking undergraduate experience was only the first chapter in his long and distinguished career. After graduating from Vanderbilt he received a law degree at Columbia, practiced law for many years at the U.S. Department of Justice, and then joined the faculty of American University's Washington College of Law where he remains today. Wynn, *Perry E. Wallace Jr., in The Tennessee Encyclopedia of History and Culture*

Wallace's trajectory – from interscholastic athletic opportunity to professional success – is representative of a recurring pattern amongst our student-athletes, and is similarly illustrated by female athletes who were belatedly given opportunities to compete at high levels and have since gone on to break barriers in other fields. Lynn Elsenhans was a member of the first varsity women's basketball team ever at Rice University, and later rose to become the first female CEO of a major oil company when she took the helm at Sunoco in 2008. Jodi Gillette, who played basketball at Dartmouth more than two decades ago, is today the White House's Senior Policy Advisor on Native American issues and among the most important Native American officials in the federal government. Loretta Reynolds, who is now one of only a few female generals in the U.S. Marine Corps, played varsity basketball at the Naval Academy years ago. See Press Release, Women's Sports Found., 40 Women Who Have Made a Significant Impact on Society After Playing High School or College Sports (May 17, 2012), *available at* http://tinyurl.com/7hxgoh5. For thousands of other student-athletes who have since followed a similar path, the same dynamic holds true: collegiate athletic experience is one early chapter in their success, but far from the last.

Moreover, as this Court has recognized, opening all aspects of our universities to the broadest range of students also yields benefits for those who have traditionally been in the majority at such institutions. Another feature of stories like Perry Wallace's from the history of collegiate sport serves to illustrate this crucial additional dimension of diversity that remains important today: playing alongside Wallace and witnessing the challenges that he and others faced provided important lessons to the white athletes and coaches on his and opposing teams. See, *e.g.*, English, *Former Vanderbilt Star Perry Wallace Learned to Overcome Hatred as Southeastern Conference's First Black Basketball Player*.

This educative aspect of diversification of athletic teams was not an isolated instance in that era: Harvard University's basketball team famously chose not to travel to segregated Louisiana to play in a game in December 1956 due to a state law forbidding interracial athletic teams. Although the team that season was all-white, the Harvard players who voted not to go cited their experience playing with their African-American teammate Bob Bowman in prior years as a key factor in their vote to make "the right decision, just on principle." Bill Pennington, *In 1956, a Racial Law Soured Harvard on a Trip to New Orleans*, N.Y. Times, Mar. 14, 2012, *available at* http://tinyurl.com/cus2pjt. Similarly, the white members of University of Buffalo's highly-ranked football team voted unanimously in 1958 to reject participation in a major bowl to be held in an Orlando, Florida stadium that would have barred their two African-American teammates from taking the field, based in large part on the sense of collective solidarity that had been formed across racial lines by interacting with each other all season. Eric Neel, *All or Nothing*, ESPN, Nov. 13, 2008, *available at* http://tinyurl.com/6qeqw3.

Former Senator Bill Bradley, in looking back at his long and distinguished career in public service, specifically gave voice to what he learned from playing basketball in a diverse setting as a younger man. Describing an ideal of cross-racial understanding and cooperation, he asked:

> Why, of all the places in America, is that ideal closest to being achieved on a basketball court? I believe it's because the community of a team is so close that you have to talk with one another; the travel is so constant that you have to interact with one another; the competition is so intense that you have to challenge one another; the game is so fluid that you have to depend on one another; the high and low moments are so frequent that you learn to

> share them; the season is so long that it brings you to a mutual acceptance. That is not to say that no racists have ever survived a multiracial team experience with their prejudices intact, but my guess is that the numbers are few.

Bill Bradley, *Values of the Game* 78-79 (1998).

Although the dynamics and challenges of race in our current interscholastic setting are different in many respects than they were a half-century ago, the essential importance of building cross-racial understanding and an inclusive atmosphere remain. Today, our athletic departments have fortunately moved far from the outright exclusionary racial practices of a prior generation, even as challenges persist. An institution like the University of Kentucky, which notably fielded an all-white basketball team as late as 1970, won the national title with an African-American coach just over a quarter-century later. The basketball court that was once a fulcrum of racial exclusion has become a venue for unusually mixed athletic teams: today 45.6% of all NCAA men's basketball players are African-American, as is 32.8% of women's basketball players. NCAA, *2009-2010 Student-Athlete Ethnicity Report* 112 (2010), *available at* http://tinyurl.com/3y9btlh.

This change has not happened overnight and even in the past decade we have made significant gains. Many of us have witnessed this during our careers, and worked to achieve such progress. We have achieved this diversity on our teams using the ultimate in individualized assessment: recruits are assessed primarily on a multitude of nonracial criteria, including academic potential, athletic talent, and leadership and interpersonal skills. See, *e.g.*, Lisa E. Wolf-Wendel et al., *There's No "I" in "Team": Lessons from Athletics on Community Building*, 24 Rev. Higher Ed. 369, 392 (2001) ("In athletics, coaches emphasize what each individual can bring to the team"). No recruit is reduced mechanically to a racial label, nor, in the competitive interscholastic atmosphere in which we operate, would it be in our interests to do so.

However, to say that race matters little in our recruitment of athletes is emphatically not to say that race has become irrelevant in those students' lives. It is impossible and unrealistic to erase the fact that our student-athletes come from dramatically different backgrounds and face dramatically different challenges in their collegiate experiences, based in part on their race. Many of our team members, particularly those from minority communities, are the first in their families to attend college. See Dawn R. Person & Kenya M. Lenoir, *Retention Issues and Models for African American Male Athletes*, 80 New Dir. Stud. Servs. 79, 80 (1997) (data "reflect a high first-generation college student population" among minority student-athletes). Lacking an experienced support structure among family and friends at home, it is imperative that these students are able to connect with others around the broader university as in the athletic department, and a university that is diverse on multiple dimensions both within and outside the athletic department is instrumental to this end. See Rhonda Hyatt, *Barriers to Persistence Among African*

American Intercollegiate Athletes, 37 Coll. Stud. J. 260, 267-68 (2003).[3]

Equally unrealistic would be to ignore race entirely in the interactions of our team members with each other. As this Court has noted in a different context, the opportunity to learn from and interact with others from "the greatest possible variety of backgrounds" can be a durable and substantial benefit from time spent in the academy as a young person. *Grutter* v. *Bollinger*, 539 U.S. 306, 330 (2003) (quotation omitted).

Our athletes experience this dynamic every day, and benefit substantially from it. Our collective experience teaches us of the value of this interaction; so too do numerous academic studies that have found that "[s]tudent athletes in certain racially diverse sports have a unique opportunity to engage in extracurricular multicultural experiences . . . ." Scott Hirko, *Intercollegiate Athletics and Modeling Multiculturalism*, 148 New Dir. Higher Ed. 91, 92 (2009). In one large-scale survey, Indiana University researchers found that "[b]ased on a sample of over 55,000 seniors attending 153 NCAA Division I institutions . . . student athletes in general have significantly greater engagement with diversity than their non-athlete peers." Ty M. Cruce & F. Nelson Laird, *What's the Score? Diverse Experiences Among*

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[3] Even in the most ostensibly neutral setting of all, on the basketball court itself, there is evidence that a player's race may matter at the margins of referees' official judgment in unintentional but identifiable ways. See Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. Econ. 1859, 1859-1860 (2010).

Collegiate Athletes and Non-Athletes 15 (2009) (manuscript *available at* http://tinyurl.com/cavelg9).

Such exposure to diverse students during the formative years of college yields tangible and durable benefits. "[I]nteracting across race is related to several important educational outcomes, including intellectual and social self-confidence, openness to diversity, critical thinking, and problem-solving." Cruce & Laird, *What's the Score? Diverse Experiences Among Collegiate Athletes and Non-Athletes* 4. These benefits are magnified in the case of college athletes given their relatively greater exposure to diversity, and their focus on a common goal in such a setting. Wolf-Wendel, *There's No "I" in "Team": Lessons from Athletics on Community Building* 369-370. Research has shown that our student-athletes are aware of this and appreciate the benefits they receive: one survey found that "on average, college athletes perceived that they had an important opportunity to learn from racial diversity, and that this learning benefited their education." Scott Hirko, *Do College Athletes Learn from Racial Diversity in Intercollegiate Athletics? A study of the Perceptions of College Athletes form the State of Michigan* 26 (2007) (unpublished dissertation *available at* http://tinyurl.com/cfnayc8). In sum, "[d]espite a history marred by the most blatant forms of discrimination, intercollegiate athletics has responded particularly well to challenges associated with diversity—and now enjoys the advantages associated with bringing together people from different backgrounds in the pursuit of a common goal." Wolf-Wendel et al., *There's No "I" in "Team": Lessons from Athletics on Community Building* 370.

The understanding and sense of perspective that these interactions produce persist long after our student-athletes leave college. Many of the nation's most prominent leaders, including our current President, have cited the lasting influence of organized team sports participation on their success much later in life. Austin Murphy, *Obama Discusses His Hoops Memories at Punahou High*, Sports Illustrated, May 21, 2008, *available at* http://tinyurl.com/7dq9j5d. One of the enduring lessons that sport can teach is the ability to work with and learn from others from diverse backgrounds. It is important that our institutions remain free to take steps to set the stage for such learning by assembling a diverse student body without externally-imposed restrictions on that goal.

II. OUR EXPERIENCE COACHING STUDENT-ATHLETES DEMONSTRATES THAT ACHIEVING TRUE DIVERSITY IS CRUCIAL FOR BOTH STUDENT-ATHLETES AND THE BROADER COLLEGE COMMUNITY

While we recognize the importance of diversity on our teams, we are also keenly aware that our student-athletes do not, and should not, exist on an island apart from the broader university. The diversity that is important to us as coaches is no less important when our athletes interact as students in the broader university. Over 400,000 student-athletes every year will "go pro" in something other than sports. See, *e.g.*, NCAA, *How Do Athletic Scholarships Work?* (2011), *available at* http://tinyurl.com/c9rqfdb. Many of them have the potential to be leaders in such fields. It is crucial that in the formative years they see pathways of opportunity in multiple contexts. The diversity of the broader university directly leverages, and is connected to, the diversity within our teams, and the broader campus diversity is essential for the future success of our student-athletes.

For this reason, it is imperative that our institutions have the academic freedom to create a university community that serves this and other important goals. However, it is our experience that when universities are deprived of the ability to consider race in admissions and build a truly diverse community, the resulting student body is often such that minority student-athletes comprise a sizable portion of *all* the minorities on campus. The all-too-common dynamic, which we have seen repeat itself on campuses throughout the country, is that minority student-athletes are admitted on athletic scholarships, but their peers are denied admissions in a process that fails to consider the racial composition of the class. In some cases, college campuses may look on paper to be numerically racially diverse, but the numbers belie the fact that diversity *within* minority groups, based on interests, talents, and experiences is virtually nonexistent. Indeed, as we discuss in detail below, this was in fact the case with the University of Texas under the Top 10% Law before it implemented its current admissions policy.

Integrating into the broader college community is difficult for student-athletes who are the only minorities on campus; they are deprived of peers and role models from similar backgrounds with a diverse set of talents and interests. The rest of the campus is also deprived of interacting with a truly diverse student body in such situations, since many of the minorities one may interface with will also be athletes. It also reinforces the stereotype that members of some minority groups are all athletic or are interested primarily in sports. Such stereotyping and isolation can create a "self-fulfilling prophecy whereby fellow students, professors, counselors, and collegiate sports fans assume that the African-American athlete is on campus only for sport participation and not to obtain an education or to excel in academics." Earl Smith, *Race, Sport, and the American University*, 17 J. Sport & Soc. Issues 206, 210 (1993).

This Court has recognized that diversity is a deeper concept than enrolling a certain number of students of certain races. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306, 329-330 (2003) (explaining that the law school's admissions policy "is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin,'" but rather focuses on "the educational benefits that diversity is designed to produce" (quoting *Univ. of Cal. Regents* v. *Bakke*, 438 US 265, 307 (1978) (Powell, J.))). As the experience of our student-athletes reinforces, it is of great importance that the student body is diverse across a multitude of characteristics; it disserves a college community, for example, to only have African-American athletes, but no African-American physicists, journalists, or engineers. Petitioner's argument turns these core principles upside down: she asks this Court to find that once a university has reached some arbitrary quantum of "enough" diversity, it is then foreclosed from exercising its customary discretion in forming the remainder of the academic community. See Pet. 20; *Fisher* v. *Univ. of Tex. at Austin*, 631 F.3d 213, 234 (5th Cir. 2011) (Petitioner "question[s] whether UT *needs* a *Grutter*-like policy" because of the Top 10% Law.) The compelling interests of our academic institutions, and our nation, warrant a far more individualized approach than this.

A. The Diversity of the Broader University Interacts with the Diversity of Our Teams in Multiple Ways

Our long experience at institutions of higher learning makes us keenly aware of the importance of building a diverse community in the university at large, not merely within the athletic department. Such diversity yields direct benefits to our student-athletes while they are in school, and also after their graduation, and facilitates the broadest possible beneficial interaction between all students.

First, it is clear that our student-athletes have a substantially richer and more successful collegiate experience when they are able to engage with the university as a whole. We see this every year in the large numbers of our players who take part in a range of academic and extracurricular activities other than basketball. Academic studies confirm our experiential observations: collegiate athletes achieved greater academic success when they "perceived their campus environment to be more supportive of their academic and social needs." Peter D. Umbach et al., *Intercollegiate Athletes and Effective Educational Practices: Winning Combination or Losing Effort?*, 47

Res. in Higher Educ. 709, 725 (2006). These beneficial interactions are most likely to take place when the broader university reflects the diversity of the broader society, and when they can connect with peers who share similar backgrounds and experiences.

Second, our athletes and all students from diverse backgrounds are more likely to succeed after their undergraduate years when they are fully aware of all the pathways to future success open to them. A university that is broadly and eclectically diverse is more likely to produce the role models who in turn will inspire and attract future leaders to follow their path. Most of our student-athletes will not have a career playing professional basketball – it is crucial that they are aware of and engage with other options for the future. We are aware of our own athletic departments' past shortcomings on this dimension – the diversity of our student-athletes has not historically been reflected in our own ranks or in the leadership of our departments, a situation we have actively sought to remedy in recent years. NCAA, *2009-2010 Race and Gender Demographics Report* 7 (2010), *available at* http://tinyurl.com/c9rqfdb. But just as it is important for our student-athletes to imagine career options in athletic leadership, we want to ensure that the full range of options in graduate and professional school is tangibly visible to them as potential career paths.

B. When Universities are Deprived of the Ability to Build a Racially Diverse Class, Minority Student-Athletes are Often a Substantial Number of the Minorities on Campus, Which Undermines the Universities' Ability to Build True Diversity

As this Court has recognized repeatedly, the broader university community also benefits from diversity and the ability to interact with people of different races, backgrounds, talents, and interests. *Grutter* v. *Bollinger*, 539 U.S. 306, 330-331 (2003). A university that is diverse only within the confines of its sporting venues fails to advance these important values. This is illustrated by unfortunate recent experience. Several of us have worked at institutions whose ordinary academic discretion over admissions was curtailed by judicial or legislative fiat. Such external strictures have often produced a skewed and imbalanced campus community where the diversity of the athletics department, and of society generally, is not reflected across the university.

The result in some situations is that our student-athletes represent a large portion of all the minorities on campus. Following the passage of Proposition 209 in California, which prohibits the consideration of race in admissions, African-American enrollment at UCLA fell to a thirty-year low. See Rebecca Trounson, *A Startling Statistic at UCLA*, L.A. Times, June 3, 2006, *available at* http://tinyurl.com/dy58neh. Only ninety-six African-American freshmen were in an entering class of 5000 at UCLA in 2006, and a substantial fraction of that number was recruited athletes. *Ibid.* The University of Texas itself provides another example. The entering freshman class of 2004, the last class admitted under the Top 10% Law but without considering race in its admissions process, enrolled only 309 African-American students out of an incoming class of nearly 7000. Office of Admissions, Univ. of Texas at Austin, *Implementation and Results of the Texas Automatic Admissions Law* 6 tbl. 1 (2008), *available at* http://tinyurl.com/bobwsrc.

This imbalance disserves all students, athletes and non-athletes alike. Students in such situations are deprived of experiencing a truly diverse college community; the minorities that students interact with, because many are athletes, will share interests, talents, and extracurricular activities. It is not enough to simply have diversity as measured by a numerically high grouping of minority students – for campus diversity to have its full intended benefits, the university must ensure that there is diversity *within* racial groups. See *Gratz* v. *Bollinger*, 539 U.S. 244 (2003) (O'Connor, J., concurring) (explaining that an admissions program should "tak[e] into account diversity within and among all racial and ethnic groups"); see also *Smith* v. *Univ. of Wash.*, 392 F.3d 367, 378 (9th Cir. 2004), cert. denied 546 U.S. 813 (2005) (explaining that law school was justified in seeking to ensure diversity amongst its Asian American students).

This is no different from what we do while building our teams. We do not recruit basketball players generally – we recruit, from the general pool of talented basketball players, specific athletes who bring a unique skill set that suits them best for a specific position. Without that diversity of talents and experiences, our teams would surely falter; a team of only point guards would lose every game, even if they were exceptionally talented.

In sum, we know from long experience that the diversity within the athletic department cannot, and should not, exist in a vacuum apart from the broader university and society at large. We share the belief of our colleague, Michigan State men's coach Tom Izzo, that "our basketball teams are like a little tiny part of this big picture which is our university first, our city second, our state third, and it just keeps growing." One United Michigan Press Conference, Apr. 6, 2006, *available at* http://tinyurl.com/cthwmgh. This Court has repeatedly endorsed the compelling importance of diversity to the educational mission of American colleges and universities, including the appropriate use of means to foster such diversity, and ought not revise that principle in this case.

C. Petitioner's Argument Would Force Our Institutions to Rigidly Ignore all of These Goals, Which Cannot Be Achieved Without Individualized Consideration of Race

Petitioner argues that the University of Texas no longer needs to consider race in admissions because of the Top 10% Law. See Pet. 20, 35-37; *Fisher* v. *Univ. of Tex. at Austin*, 631 F.3d 213, 234 (5th Cir. 2011). Specifically, Petitioner argues that, because the Top 10% Law draws what Petitioner believes to be sufficient "levels of Hispanic and African-American enrollment," there is no "possible need to continue using race" in the university's admissions process. Pet. 35; see also *Fisher*, 631 F.3d at 253-254 (Garza, J., specially concurring). Apparently, according to Petitioner, a university should never be permitted to consider race in its admissions process if it achieves certain "levels of Hispanic and African-American enrollment." Pet. 35.

Given the compelling importance of diversity in achieving the multiple goals described above, the Petitioner's argument would dramatically injure the enterprise in which we are engaged. Such mechanistic restrictions based on nothing more than the raw number of minority students on campus have, and would, severely hamper our institutions in their ability to serve society by providing diverse opportunities and by fostering interaction among future leaders from different backgrounds.

The Petitioner's position here is actually more rigid and mechanical relative to the racial composition of the University of Texas than the more nuanced review practiced by the University and many other institutions. We have witnessed firsthand the compelling fruits afforded by the University's current individualized review. Acceptance of Petitioner's argument, however, runs contrary to our collective experience, undermines the benefits to be realized from a diverse environment and directly interferes with our efforts to aid the future development and success of our athletes.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AUGUST 13, 2012

AMICUS CURIAE BRIEF

No. 11-345

In the
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL BLACK LAW STUDENTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Black Law Students Association ("NBLSA") submits this brief as *amicus curiae* in support of Respondents, urging this Court to affirm the ruling of the United States Court of Appeals for the Fifth Circuit upholding the race-conscious admissions policy of the University of Texas at Austin ("UT Austin").[1] NBLSA is a membership organization formed in 1968 to promote the educational, professional, political, and social objectives of Black law students. Today, NBLSA is the largest student-run organization in the United States, with nearly 6,000 members, over 200 chapters in our nation's law schools, a growing pre-law division, and 6 international chapters or affiliates. NBLSA has an interest in this case because it is dedicated to protecting the racial diversity in legal education and the legal profession made possible by race-conscious college and university admissions programs.

SUMMARY OF ARGUMENT

Over 60 years ago this Court recognized that

> [t]he law school, the proving ground for legal learning and practice, cannot

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

> be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. Painter, 339 U.S. 629, 634 (1950). Thankfully, the blatant racial segregation of law students challenged in *Sweatt* is in the past and today almost all of this nation's law schools embrace the fact that a racially and ethnically diverse student body improves the quality of legal education for all students. However, there remains a systemic racial hierarchy that produces and perpetuates racial disparities in educational opportunities and outcomes. Race-conscious admissions programs, like the one used by UT Austin, are designed to overcome some of this systemic racism and serve as a vital pipeline to educational and professional opportunities for minority students.

This Court has held that race-conscious admissions programs in public colleges and universities are constitutional, *see Grutter v. Bollinger*, 539 U.S. 306, 335 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978), with benefits that flow to the educational institution, the larger society and individual students. *See Grutter*, 539 U.S. at 335. Yet, opponents of race-conscious admissions programs continue to argue that these programs demoralize minority students, exposing them to stigma and academic environments in which they are outmatched. In an *amicus curiae* brief submitted to the Court in this case, *amici* cite to class rank and bar passage rates of Black law students as evidence that race-conscious admissions programs lead minority students to attend colleges, universities and professional schools for which they are unqualified.[2] *Brief of Richard Sander and*

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[2] Although *amici* Sander and Taylor present their arguments and analysis as unchallenged, their arguments have been presented before in law review articles authored by Professor Sander, and his analysis and conclusions have been widely challenged and criticized. *See e.g.* Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 Denver U. L. Rev. 751 (2011); Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 Nw. U. L. Rev. 1759 (2007); andre douglas pond cummings, *"Open Water": Affirmative Action, Mismatch Theory and Swarming Predators – A Response to Richard Sander*, 44 Brandeis L.J. 795, 826-829 (2006); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005); Michele Landis Dauber, *The Big Muddy*, 57 Stan. L. Rev. 1899 (2005); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915 (2005); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 Yale L.J. 1997 (2005); Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 Yale L.J. 2011 (2005); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 7 Afr.-Am. L. & Pol'y Rep. 1 (2005); Beverly I. Moran, *The Case for Black Inferiority? What Must be True if Professor Sander is Right: A Response to A Systemic Analysis of Affirmative Action in American Law Schools*, 5 Conn. Pub. Int. L. J. 41 (2005). These authors have

Stuart Taylor. Jr. as Amicus Curiae in Support of Neither Party at 5-10 [hereinafter "Sander Brief"]. The statistics cited in the Sander Brief are indeed troubling and a legitimate cause for concern. But, the Sander Brief ignores the fact that "[r]ace continues to structure the opportunities and outlook of all Americans even as overt discrimination based on race recedes. Any dialogue about affirmative action, or about legal education and practice generally, must candidly acknowledge this complex reality." David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915, 1961 (2005) [hereinafter "*Systematic Response*"]. Accordingly, to assess the impact of race-conscious admissions programs we must first acknowledge and address several critical factors that contribute to Black underperformance in the classroom and on the bar examination, including racial discrimination, stereotype threat and segregated and inadequate K through 12 education systems. The gap between the performance of Black and white law students is quite troubling, but race-conscious admissions programs cannot be faulted for those troubles.

Furthermore, eliminating the consideration of race would drastically reduce the number of Black law students and lawyers, particularly at our nation's most selective law schools. *See, e.g.*, David Chambers, et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57

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engaged Professor Sander's arguments on his terms, despite the flaws in his methodology.

Stan. L. Rev. 1855, 1857 and 1898 (2005) (concluding that eliminating race-conscious admissions programs would result in a "substantial net decline in the number of African Americans entering the bar"); *see also* Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1853 (2005) (arguing that race-conscious admissions programs mitigate racial disparities and are likely to produce more Black lawyers). Indeed, rather than supporting the abandonment of race-conscious admissions programs, the significant contributions by minority lawyers serve as compelling evidence of their success and value, and counsels in favor of continuing admissions programs such as UT Austin's.

Finally, arguments by *amici* urging this Court to adopt the position that there is no benefit to diversity on college and university campuses because positive interaction among members of different racial and ethnic groups is only possible when the number of non-white students is kept to a minimum should be rejected. That position would only lead us to a return to racial separatism and tokenism, and continued inequality.

ARGUMENT

I. The Primary Purpose of Race-Conscious Admissions Programs is to Benefit the Larger Educational Community and Society as a Whole.

As the Fifth Circuit held in the decision below, and as the Petitioner concedes, a public university has a compelling state interest in achieving diversity in its student body because of the myriad benefits to the student body as a whole. *See* Brief for Pet. at 26; *Fisher v. Univ. of Tex.*, 631 F.3d 213, 230 (5th Cir. 2011). These race-conscious admissions policies "promote 'cross-racial understanding,' 'break down racial stereotypes,' enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as 'spokespersons' for their race." *Fisher*, 631 F.3d at 230; *see also Grutter*, 539 U.S. at 330. This Court has long accepted that the educational mission of an American institution of higher learning goes far beyond the particular subject matter discussed in any single classroom to encompass the goals of ensuring availability of opportunity for all citizens, training students for leadership, and opening students' minds in an effort to create citizens who can collaborate, communicate and contribute meaningfully to an increasingly multi-ethnic and global community. *See, e.g.*, *Grutter*, 539 U.S. at 331; *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Therefore, the assertions in the Sander Brief, arguing that race-conscious admissions should be rejected because these programs lead to under achievement and stigma for minority students, Sander Br. at 2-3, are not persuasive.[3] Minority students are not the sole

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[3] The Sander Brief argues, in essence, that Black students who underperform on the LSAT do not belong at top-tier schools because they experience an academic mismatch between their level of preparation and performance and that of

intended beneficiaries of race-conscious admissions programs. The benefits of race-conscious admissions programs are substantial and inure to many segments of society.

While educational institutions have an interest in creating a diverse learning environment, society has a larger interest in colleges and universities training a diverse group of future leaders. Indeed, there has emerged a "national consensus among university, business, and military leaders on the value of racial inclusiveness." Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 Harv. L. Rev. 113, 122 (2003) [hereinafter "*Admissions Rituals*"]; *see also Grutter*, 539 U.S. at 330-331 (citing to briefs on behalf of major U.S. corporations and military officials in support of the benefits of race-conscious admissions programs). Institutions of higher education are the training ground for our future leaders. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332.

In short, institutions of higher education seek diversity in service of their "twin goals of educational excellence and democratic opportunity," *Admissions Rituals* at 199, not for the sole benefit of minority students admitted under race-conscious programs.

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their white and Asian counterparts. Sander Brief at 3-4, 5-6, 8-9.

"[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." *Id.* at 331-32. "[N]owhere is the importance of such openness more acute than in the context of higher education. Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332.

II. Race-Conscious Admissions Programs are Not Harmful to the Professional Aspirations or Personal Well-Being of Black Law Students.

A. Black Law Students are Fully Aware of the Benefits and Risks of Attending Top-Tier Law Schools and are Capable of Making Their Own Informed Decisions.

The argument that race-conscious admissions programs should be outlawed because Black law students end up attending schools that are too academically challenging for them inappropriately seeks to displace the independent, informed judgment of minority students of the potential costs and benefits of attending flagship universities and top-tier graduate schools. The members of NBLSA are not misinformed and are not operating under a false consciousness. We are, like most other students, aware of the U.S. News and World Report rankings of the law schools to which we apply and to which we are accepted. *See* andre douglas pond cummings,*"Open Water": Affirmative Action, Mismatch Theory and Swarming Predators – A Response to Richard Sander*, 44 Brandeis L.J. 795, 826-29 (2006). We have readily available access to the LSAT scores and undergraduate GPAs of entering classes at particular law schools. The choice to stretch and challenge ourselves academically at top-tier law schools in exchange for the academic opportunities and the potential of increased career opportunities is a valuable one that race-conscious admission programs have made possible. The ability to make these choices for ourselves should not be taken away. Like all law students, NBLSA students must be allowed to continue weighing potential benefits and risks, and have our decisions respected.

The issue as articulated in the Sander Brief comes down to a choice between grades and class rank on the one hand and the prestige and reputation of the law school on the other. *See* Sander Br. at 13, 31. However, the decision made by Black law students as to which law school to attend involves much more than this. As Black law students are working to become legal professionals, we make choices about which law school to attend by engaging in our own cost-benefit analysis, which often goes beyond potential GPA and class rank. Clearly,

> educational and placement benefits are undoubtedly a large part of why students of all races, creeds, and colors fight so hard to get into top schools. As important as these benefits are,

> however, they fail to capture anything approaching the full value of attending an elite law school. In addition to acquiring substantive knowledge and gaining preferential initial access to the employment market, students attending elite schools are also socialized into the habits and possibilities of eliteness and granted a lifetime membership in the elite networks to which the graduates of such institutions automatically belong.

A Systematic Response at 1931.

Despite statistics indicating lower-than-average GPAs, class rank and bar passage,[4] the fact is that most Black law students go on to be lawyers. Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 Law & Soc. Inquiry 711, 727 (2004). That some Black students graduate in the bottom half of their class or may not pass, or even take, the bar examination does not wholly negate the value of the legal education they received. To the contrary, their legal education will continue to be valuable to them as they pursue careers in business, real estate, law enforcement or other law-related careers.[5] In addition to substantive knowledge, they have gained credentials employers will value, relationships and skills that will continue to serve them throughout their law-related careers. *See A Systematic Response* at 1943-44. Considering these potential benefits, it is hard to believe that the Black students who currently graduate from law school, even if they are not at the top of their class, would have been better off had they not been accepted into law school at all.

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[4] While reports that Blacks fail the bar examination at higher rates than other law school graduates are troubling, they are not entirely useful without information regarding which state bar examinations were taken and adjustments for the difficulty of each state bar.

[5] Although the recession and the resulting economic

Rather than misguiding Black law students, race-conscious admission programs allow many an opportunity to attend a top-tier, highly ranked law school, where, yes, their test scores and GPAs may be below the average as compared to other admitted students. However, their legal careers are not undermined by the choice that many make to pursue this opportunity. In a study of graduates of the University of Michigan Law School, for example, the authors found that LSAT scores and undergraduate GPAs do not predict the future career success of minority students. Richard O. Lempert, et al, *Michigan's Minority Graduates in Practice*, 25 Law & Soc. Inquiry 395, 501 (2000) [hereinafter "*Michigan's Minority Graduates*"]. Despite the lower LSAT scores and undergraduate GPAs of many admitted minority students, these students went on to achieve levels of career success that met or surpassed the levels achieved by their white peers. *Michigan's Minority Graduates* at 504. Moreover, the study found that law school grades explain less than 5% of the variance in income across the students in the sample. *Id.* Accordingly, a decision to eliminate race-conscious admission programs should not rest on the perceived impact of the entering credentials of minority students or the fact that many Black law students do not graduate at the top of their class, when those factors have not been found to predict future success.

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[5] Although the recession and the resulting economic realities have negatively impacted the job market and the market for legal services, there is continuing value in a legal education as law schools provide valuable training and credentials that prepare their students for legal and law-related careers.

B. Black Students at Top-Tier and Flagship Educational Institutions Graduate at High Rates and Move on to Have Successful and Distinguished Careers.

Far from impeding their future achievements, the choices that Black students are making about which law schools to attend have led them to success, individually and for their broader communities. It is not disputed that Black graduates of top-tier law schools overwhelmingly complete law school and go on to pass the bar. Indeed, over 95% of Blacks attending the most elite schools graduate. *A Systematic Analysis* at 437. And while many Black students are not graduating in the top of their law school classes, we cannot ignore the fact that race-conscious admission programs at the undergraduate and graduate level have helped Black lawyers overcome systemic barriers that previously blocked the entrance to our nation's flagship colleges and universities, creating pipelines to impressive and influential legal careers.

Black students at top-tier institutions in fact graduate at high rates and move on to have careers as distinguished and accomplished as their white classmates. *See* William G. Bowen & Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS at 55-57 (1998) [hereinafter "SHAPE OF THE RIVER"]; *Michigan's Minority Graduates*. In CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES (2011), the authors found a strong positive relationship between graduation rates and the selectivity of the educational institution. William G. Bowen et al., CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES at 192 [hereinafter "CROSSING THE FINISH LINE"]. The authors also directly challenged the assumption that "mismatching" led to lower graduation rates for Black students. In their study, the authors grouped Black men by their high school GPAs and then examined whether those with relatively low GPAs who enrolled in more selective public universities graduated at lower rates than those with the same GPAs who attended less selective institutions. The results proved just the opposite. To illustrate, of the students with high school GPAs below 3.0, those who went to the most selective colleges and universities in the study had a graduation rate six percentage points higher than those who went to second-tier schools and eight percentage points higher than those who went to third-tier schools. CROSSING THE FINISH LINE at 209.

Indeed, for all GPA levels Black men who went to more selective institutions graduated at higher rates than their peers with similar grades who went to less selective colleges. *Id.* at 209. "Moreover, contrary to what the overmatch or mismatch hypothesis would lead us to expect, the relative graduation rate advantage associated with going to a more selective university was even more pronounced for black men at the lower end of the high school grade distribution than it was for students with better high school records." *Id.*

Similarly, in the earlier study by Bowen and Bok, they found that "the more selective the college attended, the lower the Black dropout rate." SHAPE OF THE RIVER at 259.

The findings of several studies also directly refute any claim that Black students would fare better academically at schools where the average SAT score was similar to their own scores. The study found that the Black students in the lowest category of SAT scores graduated at higher rates the more selective the school they attended. *See* CROSSING THE FINISH LINE at 209; SHAPE OF THE RIVER at 61, 259. Moreover, for students of similar gender, socioeconomic status, high school grades and SAT scores, graduation rates were highest for those students who attended the most selective schools. SHAPE OF THE RIVER at 63, 259. Finally, students in the same category of SAT scores were more likely to ultimately earn an advanced degree the more selective the school they attended. SHAPE OF THE RIVER at 114. This was true even if the student received a lower GPA at the more prestigious school. *Id.*

These studies support the conclusion that to help improve the academic and professional outcomes for minority students we should not "discourage them from enrolling in academically strong programs that choose to admit them. On the contrary, ...[they] should be encouraged to 'aim high' when deciding whether and where to pursue educational opportunities beyond high school." CROSSING THE FINISH LINE at 211. Indeed, the problem of "undermatching," where students with strong academic credentials do not enroll in colleges or universities that match their academic credentials, is far more troubling for minority students than the alleged issue of mismatch advanced in the Sander Brief. *See Id.* at 100. A study of undermatching conducted by the authors of CROSSING THE FINISH LINE found that a disproportionate number of undermatches are among racial and ethnic minorities, with it being more common among Black students. *Id.* at 103. The issue of undermatching is connected to the issue of diversity and race-conscious admissions programs as one cause for students not attending colleges and universities that match their academic credentials is their belief that they would be "uncomfortable" in that community. *See Id.* at 104.

C. Access to Top-Tier Law Schools is Important to Maintaining Integration in the Legal Profession.

Eliminating race-conscious admissions programs could potentially eliminate many of the gains that such programs have facilitated. Several published critiques of the theories advanced in the Sander Brief found that without race-conscious admissions programs, the enrollment of Black law students and the number of Black lawyers would sharply decline.[6] David Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855, 1857, 1898 (2005) (concluding that eliminating race-conscious admissions programs would result in a

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[6] Percentage plans, like the one used by UT Austin, alone cannot ensure meaningful diversity at the undergraduate or professional school level in the absence of race-conscious admissions programs. First, they often undermine the goals of diversity and integration by relying on continuing educational and residential racial segregation for their success. *See* Michelle Adams, *Isn't It Ironic?: The Central Paradox at the Heart of "Percentage Plans"*, 62 Ohio St. L.J. 1729 (2001); U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002). Indeed, admissions of a meaningful number of minority students occurs under percentage plans when members of the same race compete against each other for the top positions in their class. Second, percentage plans were designed to address admission to undergraduate institutions, *see* Brief of the Authors of the Texas Ten Percent Plan as Amicus Curiae in Support of Respondents in *Gratz v. Bollinger* at 8-9, and there is no evidence that they can be translated to admissions programs at the law school or graduate school level. *Grutter* at 340. Finally, percentage plans are unlikely to achieve the diversity sought by law schools. *Id.* (finding that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.").

"substantial net decline in the number of African Americans entering the bar"); *see also* Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1853 (2005) (arguing that affirmative action mitigates racial disparities and is likely to produce more Black lawyers).

Furthermore, simply having access to *a* legal education will be insufficient to continue the presence of Black lawyers in prestigious legal institutions and critical leadership positions. The legal profession is still far from achieving significant levels of integration, particularly at the most elite levels of practice. *See* Elizabeth Chambliss, *Miles to Go 2000: Progress of Minorities in the Legal Profession*, A.B.A. Comm'n on Opportunities for Minorities in the Profession (2000). Although minority graduates of top-tier law schools go on to achieve similar success to their white classmates, racism continues to impact and impede the careers of minority attorneys, particularly those who do not have the credential of a degree from a top-tier school. David B. Wilkins, *Rollin' On the River: Race, Elite Schools, and the Equality Paradox*, 25 Law & Soc. Inquiry 527-28 (2000) [hereinafter "*Rollin' on the River*"]; *see also* William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession*, ABA Journal, July 2012 (Finding "[d]ecades after graduation, elite law schools continue to open doors closed to graduates of less-favored schools"). The success of Black lawyers cannot be divorced from the access to top-tier law schools facilitated by race-conscious admissions programs. Powerful and influential Black lawyers are most often graduates of "elite" law schools, and have used their success to help open the doors for other Black lawyers. *A Systematic Response* at 1938-39; Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1329 (1986).

There is evidence that a law degree from a top-tier institution is a credential required of Black lawyers more often than their white colleagues. In a survey of the 250 largest law firms in the country, in New York and Washington, D.C., more than 50% of all Black associates hired graduated from either Harvard Law School or the top schools in those local markets, i.e. Columbia Law School and NYU Law School in New York and Georgetown University Law Center in Washington, D.C. *Rollin' On the River* at 534. The numbers for white associates in those two cities were 40.4% in New York and 23% in Washington, D.C. *Id.* The numbers are even more stark for those who have achieved partnership in firms: in 1993, 77% of the Black partners profiled in the ABA's directory of minority partners at predominantly white corporate law firms attended elite law schools, with nearly 47% of those graduating from either Harvard Law School or Yale Law School.[7] *Rollin' On the River* at 534.

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[7] This study defined elite law schools as Harvard Law School, Yale Law School, Stanford Law School, University of Chicago, University of Michigan, Columbia Law School, NYU Law School, Berkeley, University of Virginia, University Pennsylvania and Northwestern University. *Rollin' On the River* at 534 n.8 (2000).

As the Court acknowledged in *Grutter*, law schools are a training ground for our country's leaders in federal, state and local government, business and social institutions, both public and private. *Grutter*, 539 U.S. at 332. In order to ensure that we achieve a representative democracy and democratic society, we need to make sure the bench and bar, as well as our elected leaders, business leaders, and leaders of public institutions represent all ethnicities and backgrounds. As a practical matter, law schools cannot succeed in their quest for a well-qualified, racially and ethnically diverse student body unless flagship colleges and universities admit racially and ethnically diverse students to their undergraduate programs.

D. Race-Conscious Admissions Programs Have Not Been Found to Create Stigma for Minority Students.

In addition to the clear benefits to the educational and career opportunities for Blacks brought about by race-conscious admissions programs, the individual harms that were feared would befall minority students under these programs have not come to pass. A prominent critique of race-consciousness is that minority students admitted under race-conscious admission programs will experience "internal" and "external" stigma, both doubting their own abilities and merit and having their fellow students assume they were admitted because of their race and not their qualifications.[8] If race-conscious admissions programs in fact cause external or internal stigma for minority students, one would assume that minority students enrolled at colleges and universities in states that have banned race-conscious admissions programs would not experience this stigma. Or, that the stigma experienced by these students would be less than the stigma experienced by students attending schools on campuses actively employing race-conscious admissions programs. Yet, no causal connection between race-conscious admissions programs and racial stigma has ever been established. In fact, recent studies have discounted any role of race-consciousness in promoting racial stigma on college and university campuses. Rather, students attending schools in states banning the consideration of race are likely to find themselves in unwelcoming environments, and are more likely to encounter racial hostility and stigma. In many respects, they are not faring as well as their counterparts attending schools that embrace the value of racial diversity and employ race-conscious admissions programs.

In the first study, a study of the experiences of minority students currently enrolled in undergraduate and graduate programs in the "hard sciences," the author found that minority students in states that allow the use of race-conscious admissions programs experience far less stigma than students in states that have banned racial considerations.[9] *See* Deirdre M Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197 (2010) [hereinafter "*Brilliant Disguise*"]. First, the study confirms that overt acts of racism continue on college and university campuses, in fact occurring twice as often on campuses in the four states in which the consideration of race has been banned. *Brilliant Disguise* at 1222.

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[8] In fact, those who argue that race-conscious admissions programs should be banned because it stigmatizes minority students are only aiding racial discrimination. Stamping all minority students with "badges of inferiority" by assuming they lack qualifications is itself racial discrimination. *See* andre douglas pond cummings, *The Associated Dangers of "Brilliant Disguises," Color-Blind Constitutionalism, and Postracial Rhetoric*, 85 Ind. L.J. 1277, 1282 (2010).

Furthermore, the study suggests that in states where race-consciousness is banned, minority students are the victims of stigmatization more often than students attending school on campuses openly practicing race-conscious admissions. *Id.* at 1218. Contrary to what opponents of race-conscious admissions have argued, the consideration of race may in fact help reduce the racial stigma suffered by minority students, not produce it.

Finally, the study suggests that increased racial diversity, not less, may help to alleviate feelings of stigma. Racial isolation on campuses may increase feelings of internal and external stigma, as minority students who have been the sole minority student in a course experience more stigma "than do their counterparts who have taken no classes in which they were the sole minority student." *Id.* at 1229. Unsurprisingly, minority students enrolled in schools in states that have banned race-conscious admissions programs were disproportionately more likely to attend classes in which they were the sole minority student. *Id.* at 1227. Indeed, the study found that 68.6% of students who attended school in states that banned the consideration of race in admissions decisions had one or more class in which they were the sole minority student. *Id.* Minority students who were the lone minority student in a class experienced overt racism from other students at a rate of four times as often as students who have never taken a class in which they were the only minority, *Id.* at 1228-29, and "...encountered racism from faculty at twice the rate of students who have never found themselves as the lone minority in the classroom." *Id.*

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[9] Four states included in the study—California, Washington, Florida, and Michigan—have banned race-conscious admissions programs. *Brilliant Disguise* at 1217. Twenty-three other states and two territories where affirmative action is allowed were also included in the study. *Id.* at 1218

In another study based on survey responses of white and minority students at seven upper-tier public law schools,[10] the authors also sought to examine whether racial stigma would dissipate if race-conscious programs were eliminated. To the contrary, the study found that there was no statistically significant difference in feelings of stigmatization for minority students who attended schools that did have race-conscious programs and those that did not. Angela Onwuachi-Willig, et al., *Cracking the Egg: Which Came First – Stigma or Affirmative Action?*, 96 Cal. L. Rev. 1299, 1332 (2008).

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[10] The law schools included in this survey were the University of California, Berkeley; the University of California, Davis; the University of Cincinnati; the University of Iowa; the University of Michigan; the University of Virginia and the University of Washington. Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First – Stigma or Affirmative Action?*, 96 Cal. L. Rev. 1299, 1304 (2008).

The fact remains, the root causes of racial stigma reach back much further than race-conscious admissions programs; minority students faced racial stigma long before the use of these programs and that stigma will continue without these programs. Not only do the alleged harms of race-conscious admissions programs not outweigh their documented benefits, there is no proof that those harms exist at all. Minority students are less likely to suffer from stigmatization where they are part of a critical mass of minority students, often made possible through the use of race-conscious admissions programs. Walter R. Allen & Daniel Solorzano, *Affirmative Action, Educational Equality and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 Berkeley La Raza L.J. 237 (2001). Concerns about the impact of racial stigma, therefore, weigh in favor of expanding race-conscious admissions programs, not decreasing or abolishing them.

III. Stereotype Threat Provides an Empirical Explanation for Race-Based Achievement Gaps in Law School and the Legal Profession.

In arguing that Black students who underperform on the LSAT do not belong at top-tier schools because they experience an academic mismatch between their level of preparation and performance, nowhere does the Sander Brief offer an explanation for the root-causes of the alleged mismatch, except to note by implication that it is simply a function of cultural upbringing. Sander Br. at 22 n.58. Instead, the brief casually dismisses stereotype threat by suggesting that the threat exists only in the artificial environment of the psychology lab and is wholly absent in the real world. Sander Br. at 25. Moreover, in *amici* Sander's and Taylor's view, to the extent that stereotype threat does exist as a real world phenomenon and does result in underperformance in academia and the profession, it only further establishes that most Black students do not belong in elite institutions, where the stereotype threat is presumably at its highest, but instead are better off at less competitive institutions, where their alleged academic mismatch is less pronounced and, therefore, less threatening. Sander Br. at 11-14, 25-26. This argument represents a misunderstanding of stereotype threat, a social science body of work that, unlike the academic mismatch theory, has been peer-reviewed, replicated and confirmed in over 400 studies over the course of fifteen years.

A. Stereotype Threat is a Universal Phenomenon in Which People Underperform When Social and Historical Cues Conspire to Tell Them That They are Less Than Competent.

Social scientists define stereotype threat as "a situational predicament in which individuals are at risk, by dint of their actions or behaviors, of confirming negative stereotypes about their groups." Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African-Americans*, J. of Personality & Soc. Psychol., 69 (1995) [hereinafter "*Stereotype Threat and the Intellectual Test Performance of African-Americans*"]. According to stereotype threat, the mere existence and awareness of cultural and historical negative stereotypes creates in individuals who are the subject of the stereotype a tendency to perform at a level below their potential. *See* Michael Inzlicht & Tony Schmader, STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 7 (2011) (hereinafter "STEREOTYPE THREAT"). Scientists term it "a threat in the air." *See* Claude Steele, *A Threat In the Air: How Stereotypes Shape Identity and Performance*, 52 Am. Psychologist 613 (June 1997), because, unlike nature-based claims that ascribe biological causes to the achievement gaps among different groups, or nurture-based arguments that trace low intellectual performance to an individual's upbringing, culture or lack of preparation, stereotype threat describes a process by which, controlling for all other factors, an individual may perform below his or her potential—and indeed below his or her level of preparation—because social cues signal negative stereotypes about the individual's groups, thereby creating an atmosphere in which the individual feels pressured and ultimately fails to overcome the stereotype. STEREOTYPE THREAT at 6.

For example, "because African-Americans are well aware of the negative stereotypes impugning their intellectual ability, whenever they are in a situation—say, a standardized testing situation—they may fear confirming the stereotype." *Id.* For another example, because women have historically been the subject of negative stereotypes about their intellectual capacity for math and science work, their fear of living down to the stereotype often has a significant impact on math and science tests. *See* Christine Logel et al., *Threatening Gender and Race: Different Manifestations of Stereotype Threat*, in STEREOTYPE THREAT at 161-62. But lest stereotype threat be misunderstood as targeting only those groups that have historically been disadvantaged or marginalized, the fact is all of us, in one way or another, experience the effects of stereotype threat, including, for example, white males who, when told prior to a math test that their performance on the test will be used to examine Asian superiority in math, performed significantly below their level of preparation. *See* Joshua Aronson et al., *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. of Experimental Psychol. 29 (1999).

Two social scientists, Claude Steele and Joshua Aronson, first demonstrated the phenomenon of stereotype threat in a now-classic article in the Journal of Personality and Social Psychology. Their research grew out of a simple question:

> From an observer's standpoint, the situation of a boy and a girl in a math classroom or of a Black student and a

> White student in any classroom are essentially the same. The teacher is the same; the textbooks are the same; and in better classrooms, these students are treated the same. Is it possible, then, that they could still experience the classroom differently, so differently in fact as to significantly affect their performance and achievement there?

Claude Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance,* American Psychology 52 (1997). Steele and Aronson's insight, borne out of empirical evidence, was that for the girl in the math classroom and the Black student in any classroom the seemingly neutral environment held the key to their diminished performance because the environmental cues that signal to the girl that she was less competent in math and to the Black student that he was intellectually inferior produced not merely test and performance anxiety but rather mind-body changes that significantly lowered their performance. Put plainly:

> It is not just the case that individuals feel anxious when they are stereotyped and that is why they underperform. Furthermore, it is not just the case that stereotypes are activated and automatically induce stereotype-consistent behavior. The phenomenon...involves both cognitive and affective components and engages

> both automatic and controlled processes.

Toni Schmader & Sian Beilock, *An Integration of Processes That Underlie Stereotype Threat*, in STEREOTYPE THREAT at 35.

In the years since Professor Steele's original article, stereotype threat has become one of the most widely and rigorously researched topics in all of social psychology, producing over 400 studies on the effects of stereotype threat in different groups, on different tasks, and even in different countries. *See* STEREOTYPE THREAT at 6. These studies, spread over fifteen years, have conclusively shown that stereotype threat contributes to low performance not only among Blacks, but also Latinos and the poor in standardized testing, women in math and science, the elderly in memory, and whites in athletics. *See* Patricia Gonzalez et al, *The Effect of Stereotype Threat and Double-Minority Status on the Test Performance of Latino Women*, 28 Personality & Soc. Psychol. Bull. 659 (2002); Christine Logel et al., *Threatening Gender and Race: Different Manifestations of Stereotype Threat, in* STEREOTYPE THREAT at 163; Jean Claude Croizet & Mathias Millet, *Social Class and Test Performance: From Stereotype Threat to Symbolic Violence and Vice Versa, in* STEREOTYPE THREAT at 188; Alison Chasteen et al., *Aging and Stereotype Threat, in* STEREOTYPE THREAT at 202; Jeff Stone et al., *The Impact of Stereotype Threat on Performance in Sports, in* STEREOTYPE THREAT at 217. "Indeed so reliable are stereotype threat effects on performance that much of the current research on the topic focuses on *why* it happens rather than *if* or *when*." Wendy Mendes & Jeremy Jamieson, *Embodied Stereotype Threat: Exploring Brain and Body Mechanisms Underlying Performance Impairments*, *in* STEREOTYPE THREAT at 51 (emphasis in original). Thus, from a psychological standpoint, we now know that stereotype threat above all describes how context is the key to performance, such that the more cues present in the environment signaling negative stereotypes, the harder individuals fight to overcome the stereotype, but perversely the worse the individual's performance as a result. Mary Murphy & Valerie Jones Taylor, *The Role of Situational Cues in Signaling and Maintaining Stereotype Threat*, in STEREOTYPE THREAT at 18-19. In terms of physiology, we also know that in situations in which individuals are expected to perform, the psychological stresses brought about by the experience of negative stereotypes trigger neurobiological changes that decrease performance. *See* Mendes & Jamieson, *Embodied Stereotype Threat*, *in* STEREOTYPE THREAT at 51.

We are all potentially subject to stereotype threat because it is a manifestation—albeit a maladaptive one—of an indispensable human cognitive and emotional trait: our capacity to interact effectively with other human beings by reading social cues in order to anticipate what they think of us and how they will react to what we say or do. Claude Steele, *Extending and Applying Stereotype Threat Research*, in STEREOTYPE THREAT at 298. Stereotype threat arises when, in the process of developing behavior appropriate to a particular social milieu, we pick up on social cues that signal to us that other people harbor negative stereotypes about us and are likely to judge us negatively based on that stereotype. STEREOTYPE THREAT at 7. The point is not that others do in fact judge us based on the stereotype, nor is the point that we in fact believe in the stereotype about ourselves, but rather that our awareness of the stereotype, our fear of confirming the worst of it, and our often desperate fight to disprove it, end up "hijacking" the very cognitive and emotional energy and systems we otherwise need to perform well at the task at hand. Gonzales et al., *The Effect of Stereotype Threat and Double-Minority Status on the Test Performance of Latina Women*, 28 Personality & Soc. Psychol. Bull. at 659.

B. Peer-Reviewed Research has Conclusively Demonstrated the Effects of Stereotype Threat Upon Blacks and Latinos in Academic Settings.

While every group, given the right conditions, may fall prey to the effects of stereotype threat, peer-reviewed research has amply demonstrated its impact on Blacks and Latinos in various intellectual domains. *See Stereotype Threat and the Intellectual Test Performance of African Americans* at 797; Gonzales et al., *The Effect of Stereotype Threat and Double-Minority Status on the Test Performance of Latina Women*, 28 Personality & Soc. Psychol. Bull. at 659.

In fact the initial Steele and Aronson study that first identified the concept of stereotype threat involved academic performance by Black students. The same test was administered to Black and white Stanford students under two different conditions, one in which they were told that the test would diagnose their intellectual ability, the other in which they were informed that the test was a mere problem-solving task not intended to evaluate their intellectual ability. Under the former condition, Black students performed substantially worse than their white counterparts, whereas under the latter the racial gap was virtually eliminated. *Stereotype Threat and the Intellectual Test Performance of African Americans* at 797. Similarly, when told that a math test would evaluate their intellectual ability Latino college students scored much lower than White students, whereas when told that the test did not evaluate their ability, they performed as well as White students. Gonzales et al., *The Effects of Stereotype Threat and Double-Minority Status* at 659.

The effect of stereotype threat on Black and Latino students has real world consequences. Social scientists have shown, for example, that the higher high school dropout rate for Black students as compared to white students is due in part to an attempt by Black students to avoid being judged by negative stereotypes of their intellectual abilities. J.W. Osborne & C. Walker, *Stereotype Threat, Identification with Academics, and Withdrawal from School: Why the Most Successful Students of Colour Might Be Most Likely to Withdraw*, 26 Educ. Psychol. 563-577 (2006). Indeed, for so-called non-Asian minorities, the most pernicious effects of stereotype threat comes to this:

> Because stereotypes about the academic ability of Blacks and Hispanics target a domain that is essential to a broad range of careers, behaviorally avoiding the stereotype by skipping a test, enrolling in easy rather than challenging classes, or, at the extreme, dropping out of school may contribute to poverty and poor life outcomes.

Christine Logel et al., *Threatening Gender and Race: Different Manifestations of Stereotype Threat*, in STEREOTYPE THREAT at 163.

C. The Elimination of Race-Conscious Programs Will Exacerbate Rather Than Ameliorate the Effects of Stereotype Threat Upon Blacks and Latinos.

The Sander Brief repeatedly insists that benign, race-conscious remedies in fact stigmatize Blacks and Latinos, and cause even students who would otherwise be expected to perform to the top of their class to underperform out of an internalized sense of inferiority. The solution, according to that argument, is simply to eliminate all race-conscious programs.

This argument is premised on a fundamental misunderstanding of stereotype threat and an almost willful blindness of the research described above. Whatever feelings of inferiority Blacks and Latinos may or may not feel when attending top-tier institutions does not originate or flow from the fact that, for example, in any given year these students happened to be part of the one percent of candidates UT Austin did not admit under its percentage plan. Rather, these feelings of inferiority, such as they may be, are rooted in an ancient and malignant narrative passed on from generation to generation and repeated in so many subtle and not so subtle ways that in time they have become, to paraphrase Professor Steele, the very air we breathe.

IV. Assertions That Limiting the Number of Minority Students on College Campuses Would Improve Cross-Racial Interactions are Simply Advocating Racial Tokenism

In their *amicus curiae* brief in support of Petitioner, Abigail Thernstrom, Stephan Thernstrom, Althea K. Nagai and Russell Nieli [hereinafter "Thernstrom Brief"] attempt to persuade this Court that its conclusion in *Grutter,* that the goal of achieving a diverse student body constitutes a compelling state interest, was wrong. Thernstrom Br. at 3-4. Based on little more than anecdotes and their own previous writings, the Thernstrom Brief argues that contact between people of different races, ethnicities and cultures only exacerbates tension and distrust and leads to separatism; therefore, encouraging contact between people of different races, ethnicities and backgrounds is neither a laudable goal nor constitutional under the Equal Protection Clause of the Fourteenth Amendment and should be struck down by this Court. Thernstrom Br. at 10. Shockingly, these *amici* argue in favor of racial isolation because "the more ethnically diverse the people we live around the less we trust them." *Id.* at 12. This argument is both erroneous and offensive.

The cross-cultural contact that a diverse student body provides contributes to breaking down stereotypes, cross-cultural communication, and positive cognitive and social growth for all students. *See, e.g.*, Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns,* 45 Res. Higher Educ. 529 (2004); Gretchen E. Lopez, *Interethnic Contact, Curriculum, and Attitudes in the First Year of College,* 60 J. Soc. Issues 75 (2004); Victor B. Saenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students,* 48 Res. Higher Educ. 1 (2007). In an effort to discredit this accepted premise, the Thernstrom Brief ignores reams of reliable data, and relies instead on personal feelings. First, the brief points to global ethnic tensions and strife in places such as Yugoslavia and Central Africa to argue that "contact between people of different racial and ethnic groups is more likely than not to lead to tension, ethnic conflict, and a tendency to self-segregate and harbor deep suspicions of outsider groups than it is to further intergroup cooperation and trust." Thernstrom Br. at 10. They argue, without any empirical evidence, that increasing diversity on college campuses similarly leads only to separatism. Thernstrom Br. at 23-24.[11]

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[11] The self-segregation hypothesis promoted by Abigail Thernstrom and Orlando Patterson, among others, has been frequently disputed and undermined. *See, e.g.*, Robert DeFina, *Do African-Americans Prefer To Live in Self-Segregated*

Although the brief stops short of articulating the logical conclusion of their position, there is no way around the fact that this argument leads to a claim in support of segregation by race or ethnicity.

Indeed, it is in part because of the tension that results from ongoing segregation in areas such as housing and primary and secondary education that diversity in higher education is paramount. *See, e.g.*, Janea F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties, and Unfinished Tasks*, 36 J. of College & University 875, 940-41 (2010). Rather than abandon the efforts universities are making to resolve conflicts and disparities, this Court must reaffirm that the contact students have with those from other racial and ethnic groups is beneficial to society and increases the educational value of a college or university community.

The Thernstrom Brief also argues that diversity is only beneficial when it is "organically occurring." Thernstrom Br. at 10. It further argues that race-conscious admissions programs do more damage than good by adding to the natural tension of contact. *Id.* at 18. This argument is nothing more than a thinly-veiled description of the kind of racial tokenism that has obstructed true integration, equality and justice, and rings of the segregationist sentiments espoused in *Plessy v. Ferguson,* 163 U.S. 537 (1896), and other cases upholding racial segregation.

Communities?, Business Review, Issue Q4 (2007); Martin Kilson, *Critique of Orlando Patterson's Blaming the Victim Rituals*, Souls, Winter 2001.

Tellingly, the only illustration of "natural" diversity offered in the brief is that of Jackie Robinson being signed by the Brooklyn Dodgers in 1947, a time when Black baseball players were prohibited from playing alongside White players. Thernstrom Br. at 14-16. Nothing paints a clearer picture, however, of the impossibility of relying on "naturally occurring" diversity. Jackie Robinson was an extraordinarily talented athlete, whose talents so far exceeded those of many other professional athletes that he earned national and international respect. However, the signing of Jackie Robinson did not change the conditions for other Black baseball players for many years. Indeed, the signing of Jackie Robinson has been described by many as a clear example of tokenism that assuaged the guilt of the white community by creating a spectacle of the achievements of one Black man while not actually moving in any significant way toward truly integrating professional baseball for many years. Alvin Hall, THE COOPERSTOWN SYMPOSIUM ON BASEBALL AND AMERICAN CULTURE: 1997 (Peter M. Rutkoff, ed. 2000).

Indeed, it helps to remember that members of his own team signed a petition objecting to his signing, players on other teams threatened to strike rather than play against him, and for years fans treated him to boos and racial taunts every time he took the field. Jackie Robinson's experience was far from unique. Few if any American institutions have been organically integrated. The sort of merit-based "natural diversity" to which the Thernstrom Brief refers is one that exists only in the misty memory of sentimental historians. Eliminating the ability of colleges and universities to consider race in their admissions decisions will undercut the ability to encourage a more racially inclusive and integrated academic community and society.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

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BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondent.

**On Writ of Certiorari to the
United States Courts of Appeals
For the Fifth Circuit**

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,[1] on behalf of the National Education Association ("NEA") and 27 of its affiliated state education associations;[2] the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") and its affiliated national unions, including the American Federation of Teachers ("AFT") and the American Federation of State, County, and Municipal Employees ("AFSCME"); the Service Employees International Union ("SEIU"); and People For the American Way Foundation ("People For Foundation").

NEA is a nationwide employee organization with more than three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA has a deep and abiding commitment to equal opportunity in all aspects of our society and to the proposition that equal educational opportunities, including the opportunity to learn with students of races other than one's own, are a fundamental prerequisite to such equality. As NEA's governing policy affirms, a "racially diverse student population is essential for all elementary/secondary schools, colleges, and universities to promote racial acceptance, improve academic performance, and foster a robust exchange of ideas." Attaining such racial diversity may require "elementary/secondary schools, colleges, and universities to take race into account in making decisions as to student admissions, assignments, and/or transfers." These are likewise the views of the NEA affiliates that have joined in this brief.

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

[2] The state education associations that join in this brief are the Arizona Education Association, California Teachers Association, Colorado Education Association, Delaware State Education Association, Education Minnesota, Federal Education Association, Florida Education Association, Georgia Association of Educators, Idaho Education Association, Illinois Education Association, Massachusetts Teachers Association, Michigan Education Association, Missouri NEA, NEA-New Hampshire, NEA-Rhode Island, New Jersey Education Association, New York State United Teachers, Ohio Education Association, Oklahoma Education Association, Oregon Education Association, Pennsylvania State Education Association, South Dakota Education Association, Texas State Teachers Association, Utah Education Association, Vermont-NEA, Washington Education Association, and Wisconsin Education Association Council.

AFL-CIO is the largest organization of working men and women in the United States, consisting of 56 national and international unions representing over 12 million members. Many of these members, including those of the AFL-CIO's affiliate AFT, teach or perform other essential services in universities, colleges and public elementary and secondary schools. The AFT, for example, represents over 1.5 million members who work in public education, including over 200,000 full and part time faculty, administrative staff, and graduate teaching fellows at public colleges and universities across the country. Dating back to the Court's historic desegregation decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), in which the AFT filed an *amicus curiae* brief supporting the plaintiffs, the AFL-CIO and AFT have had an enduring commitment to educational equality for all, regardless of race.

AFSCME is an international labor organization representing approximately 1.6 million working men and women throughout the United States and Puerto Rico, including tens of thousands who are employed in higher education, providing important services at public colleges and universities throughout the country.

SEIU represents 2.1 million men and women working in health care, property services, and public services, including public school and university employees. SEIU's membership is among the most diverse in the labor movement. The union is deeply committed to the principles of equal opportunity and social, economic, and racial justice. This commitment is reflected in SEIU's Mission Statement, adopted as part of its Constitution and Bylaws, which affirms that "we must not be divided by forces of discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation or immigration status." SEIU believes that diversity in elementary, secondary, and higher education classrooms is vitally important to achieving a society that lives up to these ideals.

The NEA, AFL-CIO, AFT, AFSCME, and SEIU recognize that virtually every student in our public schools will ultimately enter the workplace. Once there, they will be expected to honor a set of fundamental public policies, including the command that they not discriminate on the basis of race. The experience of the labor organization *amici* teaches that opportunities for students to interact with their peers from other races in the educational process—opportunities that are fostered by policies such as those at issue in this case—have substantial, positive impacts that make them better citizens in our democracy and in the workplace.

People For Foundation is a nonpartisan, education-oriented, citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For Foundation now has hundreds of thousands of members and supporters nationwide. People For Foundation continues to seek to combat discrimination and its effects and to promote quality public education, including classroom diversity, through educational programs and participation in important litigation such as these cases.

INTRODUCTION

Amici believe that racially integrated public elementary and secondary schools and institutions of higher education not only help to overcome our nation's deplorable legacy of slavery, segregation, and discrimination, but also—and more to the point in the present context—enable such schools to fulfill their dual mission of instilling in all students "the values on which our society rests," *Ambach v. Norwich*, 441 U.S. 68, 76 (1979), and providing them with the skills and knowledge necessary to realize their full potential, *see Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972). To accomplish those ends, educational institutions should be permitted in certain narrowly-limited circumstances to consider race and ethnicity when making educational policy judgments (ranging from school attendance zones to college admissions criteria) that affect the composition of schools and classrooms.

While this Court has been unyielding in its insistence that any use of racial classifications in such decisions must satisfy "strict scrutiny," *Adarand Constructors, Inc.*

v. Peña, 515 U.S. 200, 222 (1995), so as to "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), this Court has also been clear that diversity in schools and classes, including racial and ethnic diversity, can be "a goal important enough" to warrant consideration of race in making such decisions. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007) (recognizing that the government can have a "compelling" interest in "student body diversity" at the higher education level); *id.* at 782 (recognizing that "diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue") (Kennedy, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). Such diversity promotes "'cross-racial understanding,' helps to break down racial stereotypes," precipitates "more enlightening" classroom discussion, promotes better "learning outcomes" and "better prepares students for an increasingly diverse workforce and society." *Grutter*, 539 U.S. at 330. Those interests are compelling; nothing less than the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J.) (citation and internal quotation marks omitted).

Petitioner and the supporting *amici* seek to overturn these precedents either directly or indirectly by making strict scrutiny fatal in fact in every circumstance. As the duly-authorized representatives of millions of educators and millions more working Americans, we write to urge this Court to continue to recognize that ensuring diversity at the school and classroom level, including racial and ethnic diversity, is a compelling government interest that can justify the appropriately limited use of race as one of many factors in school admissions and assignment decisions—whether at the primary, secondary or higher education level.

SUMMARY OF ARGUMENT

A. Ours is not a color-blind society, and race still matters. When it comes to public elementary, secondary, and higher education, racial classifications continue to carry great weight—dividing educational opportunities inequitably and distorting perceptions with stereotypes and prejudice. The mission of public elementary, secondary, and higher education is to instill in all students the values on which our society rests and to provide them with the skills and knowledge necessary to realize their full potential. That mission cannot adequately be fulfilled without racially-diverse classrooms. Accordingly, achieving such diversity unquestionably serves a compelling state interest.

B. The societal and educational benefits of racially diverse classrooms in public elementary, secondary, and higher education are well documented. A robust body of recent empirical research confirms that racially diverse schools and classrooms produce tangible and lasting improvements in academic achievement for minority students, while often benefitting nonminority students as well. Classroom contact among students of different races also reduces stereotypes and prejudice, and has been found to be more effective in promoting tolerance and cross-racial understanding than any other pedagogical method. Racially diverse classrooms therefore offer enduring benefits to a multiracial, democratic society, and its citizens.

ARGUMENT

ACHIEVING DIVERSITY IN PUBLIC SCHOOLS AND INSTITUTIONS OF HIGHER EDUCATION REMAINS A COMPELLING GOVERNMENT INTEREST

Diversity—specifically, "obtaining the educational benefits that flow from an ethnically diverse student body," *Bakke*, 438 U.S. at 306—is an even more compelling interest today than it was when this Court decided *Bakke* and *Grutter*. Because of the changing demographics of American society, the ability of an individual to function in a racially and ethnically diverse environment is increasingly important. By 2025, the year in which children who are entering kindergarten this year will graduate from high school, over half of all children will be Black, Hispanic, American Indian, Native Hawaiian, or multiracial, and over 42% of the overall population will be from these historically minority racial and ethnic groups.[3] By 2042, the U.S. Census Bureau projects that Whites will no longer be a majority of the population.[4] These demographic shifts reflect an ongoing trend in which "[t]he country as a whole and the workforce in particular is becoming more, not less [racially] diverse."[5]

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[3] U.S. Dep't of Educ., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC MINORITIES 7 (July 2010); U.S. Census Bureau, *An Older and More Diverse Nation by Midcentury* (Aug. 14, 2008), *available at* http://www.census.gov/newsroom/releases/archives/population/cb08-123.html.

[4] *An Older and More Diverse Nation by Midcentury*, *supra* note 3.

Yet, at the same time that American society is becoming more racially diverse, the nation's public elementary and secondary schools remain highly segregated. The most serious segregation affects Black and Hispanic students: "in both of these populations about two of every five students attend intensely segregated schools."[6]

Institutions of higher education thus confront a choice in making admissions decisions. They can ignore the persistent inequalities in the elementary and secondary school systems that segregate students by race, depriving all students of an education enriched by exposure to diversity. Or, they can take that reality into account in some limited and measured way by, for example, considering racial and ethnic background as one of many factors used in admitting a truly diverse student body. We detail below why institutions have a compelling interest in choosing the latter course in order to fulfill their two interrelated purposes of instilling in all students "the values on which our society rests," *Ambach*, 441 U.S. at 76, and providing them with the skills and knowledge necessary to realize their full potential by "expand[ing] their knowledge, broaden[ing] their sensibilities, kindl[ing] their imagination, foster[ing] a spirit of free inquiry, and increas[ing] their human understanding and tolerance," *Yoder*, 406 U.S. at 239. While these purposes have long been recognized by this Court as those underlying the public elementary and secondary school system, there is no doubt that in the 21st Century they demarcate the aspirations of public higher education as well.

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[5] Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 134-35 (2002).

[6] Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 12 (January 2009), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf.

A substantial body of empirical evidence indicates that racially diverse classrooms contribute significantly to the achievement of both of these purposes. Learning in a racially diverse setting furthers students' cognitive and intellectual development, thus providing an important educational benefit to students of every race. Diverse classrooms also teach students to judge others as individuals, rather than according to stereotypes and prejudices. These benefits provide a powerful catalyst toward integration over the course of a student's lifetime.

Before turning to that showing, in order to provide a context in which to judge the importance of the benefits produced by racially diverse classrooms, this brief first endeavors to show the extent to which educational opportunities continue to be inequitably apportioned by race. What will emerge from this review is the stark reality that we can predict—based largely on the color of a student's skin—what kind of schools that student will attend, how well that student will be prepared for college, whether that student will obtain higher education, and what that student's prospects are in the workforce.

A. The Inequitable Apportionment of Educational Opportunities by Race

We doubt that there is anyone connected with these cases—on either side—who does not share the goal of attaining a society in which, in the words of Martin Luther King, Jr., our children "will not be judged by the color of their skin, but by the content of their character." Notwithstanding intimations to the contrary in the briefs of Petitioner and the supporting *amici*, we still have a long way to go to realize Dr. King's dream. Racial classifications continue to carry great weight in our country, dividing educational opportunities inequitably and distorting perceptions with stereotypes and prejudice.

1. A student's race is, by itself, largely predictive of the racial composition of the elementary and secondary schools he or she will attend. In the 2006-2007 school year, over half of all Black (51.5%) and Hispanic (57.3%) public elementary and secondary students attended public schools in which the combined enrollment of Black, Hispanic, Asian/Pacific Islander, and American Indian/Alaska Native students was at least 75%; in comparison, only 3.3% of White students attended such schools.[7] Conversely, only 7.9% of Black students and 7.3% of Hispanic students attended public schools in which the enrollment was at least 75%

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[7] U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2009 198 (June 2009).

White, while 62.2% of White students attended such schools.[8]

The magnitude of the problem is drawn into its sharpest relief with public schools that have 99-100% non-White enrollment. In the 2005-2006 school year, these schools enrolled almost 2.5 million—about one out of every twenty—public school students.[9] Nationwide, these schools enrolled roughly one-sixth of all Black students and one-ninth of all Hispanic students.[10] In the nation's largest metropolitan areas, more than one-third of Black students and about one-fifth of Hispanic students attended these profoundly racially isolated schools.[11]

This highly concentrated segregation of Black and Hispanic students into majority-minority schools is on the increase. From the 1990-1991 school year to the 2006-2007 school year, the enrollment of Black students in schools with a student body comprised of at least 75% minority students increased by nearly seven percentage points (from 44.8% to 51.5%); over the same time period, the figure for Hispanic students increased by more than six percentage points (from 50.9% to 57.3%).[12]

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[8] THE CONDITION OF EDUCATION 2009, *supra* note 7, at 199.

[9] Gary Orfield & Erica Frankenberg, *The Last Have Become First: Rural and Small Town America Lead the Way on Desegregation* 7 (2008), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/the-last-have-become-first-rural-and-small-town-america-lead-the-way-on-desegregation/frankenberg-last-have-become-first-2008.pdf.

[10] *Id.*

[11] *Id.*

2. The trend toward higher levels of concentrated segregation for Black and Hispanic students has ramifications beyond racial isolation. Nearly nine times out of ten, segregated schools with high percentages of students of color are also high poverty schools.[13] Among all public school students in the 2009-2010 school year, approximately 37% of Black and Hispanic students attended high-poverty schools (defined as public schools where 76% or more students are eligible for the free or reduced-price lunch), while less than 6% of White students attended such schools.[14] This effect is even more pronounced in large urban areas, where 48% of Black and nearly 46% of Hispanic students attend high-poverty schools.[15]

Students in such high-poverty, minority-segregated schools often lack adequate access to the necessary components of a high-quality education, such as Advanced Placement courses, science labs, and gifted-and-talented programs.[16] Furthermore, although educational research has shown the critical importance of a stable, high-quality teaching force,[17] high-poverty, minority-segregated schools are more likely to be associated with high rates of teacher turnover and fewer experienced and fully certified teachers.[18] For example, fully certified mathematics and science teachers are more prevalent in low-minority schools than in high-minority schools, and fully certified science teachers are more prevalent in low-poverty schools than in high-poverty schools.[19] And more generally, schools with the largest numbers of low-income and minority students are much more likely than other schools to fill vacancies with substitutes, teachers who are not fully certified, or teachers instructing classes in which they are not certified; such schools are also more likely to expand class sizes or cancel course offerings when they cannot find teachers.[20]

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[12] THE CONDITION OF EDUCATION 2009, *supra* note 7 at 200.

[13] Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 16 (2005), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf.

[14] U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2012 172 (May 2012).

[15] *Id.* at 173.

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[16] Linda Darling-Hammond, *Educational Quality and Equality: What It Will Take to Leave No Child Behind*, in ALL THINGS BEING EQUAL 39, 55-59 (Brian D. Smedley & Alan Jenkins eds., 2007); Nat'l Sci. Bd., SCIENCE AND ENGINEERING INDICATORS 2004 18, 46-47 (May 2004).

[17] Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1, 31-33 (2000).

[18] C. Kirabo Jackson, *Student Demographics, Teacher Sorting and Teacher Quality: Evidence from the End of School Desegregation*, 27 J. LAB. ECON. 213, 247-49 (2009).

[19] Nat'l Sci. Bd., SCIENCE AND ENGINEERING INDICATORS 2012 1-23 (January 2012).

[20] Linda Darling-Hammond & Laura Post, *Inequality in Teaching and Schooling: Supporting High-Quality Teaching and Leadership in Low-Income Schools* in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 136 (Richard D. Kahlenberg, Ed. 2000).

3. The result of this pervasive segregation is all too predictable. Students who attend high-poverty, minority-segregated primary and secondary schools have poorer educational outcomes and are often not as well equipped to enter institutions of higher education or the workforce. The most obvious measure of this is that Hispanic and Black students are far more likely than White students to drop out of high school: in 2010, the dropout rate was 15.1% for Hispanic students and 8.0% for Black students, as compared to 5.1% for White students.[21]

In addition, Hispanic and Black students are far less likely to pursue higher education. In 2008, about 44% of White 18 to 24-year-olds were enrolled in colleges and universities, as compared to 32% of Blacks and 26% of Hispanics in the same age cohort.[22] Those Blacks and Hispanics who do pursue higher education are far less likely to enroll in a four-year college program: in 2008, 45% of Hispanic college students and 36% of Black college students were enrolled in 2-year colleges, while just 28% of White college students were enrolled in such programs.[23]

These inequities are only growing worse. Between 1980 and 2011, the gap between Blacks and Whites in the percentage of 25- to 29-year-olds who had attained a bachelor's degree or higher increased by 6 percentage points, from 13% to 19%; and the gap between Whites and Hispanics increased by 9 percentage points, from 17% to 26%.[24]

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[21] THE CONDITION OF EDUCATION 2012, *supra* note 14, at 240.

[22] STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS, *supra* note 3, at 121.

[23] U.S. Census Bureau, *School Enrollment in the United States: 2008* 14 (June 2011), *available at* http://www.census.gov/prod/2011pubs/p20-564.pdf.

4. The fact that Black and Hispanic students are more likely to attend high-poverty, racially-isolated schools, which in turn often leaves them less prepared to pursue higher education, has dire consequences for their prospects for success in the workforce. Black and Hispanic adults face persistently higher rates of unemployment than their White counterparts,[25] with much of that unemployment concentrated among those with a high school diploma or less.[26]

The wage gap between college and high school graduates is at a historical peak.[27] The median weekly earnings of a full-time, full-year bachelor's degree holder in 2011 were 64 percent higher than those of a high school graduate.[28] College graduates are more consistently employed than high school graduates; they also receive a higher share of nonwage fringe benefits, including sick and vacation pay, employer-paid health insurance, pension contributions, and safe working conditions.[29] The rising relative earnings of college graduates are not just due to rising real earnings for college-educated workers, but also to falling real earnings for non-college-educated workers.[30]

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[24] THE CONDITION OF EDUCATION 2012, *supra* note 14, at 114-15.

[25] U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 378 (2012).

[26] *Id.* at 404.

[27] David Autor, *The Polarization of Job Opportunities in the U.S. Labor Market* 5 (April 2010), *available at* http://www.americanprogress.org/issues/2010/04/pdf/job_polarization.pdf.

[28] U.S. Dep't of Educ. & U.S. Dep't of Treas., *The Economic Case for Higher Education* 1 (June 21, 2012).

Those with college educations also benefit from higher levels of satisfaction and feelings of accomplishment related to their work. For example, in 2008, 58% of college graduates reported being very satisfied with their jobs, compared to 50% of high school graduates and 40% of individuals without a high school diploma. Similarly, in 2006, 59% of college graduates reported that feeling their work is important and having a sense of accomplishment from their work are the most important characteristics in a job, compared to 36% of high school graduates and 21% of those without a high school diploma.[31]

To put the point plainly, this empirical evidence shows that inequitable opportunities for education at the elementary and secondary level have profound implications for students for the rest of their lives.

5. Even minority students who receive the same tangible educational opportunities as White students may, due to their race, still have very different educational

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[29] Autor, *supra* note 27, at 5.

[30] *Id.* at 6.

[31] Sandy Baum et al., *Education Pays 2010: The Benefits of Higher Education for Individuals and Society* 19 (2010), *available at* http://trends.collegeboard.org/ downloads/ Education_Pays_2010.pdf.

and workforce experiences. People—even children—have been found to react to individuals differently based on their racial perceptions. For example, a 1995 study found that children, when asked to read a list of names and decide whether the named individuals were politicians or criminals, were more likely to decide that names typically associated with Black Americans were the names of criminals.[32]

As a society, we have not outgrown these responses. In 2004, researchers studied racial discrimination in the labor market by sending fictitious resumes to employers with randomly-assigned names statistically associated with Black or White individuals. White-associated names led to 50% more callbacks for interviews—a racial gap that was uniform across occupation, industry, and employer size.[33]

In sum, ours is not a color-blind society, and race still matters. When it comes to public elementary and secondary education, minority and nonminority students of equal ability do not, in the aggregate, have equal opportunities. In light of this inescapable fact, the mission of public elementary, secondary, and higher education cannot be fulfilled without affirmative efforts to achieve racially diverse classrooms. Such racial diversity in classrooms, as we now show, contributes significantly to the fulfillment of the public educational mission.[34]

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[32] Connie T. Wolfe & Steven J. Spencer, *Stereotypes and Prejudice: Their Overt and Subtle Influence in the Classroom*, 40 AM. BEHAV. SCIENTIST 176, 178 (Nov./Dec. 1996).

[33] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

B. The Educational and Societal Benefits of Racially Diverse Classrooms

As grim as this portrait of persistent racial disparity and *de facto* segregation may be, there are solutions that we, as a society, can pursue to address it. In what follows, we explain how an impressive body of empirical research has shown that fostering racially diverse classrooms is a fundamental and necessary step in closing minority achievement gaps and promoting productive intergroup relations in society at large.

1. Even when one controls for parental income, education, and other measures of socioeconomic status, there are persistent racial gaps in achievement and other educational outcomes.[35] These gaps—particularly in student test scores—have narrowed during peri-

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[34] As detailed *infra* note 54, merely placing minority and nonminority students in the same school does not in itself necessarily create the conditions for beneficial interactions among students of different races. Accordingly, classroom diversity rather than simply school diversity is essential. *See* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 333 (2002).

[35] Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 998 (2010).

ods coinciding with greater school integration;[36] conversely, the more recent stagnation in the narrowing of these gaps corresponds with a period when desegregation has effectively stalled or reversed.[37]

Over the past two decades, social science research has become increasingly sophisticated in its ability to isolate and identify the educational detriments of segregation and the concomitant benefits of integration. As compared to earlier research on the subject, recent scholarship examines more comprehensive data from larger nationally representative samples or state-wide populations, relies on more sensitive measures of student achievement, and uses more advanced statistical methods to control for other possible mediating factors such as family background and school quality.[38] Because much of this research has been developed only in the last decade, this Court has not yet had the occasion to fully consider its implications.

Much of this research focuses on the influence of segregation on disparities in mathematics achievement, where racial gaps persist irrespective of socioeconomic factors.[39] As a whole, this body of research unambiguously finds that racial diversity in classrooms positively affects Black students' math achievement,[40] and, conversely, that racial segregation negatively affects their mathematics performance.[41] This research also presents strong evidence that segregation undermines mathematics achievement among Hispanics and moderately strong evidence that attending diverse schools fosters it.[42] And these studies provide strong evidence that racial isolation negatively affects the achievement of Whites and that attending diverse schools does not harm their mathematics achievement.[43] Together, these findings provide consistent and unambiguous evidence that math learning in racially diverse classrooms is positively related to better academic outcomes for most students—irrespective of the student's age, race, or socioeconomic status.[44]

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[36] *Id.* at 1010 (citing Mark Berends & Roberto V. Peñaloza, *Increasing Racial Isolation and Test Score Gaps in Mathematics: A 30-Year Perspective,* 112 TEACHERS COLL. REC. 978, 988-91 (2010)).

[37] *Id.*

[38] *Id.* at 1005.

[39] *Id.* at 998.

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[40] *Id.* at 1032 & n.150 (collecting studies). *See also* Bernadette Gray-Little & Robert A. Carels, *The Effect of Racial Dissonance on Academic Self-Esteem and Achievement in Elementary, Junior High, and High School Students*, 7 J. RES. ON ADOLESCENCE 109, 123, 125-26 (1997) (finding that Black and White 11th graders had the highest achievement levels at racially balanced schools and that school racial composition exerted a more powerful influence on Black student performance than it did on White student performance).

[41] Mickelson & Bottia, *supra* note 35, at 1032 & n.151 (collecting studies) *See also* Berends & Peñaloza, *supra* note 36, at 992-93.

[42] Mickelson & Bottia, *supra* note 35, at 1034 & nn.162-63 (collecting studies).

[43] *Id.* at 1033-34 & nn.156-60 (collecting studies). *See also* Gray-Little & Carols, *supra* note 40, at 123, 125-26.

Similar results obtain for segregation's effect on student's reading and verbal achievement. For example, one recent study found that attending a highly segregated Black school has a "profound" negative effect on a student's verbal achievement, "above and beyond" the effects of a student's own poverty level or racial group.[45] Another study found that, for each standard deviation increase in the proportion of Black and Hispanic students at a school, average reading gains among first-graders slowed by two-thirds of average monthly gains, with the negative association between classroom composition and reading growth being strongest for Black students.[46]

More integrated school environments are also more effective than segregated ones in helping students graduate. For example, a study of public school students in Cleveland showed that Black, Hispanic, and

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[44] Mickelson & Bottia, *supra* note 35, at 1043. *See also* Xiaoxia A. Newton, *End-of-High-School Mathematics Attainment: How Did Students Get There?*, 112 TEACHERS COLL. REC. 1064, 1087-88 (2010).

[45] Geoffrey Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TEACHERS COLL. REC. 1201, 1236-39 (2010).

[46] James Benson & Geoffrey Borman, *Family, Neighborhood, and School Settings Across Seasons: When Do Socioeconomic Context and Racial Composition Matter for the Reading Achievement Growth of Young Children?* 112 TEACHERS COLL. REC. 1338, 1371, 1374-75 (2010).

White students had lower drop-out rates when attending diverse high schools—and that this effect intensified if the students were exposed to diverse school environments before high school.[47] In other words, a diverse school environment "turn[s] the average high school into an institution that cushions more effectively the negative effects of intensifying non-school problems on graduation chances."[48]

In 2007, the National Academy of Education reviewed the available research on the impact of racial diversity in schools and concluded that, although "[r]acial diversity per se does not guarantee such positive outcomes, . . . it provides the *necessary conditions* under which other educational policies can facilitate improved academic achievement, improved intergroup relations, and positive long-term outcomes."[49] The sum of the empirical evidence is this: if we are to have a society in which children of all races are allowed to realize their academic and intellectual potential, that goal can only be reached by permitting policies that foster racial diversity in elementary, secondary, and higher education.

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[47] Argun Saatcioglu, *Disentangling School- and Student-Level Effects of Desegregation and Resegregation on the Dropout Problem in Urban High Schools: Evidence From the Cleveland Municipal School District, 1977-1998*, 112 TEACHERS COLL. REC. 1391, 1419, 1427 (2010).

[48] *Id.* at 1429.

[49] National Academy of Education, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases* 45 (2007), *available at* http://www.naeducation.org/Meredith_Report.pdf.

2. Beyond the well-documented educational benefits of racially diverse classrooms, there are broad societal benefits to be realized from the interracial contact that comes with diverse classroom environments. The theory that interracial contact reduces racial stereotypes and prejudice was first articulated by Gordon W. Allport in his seminal work, THE NATURE OF PREJUDICE. Allport posited that racial isolation breeds stereotypes and prejudice, and that "equal status contact between majority and minority groups in the pursuit of common goals" is a critical ingredient in improving relations between members of those groups, especially if such contact "is of a sort that leads to the perception of common interests and common humanity between the members of the two groups."[50]

Subsequent empirical research has repeatedly and consistently confirmed the common-sense understanding that interracial contact can combat stereotypes and prejudice and make individuals more comfortable relating to members of other racial groups.[51] This research makes plain, however, that the conditions of contact are critical to its impact. In the first place, contact that occurs during key periods of personal development—for example, in a student's formative years—and that frequently recurs, is far more effective at promoting tolerance and cross-racial understanding than intermittent contact among persons whose social beliefs and identities are fully formed.[52]

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[50] Gordon W. Allport, THE NATURE OF PREJUDICE 281 (1954).

[51] *See* Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L. J. 1, 23-24 (2000) ("[The [contact] hypothesis has been tested, and has usually been confirmed, in a large number of empirical studies using many different methodologies—field studies, survey research, and laboratory experiments—in a wide range of settings.").

So too, contact with a number of different people of another race is more effective in breaking down racist attitudes than contact with just a few individuals of another race, because it forces people to "decategorize" those with whom they are dealing and to treat them as individuals rather than simply as members of a particular racial group.[53] This finding highlights the importance of Respondent's recognition that, in the educational context, meaningful racial diversity requires a "critical mass" of minority students if it is to attain its goals.

Finally, contact must be among individuals of equal status, lest contact serve simply to reinforce rather than reduce racist attitudes and prejudices.[54]

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[52] Such crucial stages of development include not only the college years (of those individuals who advance to that educational level) but, more broadly, children's very earliest educational experiences. *See* Susanne E. Dutton et al. ***Racial Identity of Children in Integrated Predominantly White, and Black Schools***, 138 J. OF SOC. PSYCHOL. 41, 42 (1998); Richard R. Scott & James M. McPartland, ***Desegregation as National Policy: Correlates of Racial Attitudes***, 19 AM. EDUC. RES. J. 397, 399 (Fall 1982).

[53] See Marilynn B. Brewer & Norman Miller, *Contact and Cooperation: When Do They Work?*, in ELIMINATING RACISM: PROFILES IN CONTROVERSY 315, 318-20 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988)..

[54] Thus, for example, the mere fact that a school is integrated, standing alone, does not ensure improved cross-racial relations among students. Rather, the nature and number of inter-

The interactions of diverse students in higher education clearly satisfy this requirement, contrary to the claims of Petitioner's supporting *amici*.[55] As this Court recognized in *Grutter*, the benefits that accrue from student-body diversity in higher education are "not theoretical but real." 539 U.S. at 330. Such diversity fosters the ability to relate to other people, cultures, and viewpoints, which in turn holds tremendous value for our economy, military, and society at large. *Id.* at 330-333.

Given these findings, it is not surprising that interracial cooperative contact among students of different races in our public schools has repeatedly been linked with increased levels of tolerance for children of other races,[56] and increased likelihood that children of differ-

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racial interactions in which students engage are the determinative factors. *See*, *e.g.*, Janet Schofield, BLACK AND WHITE IN SCHOOL: TRUST, TENSION, OR TOLERANCE? 157, 176-81 (1981) (reporting that desegregation alone generated "a definite, but relatively modest, improvement in relations between black and white students" but that cooperative activities among black and white students generated more significant improvements).

[55] *See* Brief of *Amici Curiae* Abigail Thernstrom et al. 9-18.

[56] For example, a 1998 study reports that white fourth graders in a predominantly white school were less likely than white fourth graders in integrated schools to choose a picture of a black child as someone with whom they wanted to be friends, and were more likely than the white students in the integrated schools to choose the picture of the black child as representing the child-among an array of pictures of children-that they disliked most. *See* Dutton, *supra* note 52, at 48.

ent races will become and remain friends.[57] Such one-on-one contact has been found to be more effective in promoting racial tolerance and cross-race interaction than any other pedagogical method—including a multicultural curriculum.[58] Moreover, such contact has been linked to the formation of "close, reciprocated [interracial] friendship choices, the kind of friendships that should be [the] most difficult to change,"[59] and which social scientists have long viewed "as one of most potent agents" for promoting racial tolerance.[60]

In the end, this process—far from resulting in the racial balkanization that Petitioner and the supporting *amici* evoke—leads to precisely the opposite result. As one researcher explained, cooperative interaction between different groups "induces members [of different groups] to conceive of themselves as one (superordinate) group rather than as two separate groups, thereby transforming their categorized representations from us and them to a more inclusive we."[61]

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[57] Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. SOC. ISSUES 45, 53, 59 (1985) (concluding, based on review of nineteen studies, "that when students work in ethnically mixed cooperative learning groups, they gain in cross-ethnic friendships").

[58] *See* Yehuda Amir, *The Role of Intergroup Contact* in CHANGE OF PREJUDICE AND ETHNIC RELATIONS, IN TOWARDS THE ELIMINATION OF RACISM 240, 260, 266, 281 (Phyllis A. Katz ed., 1976) (reporting that direct interpersonal contact with blacks was more effective in changing white ethnic attitudes than participating in an educational program designed to raise awareness of black issues, and that a multicultural curriculum, standing alone, did little to improve the attitude of white students toward blacks).

[59] Slavin, *supra* note 57, at 55, 59.

[60] Amir, *supra* note 58, at 272.

3. Teaching elementary and secondary school students to treat people with whom they are dealing as individuals and to identify common ground is of great consequence to their intellectual development. Social scientists have reported that heterogeneous groups—including groups that differ only with respect to the race of the participants—are better at creative problem-solving than homogeneous groups, due to the benefits of interactions between individuals with different vantage points, skills, or values.[62] Reflecting that reality, high school students who are asked whether or not racial and ethnic diversity has enhanced their educational experience respond in the affirmative in overwhelming numbers.[63] Indeed, some even contend that

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[61] Samuel L. Gaertner et al., *How Does Cooperation Reduce Intergroup Bias?*, 59 J. PERSONALITY & SOC. PSYCHOL. 692, 693 (1990).

[62] Poppy Lauretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 250 (May 1996) (summarizing "consistent empirical support" for the conclusion that heterogeneous groups-including groups that are diverse only as to race or gender-generate more creative and feasible solutions to problems than do homogeneous groups).

[63] Surveys of public high school students in Louisville, Kentucky and Cambridge, Massachusetts, found that over 80% of students believed that their experiences in racially and ethnically diverse high schools "ha[d] helped them to work more effectively with and to get along with members of other races

greater classroom diversity would further improve the educational process.[64]

Other research provides further evidence of the cognitive benefits of interracial interactions in the educational context. For example, in one study, 250 high school students were asked to view a short film showing two boys (one black and one white) engaged in various activities—some positive, some negative and some ambiguous—both together and apart. The students were asked to describe what the boys had done in the film and predict what each would do in various specified situations. White students who had had the opportunity for more interracial classroom contact:

> (1) described [the boys] in ways that were more differentiated, more integrated, and more multivalent; (2) made predictions of the future behavior of [the boys] that were less absolute; (3) inferred the presence of attributes in [the boys]

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and ethnic groups." Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 132 (Gary Orfield ed., 2001); The Civil Rights Project-Harvard University, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District* 7 (Jan. 2002) (*"Cambridge Study"*), *available at* http://www.eric.ed.gov/PDFS/ED462469.pdf.

[64] One white high school student voiced his view that "the AP classes would be much better with a more diverse group of students." *Cambridge Study*, *supra* note 63, at 10. A black student made a similar point, voicing his discomfort as the only black student in his AP history class because "[w]hen we have discussions about the black community, I get offended and intimidated." *Id.*

> with less certainty; and (4) were less likely to perceive [the black boy] as submissive and [the white boy] as domin[a]nt.[65]

The White students' greater ability to describe the film participants in meaningful, individualized ways applied not only to their description of the Black boy but to their description of the White boy as well, "suggest[ing] that interracial contact had a facilitating effect on the development of interpersonal cognitive skills in general."[66]

4. These consequences of classroom diversity offer enduring benefits to a multiethnic, democratic society, and its citizens. Students who learn to interact with individuals of other races in elementary and secondary school are far "more likely to function in desegregated environments in later life. As adults, they more frequently live[] in desegregated neighborhoods, ha[ve] children who attend[] desegregated schools, and ha[ve] close friends of the other race[s] than did adults ... who had attended segregated schools."[67] They are also more likely

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[65] Bert Meltzer, *The Influence of the Duration of Interracial Classroom Contact on the Development of Interpersonal Cognitive Skills* 133-34 (Doctoral Dissertation, Clark University) (Ann Arbor, Mich., University Microfilms 1969, No. 69-20, 406).

[66] *Id.* at 133.

[67] Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation*, 19 J. Black Studies 267, 269 (1989) (discussing results of desegregation at the elementary and secondary school level based on national survey of 12,686 individuals).

as adults to interact with individuals of other races than are students educated in racially homogeneous schools.[68]

Two studies of high school students in Louisville, Kentucky, and Cambridge, Massachusetts support these conclusions. These studies demonstrate that racially diverse schools and classrooms produce students who have very high levels of comfort in dealing and working with individuals of other races in later life—which they attribute in large part to their school experiences.[69]

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[68] *See, e.g.*, Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306, 1322 (Mar. 1996); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. INTERCULTURAL REL. 1 (1990).

[69] *See Cambridge Study*, *supra* note 63, at 4, 6-7 (reporting, based on survey of 379 high school seniors in racially diverse school, that 90% of black students and 99% of white students said they were "comfortable" or "very comfortable" working with students of other races, that 94% of both black and white students felt prepared to work with individuals of other races after high school, and that 73% of black students and 82% of white students believed their school experiences had "helped a lot" or "somewhat" in teaching them to work with individuals of other races); Kurlaender & Yun, *supra* note 63, at 111, 124-25, 130 (reporting, based on survey of 1,164 high school juniors in Louisville, Kentucky, that 94.9% of black students and 92.6% of white students reported being "comfortable" or "very comfortable working with students of other races and that over 80% of both black and white students believed their school experience had helped them "a lot" or "somewhat" in working effectively with individuals of other races both in school and in the future).

Three more recent studies further confirm these conclusions. In one study, researchers found that early racial isolation, especially in schools, is significantly associated with a later expressed desire to live around people of the same race.[70] Another study found that attending a segregated, predominantly Black school was more influential than a student's own race in choosing to live in a predominantly Black neighborhood, indicating that more diverse public schools "may lead in the long run to more integrated neighborhoods over time."[71] Yet another study shows strong associations between high levels of school segregation and later racial isolation in workplaces—a result that held over the long term.[72]

As the foregoing studies explain, racially diverse classrooms produce these long-range benefits because they break the cycle of segregation in neighborhoods, schools, social networks, and occupations. Equally to the point, they demonstrate that by closing the door on racial diversity in the schools, we open the door to further racial prejudice and discrimination by perpetuating the racial isolation that breeds such prejudice and discrimination.

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[70] Jomills Henry Braddock II & Amaryllis Del Carmen Gonzalez, *Social Isolation and Social Cohesion: The Effects of K–12 Neighborhood and School Segregation on Intergroup Orientations*, 112 TEACHERS COLL. REC. 1631, 1649-51 (2010).

[71] Pat Rubio Goldsmith, *Learning Apart, Living Apart: How the Racial and Ethnic Segregation of Schools and Colleges Perpetuates Residential Segregation*, 112 TEACHERS COLL. REC. 1602, 1626-27 (2010).

[72] Elizabeth Stearns, *Long-Term Correlates of High School Racial Composition: Perpetuation Theory Reexamined*, 112 TEACHERS COLL. REC. 1654, 1670-74 (2010).

5. Several of the *amici* supporting the Petitioner argue that a new body of empirical research—in particular, Richard Sander's work purporting to show a "mismatch" effect from race-conscious admission policies—critically undermines the diversity rationale this Court accepted in upholding the University of Michigan Law School's admission policy in *Grutter*, 539 U.S. 306 at 327-33.[73] The thrust of Sander's mismatch theory is that, because of race-conscious admission policies, minority students arrive at institutions of higher education less qualified than their White classmates, and, because of their relative lack of qualifications, they fail to achieve at the level they otherwise would at an institution matching their qualifications.[74] The narrative that emerges from Sander's work is that policies that promote racial diversity victimize their ostensible beneficiaries by setting them up to fail.

However compelling that narrative may be, it is far more fiction than fact. Unlike the robust evidence of racial diversity's many educational and societal benefits,[75] Sander's "mismatch" hypothesis does not withstand sustained scrutiny. Several critics of Sander's work have already identified key methodological flaws that—when taken into account—yield results that either undermine Sander's original conclusion or even support diametrically opposite conclusions.[76] Indeed, attempts to replicate Sander's results using different analytic approaches (rather than simply re-running

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[73] Brief of *Amici Curiae* Cal. Ass'n of Scholars, et al. at 9-10 & n.3; Brief of *Amici Curiae* Richard Sander & Stuart Taylor, Jr.at 2-28; Brief of *Amicus Curiae* Am. Civil Rights Union at 13-14 & n.3; Brief of *Amicus Curiae* S.W. Legal Found., Inc. at 8-9 & n.3. Brief of *Amici Curiae* Pac. Legal Found. et al. at 20-24; Brief of *Amici Curiae* Gail Heriot et al. at 4-24.

[74] Richard Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 370, 449-54 (2004).

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[75] *See supra* notes 39 to 72.

[76] *See, e.g.*, Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students? A Correction, a Lesson, and an Update*, 105 Nw. U. L. Rev. 791, 811 (2011) (concluding that data do not support the mismatch hypothesis and that "mismatched students do not explain the racial gap in student outcomes"); Beverly I. Moran, *The Case for Black Inferiority? What Must be True if Professor Sander is Right: A Response to A Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L. J. 41, 58 (2005) ("Professor Sander's arguments fail on their methodology, their logic, and their real-world application."); Michele L. Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1910 (2005) (reviewing Sander's analysis and concluding that "Sander has failed to establish that his analysis and methods are sufficiently valid to support his claims");; David Chambers et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics,"* UNIV. OF MICH. LAW SCHOOL PROGRAM IN LAW AND ECONOMICS WORKING PAPER NO. 60 at 52-53 (2006) (concluding that Sanders failed to "provide convincing evidence for a mismatch effect, for his claim that affirmative action on average hurts black students, or for his prediction that without affirmative action the number of black law students passing the bar each year would not fall by much and might even rise" and stating that "the truth we believe is often the opposite of what Sander posits").

Sander's analyses on the same data) have thus far failed.[77] Sander's research therefore fails one of the most basic criteria of reliable social science, which is that others can replicate its results and confirm its hypothesis using different data and methodologies.[78]

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[77] *See, e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1853 (2005) (Assuming for purposes of replication that Sander's admission and enrollment estimates were valid, the researchers concluded that there is "no compelling evidence that the system of affirmative action in place in 1991 reduced the number of black lawyers"); David L. Chambers et al., *The Real Impact of Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1888-91 (2004) (Applying Sander's own methods but using data for another law school admissions cycle, these researchers found that without race-conscious admission policies the number of Black lawyers joining the profession would diminish rather than increase. Also, using different and—in the researchers' view more realistic—statistical assumptions, they found that even using the same data as Sanders, ending race-conscious admission policies would result in a marked drop rather than an increase in the number of Black lawyers); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE. L. J. 1997, 2004 (2005) (Using the same bar passage data as Sanders, this researcher applied more sophisticated statistical methods and found that Sander's hypothesis that law school tier causes black students to fail the bar could not be replicated); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 712 (2008) (Using the same data as Sander but applying more sophisticated statistical methods and finding "no plausible interpretation of the data" under which the elimination of race-conscious admission policies would increase the number of Black lawyers).

In any event, the notion that some Black and Hispanic students might arrive at college or law school less prepared to excel than their White colleagues does *not* support the overruling of *Grutter* or the dismissal of diversity as a compelling governmental interest. Quite to the contrary, the facts that we have laid out—which show that integrated education at the elementary and secondary level improves minority educational outcomes and preparedness for college—argue for allowing educational institutions at all levels to have *more*, not less, leeway to adopt policies that create racially diverse classrooms and learning environments. The fostering of such environments is, as the research has shown, a "necessary condition[]" for the success of other educational policies that will improve minority academic achievement and for the improvement the intergroup relations that characterize a flourishing society.[79]

6. This brief has focused primarily on public elementary and secondary education, and even in that context only on the first prong of the strict scrutiny test—*i.e.*, the value of racially diverse classrooms—as opposed to the "narrow tailoring" prong. The enormous societal value of diversity in the elementary and secondary set-

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[78] *See* Barbara Schneider, *Building a Scientific Community: The Need for Replication*, 106 TEACHERS COLL. REC. 1471, 1473 (2004) ("Without convergence of results from multiple studies, the objectivity, neutrality, and generalizability of research is questionable.").

[79] *See supra* note 49, at 45.

ting does not detract from its importance in the higher education setting. Indeed, it is precisely *because* elementary and secondary education remains so segregated that the societal interest in achieving diversity in higher education is all the more compelling. Most students—of all races—come to college without the benefits of cross-racial interactions at earlier stages of their educations. Thus, higher education is often the first opportunity to gain an opportunity to achieve the educational benefits of diversity.

Furthermore, even if we were to devote our efforts as a society to creating more diverse classrooms in elementary and secondary education, interventions in higher education would remain necessary in the short- to medium-term because any serious efforts to address a lack of diversity in elementary and secondary education would take time to become effective and certainly would not reach students entering college now.

Finally, we feel compelled in closing to say a word in response to the contention by Petitioner and the supporting *amici* that plans guaranteeing admission to a fixed percentage of graduating seniors from each high school in the state are a race-neutral alternative that ensures racially diverse classrooms. Quite apart from the practical problem of how such programs could be applied by institutions—whether kindergartens or law schools—that do not draw their students from a particular universe of feeder schools, such percentage plans at the higher education level depend entirely on the existence of segregated high schools, which in turn is bottomed on continued residential segregation. *See Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting). These plans may also create

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perverse incentives that "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." *Id.*

Although percentage plans can create some measure of diversity, institutions of higher education should not be required, in order to achieve the constitutionally permissible goal of racial diversity, to resort solely to means that rely on segregation in elementary and secondary schools.

* * *

The sum of the matter is this: if we are to "hasten the day when 'we are just one race,'" *Adarand Constructors*, 515 U.S. at 275 (Ginsburg, J., dissenting), we must ensure that our children are educated in the racially diverse settings that produce significant societal and educational benefits. Accordingly, educational institutions—at the elementary, secondary, and higher education levels—should be allowed to give some consideration to race in order to achieve such diversity. This is not an "illegitimate use[] of race," *J.A. Croson Co.*, 488 U.S. at 493, but rather is fully justified under the standard of strict scrutiny by society's compelling interest in the education of all of its children.

CONCLUSION

The judgment of the Court of Appeals—which upholds Respondent's limited consideration of race as one of many factors in making admissions decisions—should be affirmed.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

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Supreme Court of the United States

ABIGAIL NOEL FISHER, PETITIONER
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL., RESPONDENTS

**On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

BRIEF OF NATIONAL LATINO ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are national Latino civil rights organizations and associations whose missions include serving the interests of the Latino community. These Latino organizations believe that preserving race-conscious admissions policies in education is critical to the advancement of Latinos—the nation's fastest growing and largest minority community—which is itself critical to the advancement of the nation as a whole. Accordingly, all have an interest in these proceedings, and all urge affirmance of the decision below. A list and description of all *amici* appear in an Appendix, attached hereto.

SUMMARY OF ARGUMENT

Respondent University of Texas at Austin ("UT") appropriately sought to obtain the benefits of a diverse student body through narrowly tailored means that are consistent with the strict parameters of the Fourteenth Amendment. Petitioner seeks to upend the era of peace in higher education admissions and demands that this Court restrict, if not overturn, UT's judgment to consider race as one of many factors used in its holistic, individualized review of applications. This Court should decline that invitation.

Before determining that it lacked a level of student diversity that would fulfill its mission, UT engaged in an extensive examination of its overall diversity. Only after reviewing the findings as a whole did it decide to use race at all, and then only in a very limited way. The review included initially identifying underrepresented student groups, studying classroom demographics, surveying student attitudes on diversity, examining its race-neutral admissions plan and outreach efforts, and analyzing its role as a flagship university in producing a diverse group of leaders. Despite this broad-based approach and the Court's deference to a university's judgment in determining its compelling interest in diversity, petitioner asks this Court to substitute its judgment for that of UT and to hold that the number of Latino and African-American students admitted through the Top-Ten Percent law was sufficient and that a blended admissions plan was unnecessary.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of *amicus curiae* briefs have been filed with the Clerk's office.

The Fifth Circuit appropriately held that UT's limited use of race is narrowly tailored. UT uses race as one nonpredominant factor among many others in a system designed to consider each applicant as an individual. Having failed to rank in the top ten percent of her graduating class and earn automatic admission into UT, and having been denied direct admission after a holistic, individualized review of seventeen separate factors, petitioner asks this Court to focus solely on one criterion—SAT scores—and thus to substitute petitioner's preferred admissions criterion for UT's versatile approach. Nothing in the Constitution or in this Court's precedents justifies that result.

Based on UT's role as the state's flagship public university, its diversity plan helps to address institutional barriers that have historically prevented Latinos from participating fully in civic life. Indeed, the UT plan positively influences Latinos' participation in civic affairs, in political and military leadership, and in meeting the needs of Texas businesses in today's global economy. In light of the past discrimination against Latinos in Texas and continuing institutional barriers that still unfortunately exist, it is appropriate for UT to diversify its student body in a constitutional manner by opening its doors to highly qualified Latinos, among other highly qualified students of diverse backgrounds.

ARGUMENT

I. UT HAS A COMPELLING GOVERNMENTAL INTEREST IN CLASSROOM DIVERSITY, AND ITS ADMISSIONS PLAN IS NARROWLY TAILORED TO FURTHER THAT LEGITIMATE END

A. UT Has A Compelling Interest In Achieving Diversity

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court held unequivocally that a university has "a compelling state interest in student body diversity." *Id.* at 328; *see also id.* at 328-31. Indeed, "attaining a diverse student body is at the heart of [a university's] proper institutional mission, and ... 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" *Id.* at 329 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (opinion of Powell, J.)). Following *Grutter,* UT carefully sought to determine whether its student enrollment lacked the diversity it sought to fulfill its mission as the premier flagship university in Texas, and if so, how it might constitutionally seek to obtain that diversity.

After careful evaluation of its admissions program and the student body, UT determined, like the University of Michigan Law School ("UMLS") in *Grutter*, that the benefits flowing from a diverse student body had not been achieved using an exclusively race-neutral admissions plan. UT's pursuit of diversity is not equivalent to a racial quota or an attempt to have UT's student body mirror the demographics of Texas. Rather, as in *Grutter*, UT's admissions plan "is defined by reference to the educational benefits that diversity is designed to produce." 539 U.S. at 330.

In particular, UT conducted a study in the wake of *Grutter* to assess whether its wholly race-neutral admissions programs—the Top-Ten Percent ("TTP") plan—had achieved a "critical mass" of diverse students.[2] As part of that study, UT conducted a survey of students and found that UT minority students reported feeling isolated and a majority of UT students in general stated that there was insufficient diversity in the classroom.[3] App. 125a. The survey accorded with UT's statistical study of classroom demographics, which determined that a substantial proportion of undergraduate classes contained one or zero underrepresented minority students. *Id.* The study found that "in 2002, 90 percent of classes with 5 to 24 students had one or zero African American students and 43 percent had one or zero Hispanic students." *Id.* Diversity in the classroom remained highly elusive notwithstanding the dramatic increases in Latino high school graduates and Latino applicants to UT. *See* Tex. Educ. Agency, Count of Graduates by Ethnicity, PEIMS Data, at 10, 19, Dkt. No. 94-1 ("PEIMS Data"); Univ. of Tex. Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin*, Demographic Analysis of Entering Freshmen Fall 2006 at 9, Dkt. No. 96-11 (Ex. A. to Lavergne Aff.).[4]

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[2] Petitioner's argument that the race-neutral TTP law had helped restore UT's enrollment to levels for Latino and African-American students that had been achieved prior to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and therefore foreclosed UT's consideration of race, fails for at least two reasons. First, petitioner is wrong to assume that pre-*Hopwood* admitted classes ever included a diverse pool of students sufficient to fulfill UT's mission. Second, petitioners ignore the fact that the increase in minority student enrollment at UT likely reflected the huge increase in Latino and African-American students enrolling in Texas public schools since the *Hopwood* decision in 1996. The two student groups comprised 97% of the total student growth. *See West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, 2004 WL 5719215 (Tex. Dist. Nov. 30, 2004) (Finding of Fact 68).

In addition to the survey and classroom study, UT examined its race-neutral admissions plan and outreach,[5] analyzed the performance of underrepresented groups in entering the existing labor force, and reviewed its role as a flagship university in producing a diverse group of leaders that would benefit the state, the nation, and the world. SJA 1a-3a, 6a-7a, 24a.

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[3] In these circumstances, students report that they rely on campus organizations for support. For example, one Latina student, the leader of the Longhorn League of United Latin American Citizens, explained that her organization was inspired to create on-campus annual leadership summits to recruit high school students into higher education "because of the lack of Latino and other minority students at the University." Miriam Arellano Decl. at 2, Dkt. No. 72-1 (Ex. 4 to Motion to Intervene).

[4] UT administrators have echoed these findings. For example, Bruce Walker, Director of Admissions at UT-Austin, testified that underrepresented minority students reported feeling isolated and that there was insufficient diversity. JA 267a-68a.

Based on these findings, UT determined that a sufficiently diverse student body had not yet been achieved. That determination "tak[es] into account complex educational judgments in an area that lies primarily within the expertise of the university," and, as such, is entitled to deference. *Grutter*, 539 U.S. at 328. Deference is particularly appropriate because UT's conception of diversity is identical to the one ratified in *Grutter*.

UMLS defined "critical mass" as "a number that encourages underrepresented minority students to participate *in the classroom and not feel isolated*," or "numbers such that underrepresented minority students do not feel *isolated or like spokespersons for their race*." *Grutter*, 539 U.S. at 318-19 (emphases added). UT—far from establishing a pre-determined quota or percentage of minority applicants to be admitted—similarly focused its diversity study on the *classroom* and whether minority students felt isolated there. UT found in that study that a high number of UT classes included no more than one minority student, and thus reasonably determined that those students would feel "isolated" "in the classroom," and

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[5] At the time UT considered adding race for underrepresented groups as a nonpredominant factor among many others, Latino students comprised only fourteen percent of the enrollment. SJA 25a.

"feel ... like spokespersons for their race." *Id.* This determination was supported by the numerous responses of Latino and other minority students who reported feeling isolated in the classroom. Importantly, petitioner has offered no evidence to contradict UT's finding that a critical mass was lacking in its classrooms or that Latino and African-American students felt isolated in the classroom or like spokespersons for their race.

Moreover, *Grutter* embraced the view that universities may seek increased diversity to "promote[] 'cross-racial understanding,' help[] to break down racial stereotypes, and 'enable[] [students] to better understand persons of different races.' These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" *Grutter*, 539 U.S. at 330 (quoting district court opinion in *Grutter*) (fourth alteration in original). Again, UT's uncontradicted findings support its determination that it had yet to achieve a "critical mass" of minority students, and that it needed to supplement its race-neutral admissions program in order to reap the many benefits of diversity in its classrooms. *Amici* urge this Court not to upset this delicate balance, and instead to defer to UT's "complex educational judgments." *Id.* at 328.

B. UT's Admissions Program Is Narrowly Tailored

Following its comprehensive study concluding that its race-neutral approaches failed to deliver fully to its student the benefits of diversity, UT closely modeled the race-conscious portion of its admissions program on the one affirmed in *Grutter*. Accordingly, like UMLS, UT "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 337. Indeed, UT's consideration of race in admissions is significantly more narrowly tailored than the program upheld in *Grutter*.

To begin, UT's race-conscious, holistic program only applies to the minority of applicants who were not automatically admitted under the race-neutral TTP law.[6] For the non-TTP applicants, UT determines admission based on the applicant's Academic Index/Personal Achievement Index scores. The Academic Index score predicts the applicant's freshman GPA at UT based on factors such as high school class rank and SAT or ACT score. The Personal Achievement Index score is derived from three discrete elements, which are the applicant's scores on each of two essays and her "personal achievement score." The latter is based on a "holistic review" of the "applicant's demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances." App. 133a.

In evaluating the applicant's "special circumstances," in turn, UT considers seven factors: the applicant's socio-economic status, her school's socio-economic status, her family responsibilities, whether she lives in a single-parent home, whether languages other than English are spoken at home, her SAT/ACT score compared to her school's average score, and race. App. 159a n.13. In this way, UT's consideration of race is highly limited—it is "a factor of a factor of a factor of a factor." *Id.* at 159a. And contrary to being a quota system, UT's plan conforms to *Grutter*'s mandate that each applicant be "evaluated as an individual and not in a way that makes [the] applicant's race or ethnicity the defining feature of his or her application." 539 U.S. at 337.

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[6] The TTP program is itself race-neutral, and no one disputes its constitutionality.

Petitioner and her supporting *amici* ignore UT's comprehensive plan and holistic consideration of seventeen factors. *Cf.* SJA 28a-29a. Indeed, petitioner asks this Court to ignore the fact that she failed to rank in the top ten percent of her graduating class (thus reducing her chances of gaining admission by eighty percent), and then failed to gain admission under the individualized, holistic review process—unlike 6,582 other white students admitted in 2008. SJA 156a. Instead, petitioner asks this Court to focus its attention on one criterion—SAT scores—which is the one factor that has a disparate impact against Latino and African-American students.[7] In essence, petitioner and her *amici* ask the Court to set aside an admissions plan that entails a holistic review of applicants' other talents, and replace it with a plan tailored only to her strengths. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.").

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[7] *See* William C. Kidder & J. Rosner, *How the SAT Creates "Built-in Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 Santa Clara L. Rev. 131, 133 (2002).

Additionally, unlike the UMLS plan, UT's plan did not include monitoring on a daily or weekly basis the number of minority students admitted. *See Grutter*, 539 U.S. at 391-93 (Kennedy, J., dissenting) (stating that consultation of daily reports suggested lack of individual review and compromised finding that the admissions plan could survive strict scrutiny).[8] And unlike the UMLS plan, where a specific range of minority students was accepted from one year to the next, UT does not seek out any specific range. JA 131a. In fact, UT's Latino enrollment for students admitted outside the TTP plan fluctuated in numbers and percentages between the years 2005 and 2008, ranging from 158 to 343 Latino students. *See* Univ. of Tex. at Austin, Research Section, Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin* 7 (2008).[9] These aspects of UT's admissions plan demonstrate UT's faithful commitment not to evaluate applications expressly for race or ethnicity.[10]

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[8] *But see Grutter*, 539 U.S. at 336 (finding that, "[t]o the contrary, the Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these [daily] reports").

[9] *Available at* http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf.

[10] In fact, UT's consideration of race is not limited to Latino and African American students, but also may be considered for other races, including white students. App. 134a.

Finally, UT's plan is consistent with *Grutter*'s emphasis on "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342. UT informally reviews its admissions policies every year, and "every five years the admissions process is evaluated specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body, or whether race-neutral alternatives exist that would achieve the same results." App. 126a; *cf.* Resp. Br. 12 n.4.

For those reasons, there is no tenable argument under *Grutter* that UT's adoption of a program considering race as part of a holistic, individualized admissions assessment—and as a supplement to the race-neutral TTP program that continues to dominate its admissions plan—fails to qualify as narrowly tailored to serve the compelling interest of promoting a diverse student body.

II. A DIVERSE STUDENT BODY, WHICH INCLUDES LATINO STUDENTS, GREATLY BENEFITS SOCIETY

To achieve its "goal of producing future educational, cultural, business, and sociopolitical leaders," UT understands that "the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds." SJA 24a. A diverse student body not only improves educational outcomes for all students, but its benefits also extend far beyond the students' time on campus. *See Grutter*, 539 U.S. at 330-33; *see also* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Cul-*

ture, Courts, and Law, 117 Harv. L. Rev. 4, 60 (2003) ("[*Grutter*] conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership."). In particular, increased diversity at UT positively influences Latinos' participation in civic affairs, in political and military leadership, and in meeting the needs of Texas businesses in today's global economy.

A. Civic Participation

In *Grutter*, the Court emphasized that educational diversity is critical to securing "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation," which is "essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. One key metric of effective civic participation is voting registration and turnout. Although the Latino population is growing rapidly, it still lags behind other groups in voter participation. *See* Mark Hugo Lopez, Pew Hispanic Center, *The Latino Electorate in 2010: More Voters, More Non-Voters*, at 5-6 (2011).[11] The figures from the 2010 elections show that Texas's situation is even more severe than the national disparity. Only 36.5% of Texas's adult citizen Latinos were registered to vote--compared with 65.9% of the state's non-Latino whites. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2010*, tbl. 4b (2011).[12] Worse, only 15.8% of Latinos actually turned out to vote, compared with 43.1% of non-Latino whites. *See id.* Nationally, 31.2% of Latino adult citizens voted, compared with 48.6% of non-Latino white adult citizens. *See* Lopez, *supra*, at 5-6.

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[11] *Available at* http://www.pewhispanic.org/files/reports/141.pdf. Low Latino voter registration and turnout can be attributed in part to Texas's continuing history of discrimination in voting. Nearly forty years ago in *White v. Regester*, 412 U.S. 755 (1973), this Court recognized that discrimination created barriers that made it extremely difficult for native-born Latinos in Texas to participate in the political process. *Id.* at 768. As recently as 2006, this Court concluded that Texas had discriminated against Latinos in congressional redistricting. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (Kennedy, J.) ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it."). And Texas has not ceased enacting laws that create barriers to voting for Latinos. *See, e.g., Perez v. Perry*,

Comparative college attendance rates, which correlate strongly with voter participation, help to explain this disparity: "Education has long been recognized as (perhaps *the*) prime performer among the constellations of influences on turnout, and deservedly so." Robert A. Jackson, *Differential Influences on Latino Electoral Participation*, 25 Pol. Behav. 339, 354 (2003); *see also* Thomas S. Dee, *Are There Civic Returns to Education?*, 88 J. Pub. Econ. 1697, 1704 (2004) ("[C]ollege attendance has a sizable influence on subsequent civic participation."). In fact, among Latino eligible voters, 50.3% of college graduates headed to the polls in 2010, while only 25.8% of high school graduates did. *See* Lopez, *supra*, at 6.

No. 11-ca-360, Dkt. 60, at 11-12 (W.D. Tex. July 19, 2011) and *Perez v. Perry*, No. 11-ca-360, Dkt. 691, at 36-39 (W.D. Tex. Mar. 19, 2012) (three-judge panel altering temporarily Texas redistricting plans in Voting Rights Act challenge by Latino voters).

[12] *Available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

Without innovative programs like UT's, given its size of enrollment, it is unlikely that these numbers will change significantly. Although a larger percentage of young Latino adults than the general public say that a college education is important for success in life, a smaller percentage of young Latino adults than the general public say that they themselves plan to get a college degree. *See* Mark Hugo Lopez, Pew Hispanic Center, *Latinos and Education: Explaining the Attainment Gap*, at 3 (2009).[13] And nearly twice as many Latinos as non-Latino whites—29% versus 15%—have not completed high school. *See* Pew Hispanic Center, *Fact Sheet: Latinos in the 2010 Elections: Texas*, at 2 & tbl.2 (2010).[14] Expanding access to the state's premier public institution can help increase Latinos' college-attendance rate, and with it, their level of civic participation.

Cultivating college-graduate role models is a powerful, targeted way to increase the chances that talented Latino youth will follow in graduates' footsteps. *See* Ricardo D. Stanton-Salazar & Stephanie Urso Spina, *Informal Mentors and Role Models in the Lives of Urban Mexican-Origin Adolescents*, 34 Anthropology & Educ. Q. 231, 244 (2003). For example, across a series of interviews with Latino adolescents, researchers found that "the theme of exemplary adult role models as sources of inspiration and pride was consistent," and the students "could articulate many of the functions served by role models (e.g., inspiration, guide to achieving goals and dreams)." *Id.* The limiting factor seemed to be adolescents' "limited networks," which "left them often perplexed as to who they could identify as models." *Id.* In other words, role models exert a powerful influence on Latino youth, but there are simply too few of them. By seeking a critical mass of Latino students, UT's admissions plan helps to increase the number of potential Latino role models in the community.

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[13] *Available at* http://www.pewhispanic.org/files/reports/115.pdf.

[14] *Available at* http://www.pewhispanic.org/files/2011/08/TX-eligible-voter-factsheet.pdf.

Moreover, as this Court has recognized, "education ... is the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Meaningful representation of qualified Latino students at Texas's flagship university lays the groundwork for increased Latino participation in and engagement with civic affairs. In this way, UT's plan serves not just the students who attend the University, but the broader community as well.

B. Leadership Potential

Universities serve as the "training ground[s]" for our nation's leaders. *Grutter*, 539 U.S. at 332. As this Court noted in *Grutter*, this is especially true of "highly selective" schools. *Id.* As with the University of Michigan, UT is the gem of Texas's higher education system. Its undergraduate programs consistently rank among the best in the nation. *See* Univ. of Tex. at Austin, *Rankings & Kudos.*[15] Among the nation's leaders who count themselves as UT alumni are Texas Senator Kay Bailey Hutchison, former Secretary of State James Baker, former First Ladies Laura Bush and Claudia "Lady Bird" Johnson, and Supreme Court Justice Tom Clark.

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[15] *Available at* http://www.utexas.edu/about-ut/rankings-kudos.

"In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." *Grutter*, 539 U.S. at 332. UT recognizes the need for a diverse classroom environment to prepare its students adequately to assume the roles of leaders in Texas. In fact, its pursuit of diversity in admissions was explicitly adopted, among other things, to "develop the next generation of leadership, with the understanding and expectation that many of the University's graduates will become future leaders of Texas." JA 365a.

Latinos comprise 37.6% of the population of Texas. *See* U.S. Census Bureau, *The Hispanic Population: 2010*, at 6 tbl.2 (2011).[16] The Latino contingent of Texas's federal congressional delegation, however, is only 17.6%. *Compare* Nat'l Assoc. of Latino Elected Officials (NALEO), *2011 National Directory of Latino Elected Officials*, at 134-35 (six Latino congressmen), *with* U.S. House of Representatives, *Directory of Representatives* (32 House seats).[17] Representation at the state level is also disproportionately small: Latinos comprise 20.7% of Texas's Representatives (31 of 150) and 22.6% of its Senators (7 of 31). *Compare* NALEO, *supra* (Latino elected officials), *with* The Senate of Tex., *Texas Senators of the 82nd Legislature* (31 Senators)[18] *and* Texas House of Representatives, *About Us* (150 Representatives).[19] With state and local positions aggregated, Latino representation shrinks to only 7.3%. *See* Louis DeSipio, *Latino Voters: Lessons Learned and Misunderstood*, in *The Unfinished Agenda of the Selma-Montgomery Voting Rights March* 135, 139 (2005). A critical mass of talented Latino students at UT is necessary to ensure that Latinos are among our nation's leaders and that all leaders are exposed to the wide range of viewpoints from the communities that they serve.

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[16] *Available at* http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf.

[17] *Available at* http://www.house.gov/representatives/#state_tx.

C. Military Leadership

In addition to the benefits that flow from diversity in higher education, the Court in *Grutter* recognized that a "'highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its princip[al] mission to provide national security.'" 539 U.S. at 331 (quoting military brief). The Court explained that the nation's "most selective institutions must remain both diverse and selective" so that Reserve Officers Training Corps and the military could continue to "train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." *Id.*

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[18] *Available at* http://www.senate.state.tx.us/75r/Senate/Members.htm (UT graduates comprise eleven (35%) of the state senators).

[19] *Available at* http://www.house.state.tx.us/about-us/ (UT graduates comprise forty-one (27.3%) of the state representatives).

Since 1985, the Latino population in the military has "more than doubled." U.S. Army, *The Changing Profile of the Army: FY08*, at 9 (2008);[20] *see also* Karin De Angelis & David R. Segal, *Minorities in the Military*, in *The Oxford Handbook of Military Psychology* 325, 334 (Janice H. Laurence & Michael D. Matthews eds., 2012) (noting that "increased accession numbers of Hispanics are beginning to fill the manpower void left by the declining numbers of African Americans"). As this growth continues, Latino military leadership may well be necessary to help retain and lead the military's significant Latino enlisted contingent. Retaining a Latino presence in the military may thus depend on increasing the officer corps, which has always been the highest educated segment of the military.[21] As a recent report on diversity in the military explained, "[d]uring the Vietnam War, the lack of diversity in military leadership led to problems that threatened the integrity and performance of the Nation's military ... because servicemembers' vision of what is possible for their career is shaped by whether they see individuals *with similar backgrounds* excelling and being recognized in their Service." Military Leadership Diversity Comm'n, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, at 11 (Exec. Summary 2011) (emphasis added).

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[20] *Available at* http://www.armyg1.army.mil/hr/docs/demographics/changing%20profile%20report%20december%20 2008.pdf.

[21] *See, e.g.*, U.S. Army, *Careers & Jobs: Become an Officer*, *available at* http://www.goarmy.com/careers-and-jobs/become-an-officer.html (listing "the four paths to becoming a commissioned officer," all of which require a college degree); *see also* Kizzy M. Parks et al., *Latina Perceptions of Diversity Climate in the Military* (2009), *available at* http://www.deomi.org/EOEEOResources/documents/Latina_Perceptions_of_Diversity_Climate_in_the_Military-Parks.pdf ("[D]iversity climate was linked to job satisfaction and organizational commitment .... As job satisfaction and organizational commitment are strongly linked to retention and turnover for minorities—and Hispanics in particular—the military should ... build upon Latinas' strong sense of community in recruiting and retention efforts by emphasizing that the military is a large, but close-

Despite the importance of a diverse officers corps, Latinos comprise a substantially higher percentage of enlisted active duty personnel than they do of officers. In 2006, across the entire military, Latinos accounted for 11.2% of enlisted personnel, but only 4.9% of officers. *See* Mady Wechsler Segal & David R. Segal, Population Reference Bureau, *Latinos Claim Larger Share of U.S. Military Personnel* (2007).[22] Latinos are underrepresented among officers, but, "considering their lower educational attainment and their naturalization status," they are overrepresented among enlisted personnel. *Id.* Indeed, the Army reported that, in 2008, Latinos constituted 11.9% of enlisted active duty soldiers but only 5.5% of officers, *see* U.S. Army, *Army Demographics: FY08 Army Profile* (2008),[23] and ex-

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knit family that takes care of the individual by providing fair treatment and personal development opportunities.").

[22] *Available at* http://www.prb.org/Articles/2007/HispanicsUSMilitary.aspx.

[23] *Available at* http://www.armyg1.army.mil/HR/docs/demographics/FY08%20Army%20Profile.pdf.

plained that a "barrier for Hispanics entry in the Army is often related to lack of educational credentials," U.S. Army, *The Changing Profile of the Army*, *supra*, at 9.

These figures are not improving. In the 2011 Army, the Latino contingent stood at 13% of active duty soldiers, but only 8% of warrant officers and 6% of commissioned officers. U.S. Army, *Army Demographics: FY11 Army Profile* (2011).[24] By contrast, 60% of the enlisted population, 62% of warrant officers, and 72% of commissioned officers were white. *Id.*

Attaining a critical mass of Latinos at UT and other selective schools is essential to ensuring that the military officer corps is diverse and meets the military's needs. UT has already established itself as a robust training ground for our nation's military with longstanding ROTC programs—the Naval ROTC was established at UT in 1940,[25] and the Army ROTC has been active on campus since 1947.[26] Increased Latino access to these programs will benefit all levels of the military.

D. Private Sector

Latinos are underrepresented in other leadership-oriented and professional careers, and in the college pipeline that leads to such opportunities. In *Grutter*, this Court emphasized that a diverse educational background prepares *all* students to enter the modern job market and to meet the needs of modern industry. "[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330-31. The Court approvingly cited the viewpoints of *amici* Fortune 500 companies, which included several of Texas's largest and most prominent employers, such as Dow Chemical, Shell Oil, and American Airlines. *Id.* Those *amici* explained that having employees educated in a diverse environment allows companies to serve an increasingly diverse customer base, and also facilitates cross-cultural interactions with business partners. *See* Brief for 3M et al. as *Amici Curiae* Supporting Respondents at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399056.

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[24] *Available at* http://www.armyg1.army.mil/HR/docs/demographics/FY11_ARMY_PROFILE.pdf.

[25] Univ. of Tex. at Austin, *Naval Reserve Officer Training Corps*, *available at* http://www.utexas.edu/cola/depts/navymarine/.

[26] Univ. of Tex. at Austin, *Texas Army ROTC Longhorn Battalion*, *available at* http://www.utexas .edu/cola/depts/arotc/.

1. *Professional Career Paths and Diversity in the College Classroom*

An educated Latino community is particularly important for Texas and the nation. In today's economy, a college degree continues to become increasingly important. *See* Barbara Schneider et al., *Barriers to Educational Opportunities for Hispanics in the United States*, in *Hispanics and the Future of America*, at 211 (Marta Tienda & Faith Mitchell, Nat'l Res. Council of the Nat'l Academies, ed. 2006).[27] But again, fewer Latinos attend college than whites. Consequently, in the private sector, just as in the military, Latinos occupy more low-level positions. While Latinos make up 14.3% of the total population of employed civilians over 16, they comprise only 7.3% of employees in management, professional, and related occupations. *See* U.S. Census Bureau, *The 2012 Statistical Abstract*, Labor Force, Employment, and Earnings, at 393 tbl. 616 (2012).[28]

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[27] *Available at* http://www.ncbi.nlm.nih.gov/books/NBK19905/pdf/TOC.pdf.

Indeed, nationally nearly twice as many whites as Latinos per capita held management, professional, and related occupations in 2011—38.3% versus 19.5%. Bureau of Labor Statistics, U.S. Dep't of Labor, *Labor Force Statistics from the Current Population Survey*, Table 10: Employed persons by occupation, race, Hispanic or Latino ethnicity, and sex.[29] And while Latinos serve as 12.6% of sales and office occupation workers, they are overrepresented as 21.3% of service workers (including 32.5% of cooks and 38.5% of dishwashers) and over 40% of laborers in a number of construction-related occupations. U.S. Census Bureau, *The 2012 Statistical Abstract*, *supra*, at 394-96 tbl. 616. At the same time, only 3.4% of lawyers are Latino. *Id.* at 396 tbl. 616.

2. *Science, Technology, Engineering, and Math (STEM) and the Careers of the Future*

Latino underrepresentation is particularly worrisome in the fields of science, technology, engineering, and math (STEM). These fields are widely recognized to be crucial to future American economic prosperity. *See* Anthony P. Carnevale et al., Georgetown Univ. Ctr. on Educ. & the Workforce, *STEM*, at 12-17 (2011)[30]; *see also* Jennifer Godinez, *How Educators Can Support the High Expectations for Education that Exist in the Latino Family and Student Community*, in *White Teachers, Diverse Classrooms: Creating Inclusive Schools, Building on Students' Diversity, and Providing True Educational Equity* 256 (Julie Landsman ed. 2011) ("[E]ducation leaders agree that rigorous and equitable educational systems need to be developed within the next 10 years in order to train the human capital required to ensure the United States remains competitive in the global economy.").

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[28] *Available at* http://www.census.gov/compendia/statab/2012/tables/12s0616.pdf.

[29] *Available at* http://www.bls.gov/cps/cpsaat10.pdf.

Despite their widely recognized importance, filling these jobs is no easy task. *See* Shelley DuBois, *America's Science Job Conundrum*, CNNMoney (July 15, 2011) ("But even as the number of jobs in the STEM sector increases, there's a possibility that Americans could struggle to meet the demand.").[31] A recent report to the President explained that the U.S. will need to produce another million STEM professionals over what it "will produce at the current rate over the next decade if the country is to retain its historical preeminence in science and technology." President's Council of Advisors on Science and Technology, *Report to the President: Engage to Ex-*

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[30] *Available at* http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/stem-complete.pdf; *see also* Refugio I. Rochin & Stephen F. Mello, *Latinos in Science: Trends and Opportunities*, 6 J. Hispanic Higher Educ. 305, 310-13 (2007).

[31] *Available at* http://management.fortune.cnn.com/2011/07/15/America-science-job-conundrum/.

cel: Producing One Million Additional College Graduates with Degrees in Science, Technology, Engineering, and Mathematics, at i (2012).[32] Achieving this goal will require boosting "the number of students who receive undergraduate STEM degrees by about 34% annually over current rates." *Id.* By 2018, Texas will have 22% more STEM jobs than it did in 2008—a staggering *91%* of them will require postsecondary education and training, and 51% of them will require at least a bachelor's degree. *See* Anthony P. Carnevale et al., Georgetown Univ. Ctr. on Educ. & the Workforce, *STEM*, *supra*, at 47.

Latinos must be part of this critical sector of the workforce. *See* President's Council of Advisors on Science and Technology, *supra*, at 5 (considering minority groups and women "an 'underrepresented majority' that must be part of the route to excellence"). For their part, corporations are increasingly recognizing the importance of diverse workplaces. *See, e.g.*, Hispanic Ass'n on Corporate Responsibility, *2011 HACR Corporate Inclusion Index*, at 13 (2011) ("Of the total respondents, 72 percent reported having or supporting an internship program specifically geared toward recruiting Hispanics.").[33]

The trend of fewer Latinos attending college than whites unmistakably correlates with the underrepresentation of Latinos in STEM career paths—the less access Latinos have to postsecondary education, the less access they will also have to burgeoning STEM career opportunities. *See, e.g.*, Stanley Litow, *A Silent Crisis: The Underrepresentation of Latinos in STEM Careers.*[34]

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[32] *Available at* http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-engage-to-excel-final_feb.pdf.

[33] *Available at* http://www.hacr.org/docLib/20111221_2011HACRCII.pdf.

The data nationally bear out Latinos' underrepresentation in STEM careers. "Of all workers, 6 percent of white workers and 15 percent of Asian workers are currently working in STEM-related jobs.... Comparatively, only 2 percent of Latinos and 3 percent of African Americans work in STEM fields." Nat'l Action Council on Minorities in Engineering, Inc., *Critical Issues in Engineering Education Policy*, 2 Res. & Pol'y (April 2012);[35] *see also* Nat'l Action Council on Minorities in Engineering, Inc., *2011 NACME Data Book: A Comprehensive Analysis of the "New" American Dilemma* 4-5 (2011) ("Latinos continue to lag far behind the other major race/ethnic categories in college enrollment" and underrepresented minorities "earned just 13 percent of all engineering bachelor's degrees in 2009").[36]

Changing these figures depends on providing Latinos better access to the education required to perform management and STEM jobs. UT has already proven itself a leader in such initiatives. For instance, its Freshman Research Initiative (FRI), which enrolls one quarter of the class in the College of Natural Sciences, provides mentoring-rich research and publication opportunities for first-year students. *See* President's Council of Advisors on Science and Technology, *supra*, at 88 box G-1. "Early results suggest that student retention in STEM programs is 30 to 35 percent higher for students in the initiative." *Id.* Fully 40% of the 500 students participating in FRI are from underrepresented groups, and participating students demonstrate a variety of more positive educational and vocational outcomes. *See* Univ. of Tex. at Austin, ***Freshman Research Initiative, College of Natural Sciences, Facts & Numbers***.[37]

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[34] *Available at* http://www.edweek.org/ew/articles/2008/07/18/44litow-com_web.h27.html.

[35] *Available at* http://www.nacme.org/user/docs/Engineering%20RB1V2R.pdf.

[36] *Available at* http://www.nacme.org/user/docs/NACMEDatabookReprintFinal2Post.pdf.

Indeed, data suggest that once Latinos actually make it to college, they are as likely as other groups (excepting Asian-Americans) to major in a STEM subject. *See* David Beede et al., U.S. Dep't of Commerce, *Education Supports Racial and Ethnic Equality in STEM*, at 4 fig.3 (2011) (showing, *inter alia*, that of college graduates, 21% of Latinos, and 22% of non-Latino whites, majored in STEM fields).[38] Further, they are nearly as likely to enter STEM careers: the gap between whites and Latinos for those with STEM majors who now have STEM jobs is lower than the gap between whites and Latinos for college degrees generally (34% versus 28% for the former; 35% versus 14% for the latter). *Id.*

Thus, by attracting and seeking diversity at the college level, and, further, by ensuring rigorous STEM-based educational opportunities, UT's plan looks forward to the day when "the use of racial preferences will no longer be necessary to further the .... compelling interest in obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343.

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[37] *Available at* http://fri.cns.utexas.edu/about-fri/facts-numbers.

[38] *Available at* http://www.esa.doc.gov/sites/default/files/reports/documents/educationsupportsracialandethnicequality instem_0.pdf.

3. The Economic Importance of College Education for the Latino Community

An educated Latino community is important for Texas and its economy in other ways. Both nationally and locally, the domestic consumers for Texas businesses are increasingly Latino. The Texas State Demographer predicts that the Latino population will reach parity with the non-Latino white population in Texas by 2020, and will be more than 50% larger than the white population in 2040. *See* The Univ. of Tex. at San Antonio, Office of the State Demographer, *2008 Methodology for Texas Population Projections* (Feb. 2009).[39]

As the Latino population continues to increase, so too does its buying power. Already, according to one study, "[i]f it were a standalone country, the U.S. Hispanic market buying power would make it one of the top twenty economies in the world." Nielsen, *State of the Hispanic Consumer: The Hispanic Market Imperative* (2012).[40] The private sector is in great need of college graduates educated in a diverse environment who understand the needs of the Latino community and who are able to connect with this important community.

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[39] *Available at* http://txsdc.utsa.edu/tpepp/2008projections/2008_txpopprj_txtotnum.php.

[40] *Available at* http://www.nielsen.com/us/en/insights/reports-downloads/2012/state-of-the-hispanic-consumer-the-hispanic-market-imperative.html.

At the same time, the success of Texas industry is crucially important to the United States' international trade. Texas is the state with by far the strongest trading relationship with Mexico: it exports more goods to and engages in more land trade with Mexico than any other state. In 2003, for example, Texas exported $41.5 billion in goods and services to Mexico; the next-largest exporter was California, with $14.9 billion in exports. *See* Robert W. Gilmer, Fed. Reserve Bank of Dallas, *U.S.-Mexico Trade: Are We Still Connected?*, El Paso Bus. Frontier 2-3 (2004).[41] The nations' economies remain tightly intertwined. *See* Jesus Cañas et al., Fed. Reserve Bank of Dallas, *U.S., Mexico Deepen Economic Ties*, 11 (2006) ("The U.S. is Mexico's top trading partner by far.... Americans are the biggest investors in Mexico ... The U.S. and Mexican economies have become increasingly synchronized.").[42] In 2011, the United States was responsible for approximately 65% of Mexico's $700.5 billion in trade (imports and exports). *See* Jesus Cañas, Fed. Reserve Bank of Dallas, *Mexico Resilient in 2011 Amid Global Uncertainty and Sluggish U.S. Growth* (2012).[43] Having a diverse group of Latino college graduates from UT helps ensure continuing growth in economic trade with Mexico and Latin American countries.

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[41] *Available at* http://www.dallasfed.org/assets/documents/research/busfront/bus0403a.pdf.

[42] *Available at* http://www.dallasfed.org/assets/documents/research/swe/2006/swe0601c.pdf.

[43] *Available at* http://www.dallasfed.org/assets/documents/research/swe/2012/swe1202c.pdf.

In short, the benefits of diversity to the Texas and national economy are "not theoretical but real." *Grutter*, 539 U.S. at 330; *see also* Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Soc. Rev. 208 (Apr. 2009) ("[R]acial diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits."). If UT is to provide its graduates the education they need to thrive in the rapidly changing Texas and national economy, the University must educate its students in a diverse classroom environment that includes a critical mass of Latino students.

III. TEXAS'S CONTINUING INSTITUTIONAL BARRIERS TO LATINOS CANNOT BE IGNORED

With the Latino population ever increasing and now accounting for over fifty percent of the students enrolled in Texas public schools,[44] Latinos' potential for contributing substantially to society cannot be overlooked. UT recognizes this growing pool of qualified Latino applicants and how they factor into not only the current school setting, but also into the future workforce and leadership in Texas and the Nation. Nevertheless, Texas Latinos still struggle to attain the American dream. This is not surprising given the persistent institutional barriers faced by

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[44] Div. of Research & Analysis, Tex. Educ. Agency, *Enrollment in Texas Public Schools 2010-2011*, at ix (2011), *available at* www.tea.state.tx.us/acctres/Enroll_2010-11.pdf.

Latinos. Although the TTP law has undoubtedly helped create access to higher education for some Latinos, the TTP plan cannot possibly account for all of the nuanced challenges that Latino youth must overcome just to apply to a university like UT. And while *amici* do not contend that UT should implement its race-conscious admissions plan as a remedy to the persistent unequal treatment of Latinos in Texas, the following history shows contextually how much further UT and Texas have to go to ensure that Texas's fastest growing group has equal opportunities to succeed and participate fully as citizens. As this Court held in *Grutter*, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." 539 U.S. at 332.

Latinos continue to face numerous obstacles in Texas, many of which taint their educational experience. They must overcome risk factors such as poverty, quality of health, family structures, and high dropout rates—a crisis that bears heavily on the group's ability to participate meaningfully in society and in the country's political process.[45] To understand how institutional barriers persist, one cannot overlook what this Court has described as Texas's "long, well-documented history of discrimination that has touched upon the rights of African Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) (quotation omitted).

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[45] *See* Nat'l Ctr. for Pub. Policy and Higher Educ., *Policy Alert: Income of U.S. Workforce Projected to Decline if Education Does Not Improve* (2005), *available at* http://highereducation.org/reports/pa_decline/pa_decline.pdf (Latinos are the least educated racial group but the fastest growing, and the "income of [the] U.S. workforce [is] projected to decline if education doesn't improve").

A. Overcoming Past Discrimination In Texas Public Schools

As this Court recognized in *Perry*, Texas's history of discrimination has been long and pervasive. Historical discrimination has been particularly virulent—and has had particularly significant lasting effects—in the area of education. By the 1920s, school segregation in Texas had "received endorsement not only from the Superintendent of Public Instruction and the state, but from University of Texas scholars as well." Tijerina Expert Report at 25-26, *Texas v. Holder*, No. 12-cv-00128 (D.D.C. 2012), Dkt. 241-2. Many school districts established "Mexican schools," and by the 1930's, 90% of South Texas schools were segregated. *See* Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools,* 7 Harv. C.R.-C.L. L. Rev. 307 (1972). Through the early twentieth century, districts intentionally channeled Latino students into substandard "Mexican" and "migratory" schools. *See* Kristi L. Bowman, *The New Face of School Desegregation,* 50 Duke L.J. 1751, 1769 (2001).

Latinos were forced to challenge the segregation and educational inequities in courts across Texas. *See, e.g., Delgado v. Bastrop Indep. Sch. Dist., No. 388* (W.D. Tex. June 15, 1948);[46] *Cortez v. Carrizo*

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[46] *Available at* http://xa.yimg.com/kq/groups/13699726/1941412825/name/Delgado+v.+Bastrop.pdf.

Springs Indep. Sch. Dist. (1955); *Salinas v. Kingsville Indep. Sch. Dist.* (1956);[47] *Hernandez v. Driscoll Consol. Indep. Sch. Dist.*, 1957 U.S. Dist. LEXIS 4784 (S.D. Tex. Jan. 11, 1957). Indeed, Latinos were not identified as a distinct, suspect class for equal protection purposes until *Hernandez v. Texas*, 347 U.S. 475 (1954), in which this Court cited the segregation of Latino schoolchildren as evidence that the white community considered Latinos a separate race. *See id.* at 479-80.

Despite *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Hernandez*, Latinos continued to be denied equal educational opportunities in Texas. School districts often clustered African-American students with "white" Latino students, in order to claim that neither group was segregated. Indeed, not until *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972), did the courts hold that *Brown* clearly prohibits the segregation of Latino students into racially isolated schools with African-American students, while leaving white students unaffected.

Even after *Cisneros*, Latino students continued to experience significant discrimination in Texas schools throughout the twentieth century and up until the present.[48] Indeed, several school districts across Texas remain subject to desegregation orders today. *See United States v. Texas*, 601 F.3d 354 (5th Cir. 2010).[49]

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[47] *See* Richard R. Valencia, *Chicano School Failure and Success: Past, Present, and Future* (Routledge 2011). The *Carrizo Springs* and *Kingsville* cases are noted in this book but are unpublished.

[48] *See, e.g.*, *United States v. Texas Educ. Agency*, 467 F.2d 848 (5th Cir. 1972) (Austin); *Ross v. Eckels*, 468 F.2d 649 (5th Cir. 1972) (Houston); *Tasby v. Estes*, 517 F.2d 92 (5th Cir. 1975) (Dallas); *United States v. Midland Indep. Sch. Dist.*, 519

And even though formal segregation is no longer legally sanctioned, many Latino students continue to attend largely *de facto* segregated districts, which have effectively replaced the old "Mexican schools."[50] Nationally and across every region, a typical Latino student attends a school that is less than one-third white. *See* Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, at 44 (2003).[51] Seventy-six percent of Lati-

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F.2d 60 (5th Cir. 1975); *United States v. Texas Educ. Agency*, 600 F.2d 518 (5th Cir. 1979) (Lubbock); *Alvarado v. El Paso Indep. Sch. Dist.*, 426 F. Supp. 575 (W.D. Tex. 1976).

[49] In higher education in the 1950s and 1960s, UT had segregated Mexican-American students in separate dormitories and the students were excluded from joining university-sponsored organizations. *See Hopwood v. Texas*, 861 F. Supp. 551, 555 (W.D. Tex. 1994). The State of Texas was under investigation by the U.S. Department of Education (and its predecessor) from the 1970s through at least 1994 for denying equal educational opportunities to Latinos under Title VI of the Civil Rights Act of 1964. *See id.* at 555-57.

[50] Although the old "Mexican Schools" no longer exist, similar patterns of segregating Latino students on the perceived basis of language proficiency have been found even today. In Dallas, four years after being removed from a school desegregation order, a federal district court found that an elementary school principal intentionally segregated Latino students by race, using language as a proxy. *See Santamaria v. Dallas Indep. Sch. Dist.*, 2006 U.S. Dist. LEXIS 33195 (N.D. Tex. May 17, 2006).

[51] *Available at* http://pages.pomona.edu/~vis04747/h21/readings/AreWeLosingtheDream.pdf.

nos attend predominantly minority schools, more than any other group. *Id.* at 33. Latinos attending intensely segregated schools, defined as schools with 90 to 100 percent minority enrollment, grew from 462,000 in 1968 to 2.86 million in 2000, comprising 46.9 percent of all Latino students in Texas. *Id.* at 33, 52.

B. Overcoming Current Institutional Barriers In Education

The serious educational disadvantages borne by Latinos are exacerbated by low socio-economic status. In multiple studies, the U.S. Department of Education has found that student achievement is adversely affected by poverty,[52] a significant problem for Latinos because of their disproportionately high poverty rates. *See* U.S. Census Bureau, Poverty, *Highlights* (2011) (26.6 percent of Latino families below poverty level).[53] In each of the Texas counties with large Latino populations, Latinos have lower educational attainment levels, lower income levels, and a higher poverty rate than non-Latinos. This is true even when controlling for various demographic differences. *See* Chapa Expert Report at 4, *Perez v. Perry*, No. 11-cv-360, Dkt. 128-5 (W.D. Tex. Aug. 8, 2011; *see also id.* at Dkt. 128-10, tbls. 4-6. Additionally, the educational system has been largely unresponsive to the needs of Latino students, leading to high Latino attrition and dropout rates. *See* Intercultural Dev. Research Ass'n, *Attrition and Dropout Rates in Texas*.[54]

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[52] For example, on the National Assessment of Educational Progress reading scale (ranging from 0 to 500), high poverty students (75-100% eligible for free or reduced-price meals) on average performed 40 points lower than low poverty student populations (0-25% eligible for the meal program). Similar patterns exist on the mathematics scale. *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *NAEP Data Explorer: National Assessment of Educational Progress, Selected Years, 1998-2009, Reading & Mathematics Assessments, available at* http://nces.ed.gov/nationsreportcard/naepdata/.

[53] *Available at* http://www.census.gov/hhes/www/poverty/about/overview/index.html.

And although *amici* do not posit that standardized college entrance exams should be excluded for admission purposes, a rigid use of these tests for admissions, as petitioner requests, will eliminate academically promising minority and low-income students who apply with strong academic records, as well as other talents that contribute to the academic environment, but relatively low SAT scores.[55] This is especially true for Latinos, who have lower performance rates on college-readiness tests than do white students.[56]

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[54] *Available at* http://www.idra.org/Research/Attrition (in 2010-2011, 110,804 Texas high school students were lost to attrition. The racial gap between Latino and white students was 23%).

[55] Over 800 colleges limit the consideration of SAT and ACT test for admission purposes. *See* Charles Rooney, Nat'l Ctr. for Fair & Open Testing, *Test Scores Do Not Equal Merit: Enhancing Equity & Excellence in College Admissions by Deemphasizing SAT and ACT Results*, at 14, 26 (1998), *available at* http://www.fairtest.org/sites/default/files /optrept.pdf.

[56] *See* Div. of Research & Analysis, Tex. Educ. Agency, *College Admissions Testing of Graduating Seniors in Texas High Schools Class of 2010* (2011), *available at* http://www.tea.state.tx.us/acctres/sat_act_index.html. For

Despite the past discrimination and institutional barriers confronting Latinos in education, they are persevering and becoming qualified candidates for college in large part because universities like UT have begun to open their doors. It is not only important for their future but also for that of greater Texas and the nation. As the former Texas State Demographer predicts, if existing gaps between whites and minorities in educational attainment levels and household income persist, Texas will:

> have a population that would be poorer, less well educated, and more in need of numerous forms of State services than its present population but would be less able to support such services. It would have a population that is likely to be less competitive in the increasingly international labor and other markets of the world.... [But] if socioeconomic differentials between demographic groups were to be reduced through increased education and other means, Texas population growth could be a source of increased private- and public-sector resource growth.

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example, the average SAT and ACT scores decreased as the percentage of Latino students making up the student body increased: when between 20 and 30 percent, average scores were 1034 (SAT) and 22.1 (ACT); but when over 50 percent, the averages were 920 (SAT) and 18.6 (ACT). Moreover, Latino students had a 38.4% participation rate for the SAT, while white students had a rate of 53.6%, and Latino students had a 26.6% participation rate for the ACT, while white students had a rate of 37.7%.

Steve H. Murdock et al., *The Texas Challenge in the Twenty-First Century: Implications of Population Change for the Future of Texas*, at 398 (2002).[57]

While much progress has been made by Latinos, there is still a long way to go. As Justice Kennedy noted in *Parents Involved*, the "enduring hope is that race should not matter; the reality is that too often it does." 551 U.S. at 787 (Kennedy J., concurring). Texas is no different. UT's narrow use of race in a holistic, individualized manner to fulfill its compelling interest in diversity is an appropriate response.

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[57] *Available at* http://txsdc.utsa.edu/reports/2002/texaschallange/TxChall2002.pdf

CONCLUSION

The judgment below should be affirmed.

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APPENDIX

APPENDIX: LIST AND DESCRIPTION OF *AMICI CURIAE*

ASPIRA. ASPIRA is the only national organization dedicated exclusively to the education of Latino youth. Its mission is to promote the development of the Latino community through advocacy and the education and leadership development of its youth. ASPIRA has ASPIRA Associates and Affiliates in seven states (DE, IL, FL, MA, NJ, NY, PA) and Puerto Rico, as well as formal partnerships with over 30 regional and local organizations across the country. Founded in 1961, ASPIRA serves over 45,000 students each year in after-school academic enrichment, tutoring, mentoring, career and college counseling, SAT/ACT Prep, and leadership development programs geared at reducing the exceedingly high Latino drop-out rate and motivating and assisting students to enter higher education. It also reaches over 5,000 parents and young adults with a host of programs, including GED, parental engagement, and financial literacy programs. Through its signature program, the ASPIRA Leadership Development Clubs in schools, ASPIRA reaches young Latinos in over 200 high schools in low-income inner-city schools in 76 communities around the country. ASPIRA operates thirteen charter schools in Delaware, Florida, Illinois, and Pennsylvania with over 10,000 elementary, middle, and high school students. Over 95% of Aspirantes (ASPIRA youth) complete high school and 90% go on to college, and it has an alumni base of over 500,000 Latinos.

Cuban American National Council, Inc. (CNC). CNC is the largest U.S. non-profit Hispanic organization developing affordable housing for low-income seniors, and is a pioneer in providing charter school education. Other Council programs include daycare and developmental services for infants/toddlers of adolescent mothers, and employment and training services for unskilled, undereducated recent immigrants, and individuals who face an English language barrier.

Dominican American National Roundtable (DANR)/National Dominican American Council (NDAC). The Dominican American National Roundtable (DANR) is a non-profit, charitable, members organization which brings together the different voices of all people of Dominican origin in the United States. DANR is a national forum for analysis, planning, and action to advance the educational, economic, legal, social, cultural, and political interests of Dominican Americans. It aims to ensure for U.S. Dominicans the full exercise of the rights and freedoms guaranteed by the Constitution of the United States of America. The National Dominican American Council (NDAC) is the national civic-engagement/community relations organ of the Dominican American National Roundtable. It oversees 120 local councils in 85 cities across the United States. With its membership, which includes local councils, grassroots community organizations, educational, legal, health and civic organizations, DANR has evolved into a powerful research and advocacy organization on issues affecting the immigrant community.

For People of Color, Inc. (FPOC). For People of Color, Inc. (FPOC) assists law school applicants of color in gaining admission to the country's elite law schools.

Hispanic Association of Colleges & Universities (HACU). The Hispanic Association of Colleges and Universities (HACU) has championed the higher education success of the nation's youngest and largest ethnic population. The formal mission of HACU is to promote the development of member colleges and universities; to improve access to and the quality of postsecondary educational opportunities for Hispanic students; and to meet the needs of business, industry and government through the development and sharing of resources, information, and expertise.

Hispanic Federation. The Hispanic Federation provides grants to a broad network of Latino nonprofit agencies serving the most vulnerable members of the Hispanic community and advocates nationally with respect to the vital issues of education, health, immigration, economic empowerment, civic engagement, and the environment.

Labor Council for Latin American Advancement (LCLAA). The Labor Council for Latin American Advancement (LCLAA) is a national organization representing the interests of approximately 2.2 million Latino trade unionists in the United States and Puerto Rico. Founded in 1973, LCLAA builds coalitions between the Latino community and Unions in order to advance the civil, economic and human rights of all Latinos.

LatinoJustice PRLDEF. LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Its continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community especially across the Eastern United States. In its first lawsuit, *Aspira v. New York City Board of Education*, LatinoJustice PRLDEF helped establish bilingual education in New York, and it has since combated the forced segregation of Latino children in Connecticut, Delaware, Pennsylvania and Massachusetts. In addition to creating pathways for success for Spanish-speaking children in public schools, it has thirty years of experience of increasing the cadre of Latino/a law students and attorneys in the country with the pre-law counseling, LSAT test preparation, and mentoring efforts.

League of United Latin American Citizens (LULAC). The League of United Latin American Citizens is the largest and oldest Hispanic membership organization in the United States. With over 132,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans. For more than 83 years, LULAC's members have sought increased opportunities in higher education for Hispanic students through the desegregation of public schools, reaching parity in school funding, the provision of scholarships, educational counseling, and strong affirmative action programs.

Legal Aid Society-Employment Law Center (LAS-ELC). Legal Aid Society-Employment Law

Center ("LAS-ELC") is a San Francisco-based nonprofit public interest law firm which for decades has specialized in litigation on behalf of historically subordinated and underrepresented worker communities, notably including Latinos and other persons of color. LAS-ELC has long been concerned with securing full equality of opportunity in employment and education.

MANA. MANA, a National Latina Organization, is a nonprofit, advocacy organization established in 1974 whose mission is to empower Latinas through leadership development, community service, and advocacy. MANA fulfills its mission through programs designed to develop the leadership skills of Latinas, promote community service by Latinas, and provide Latinas with advocacy opportunities.

Mexican American Legal Defense and Educational Fund (MALDEF). The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States.

National Association of Hispanic Publications (NAHP). The National Association of Hispanic Publications, Inc. (NAHP) is a non-partisan trade advocacy organization, founded in 1982, representing the leading Spanish language publications serving 41 markets in 39 states, the District of Columbia and Puerto Rico, with a combined circulation of over 23 million readers.

National Association of Latino Elected and Appointed Officials (NALEO) Education Fund. The National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund is the leading nonprofit organization that facilitates full Latino participation in the American political process, from citizenship to public service. Its constituents include more than 6,000 Latino elected and appointed officials nationwide who serve at every level of government, including positions with local and state education jurisdictions; counties, municipalities and special districts; state governance bodies; and the U.S. Congress. The NALEO Educational Fund is committed to strengthening the vitality and responsiveness of our democracy by ensuring that all of our nation's residents can become active contributors to our civic life.

National Conference of Puerto Rican Women (NACOPRW). NACOPRW as a non-profit/nonpartisan organization that promotes the full participation of Puerto Rican women and other Hispanics in the social, economic, and political life of the United States.

National Council of La Raza (NCLR). The National Council of La Raza (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR works through two primary, complementary approaches: (1) Capacity-building assistance to support and strengthen Hispanic CBOs—especially those that serve low-income and disadvantaged Latinos; and (2) applied research, policy analysis, and advocacy to encourage adoption of programs and policies that equitably serve Hispanics.

National Hispanic Media Coalition (NHMC). The National Hispanic Media Coalition is a non-partisan, non-profit, media advocacy and civil rights organization established in 1986 in Los Angeles, California. Its mission is to improve the image of American Latinos as portrayed by the media, increase the number of American Latinos employed in all facets of the media and telecommunications industries, and advocate for media and telecommunication policies that benefit Latinos and other people of color.

National Latina Institute for Reproductive Health (NLIRH). NLIRH works to ensure the fundamental human right to reproductive health and justice for Latinas, their families and their communities through public education, community mobilization, and policy advocacy.

National Organization for Mexican American Rights (NOMAR), Inc. NOMAR, Inc. is a national non-profit organization with the mission to protect the civil rights of Hispanic Americans and to promote equal opportunity for Hispanic Americans in employment and education.

National Puerto Rican Coalition, Inc. (NPRC). NPRC is a national non-profit organization representing the interests of over 8 million Puerto Rican U.S. citizens on the mainland and in Puerto Rico. NPRC's mission is to systematically strengthen and enhance the social, political, and economic wellbeing of Puerto Ricans throughout the United States and in Puerto Rico, with a special focus on the most vulnerable.

SER – National, Inc. SER is a national nonprofit 501c(3) corporation serving the needs of Hispanic Americans. SER was organized in 1964 by the League of United Latin American Citizens and the American GI Forum to help Hispanics prepare for and find jobs. SER now operates charter schools, daycare centers, one stop centers, and programs for the elderly, teaches financial literacy courses, and provides many other services that help individuals become productive members of society. SER is made up of 30 affiliate organizations across the country operating in over 200 cities and serving over 1.3 million individuals a year. It is recognized by the U.S. Department of Labor as the "premier community based organization serving the employment needs of the Hispanic community."

United States Hispanic Chamber of Commerce (USHCC). The United States Hispanic Chamber of Commerce (USHCC) advocates, promotes, and facilitates the success of Hispanic businesses throughout the United States and Puerto Rico.

United States Hispanic Leadership Institute (USHLI). The United States Hispanic Leadership Institute (USHLI) is a national, non-profit organization that promotes education, civic participation, and leadership development for Latinos and other similarly disenfranchised groups. USHLI has been recognized by the American Association for Hispanics in Higher Education for its impact in promoting and facilitating access to higher education for Latino students, and was honored at the White House by then-President Bill Clinton for "the performance of exemplary deeds of service for the nation in promoting leadership and civic participation." USHLI's mission is to fulfill the promises and principles of democracy by empowering minorities and similarly disenfranchised groups and by maximizing civic awareness and participation in the electoral process.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

AUG 1 3 2012
[illegible]

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief of National League of Cities, Campus Compact, Imagining America, Anchor Institutions Task Force, Transformative Leadership Working Group, Center for Democracy and Citizenship, Chancellor Nancy Cantor, Superintendent Sharon Contreras, President Freeman Hrabowski, President Scott Cowen, CEO Nolan Rollins, Chancellor James Dworkin, Superintendent Glade Montgomery, President Thomas Rochon, Superintendent Luvelle Brown, President James T. Harris, Superintendent Cheryl Cunningham, *Amici Curiae*, Supporting Respondents

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are national organizations, higher education leaders, and public sector leaders who share an *interest* in developing higher education-public sector partnerships in areas crucial to the revitalization of metropolitan communities. *Amici* are deeply invested in racial diversity in higher education admissions for its role in building public leadership and civic engagement. *Amici* depend upon a diverse student body for the success of their collaborations, as well as their ability to develop diverse leaders. The Court's decision in this case could have a substantial effect on *Amici's* ability to advance their educational and public mission and to involve diverse leadership who are equipped to tackle the tough public problems facing metropolitan communities today. *Amici* have a strong interest in preserving higher education institutions' use of racial diversity as a factor in student admissions.

National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. NLC works in partnership with 49 state municipal leagues, serving as a national advocate for the more than 19,000 cities, villages, and towns that it represents. NLC's members work closely with higher education institutions in their communities and look to higher education institutions across the country to supply racially diverse students and college graduates for the many roles needed to meet their public responsibilities.

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[1] *Amici* submit this brief on behalf of Respondents. All parties have consented to the filing of this *amicus curiae* brief. In accordance with Rule 37.6. *Amici* state that no counsel for any party has authored any portion of this brief and no person or entity other than *Amici* signing this brief and their counsel made a monetary contribution to the preparation or submission of this brief.

Campus Compact is a nation-wide coalition of almost 1,200 college and university presidents who are committed to fulfilling the public purpose of higher education. Campus Compact believes that colleges and universities are vital agents and architects of a diverse democracy, committed to educating students for responsible citizenship and to working in partnership with communities to improve the quality of life for all.

Imagining America: Artists and Scholars in Public Life (IA) is a national consortium comprised of over 90 higher education institutions that have built partnerships with communities aimed at advancing the public good and have made a commitment to advancing knowledge and creativity through publicly engaged scholarship that draws on humanities, arts, and design. IA's members seek to advance the full participation of diverse communities, particularly those historically left out of educational and civic participation.

Anchor Institutions Task Force (AITF), with over 180 members, brings together leaders of anchor institutions and other partners to enhance how colleges, universities, and other anchor institutions address local needs and strengthen democratic, mutually beneficial partnerships. The AITF provides tools to anchor institutions to help students develop as democratic citizens who are lifelong contributors to communities and the nation's well being.

Transformative Leadership Working Group (TLWG), convened and funded by the Ford Foundation, brings together successful and visionary higher education and community leaders with a track record of innovative leadership development work related to fulfilling higher education's mission of addressing urgent problems facing diverse communities.[2] TLWG was charged with exploring how the next generation of leaders within key social and political institutions should be equipped and energized to tackle the challenges facing our nation.

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[2] The working group members, serving in their individual capacity, are: Nancy Cantor, Chancellor of Syracuse University (co-chair); Susan Sturm, George M. Jaffin Professor of Law and Director of the Center for Institutional and Social Change at Columbia Law School (co-chair); Shirley Collado, Dean of the College, Middlebury College; Mildred Garcia, President of California State University, Fullerton; Richard Gray, Director, Community Organizing and Engagement, Annenberg Institute for School Reform at Brown University; Freeman Hrabowski, President, University of Maryland, Baltimore County; Rakesh Khurana, the Marvin Bower Professor of Leadership Development at Harvard Business School; Nicholas Lemann, Dean and Henry R. Luce Professor at the Columbia University Graduate School of Journalism; Earl Lewis, Provost of Emory University; Martha Minow, Dean of Harvard Law School; Robert Moses, President and Founder of the Algebra Project; George Sanchez, Vice Dean for Diversity and Strategic Initiatives at University of Southern California; Ellen Schall, Dean of NYU Wagner School; Abigail Stewart, Professor and Director of University of Michigan ADVANCE Program; and, Beverly Daniels Tatum, and President, Spelman College.

Center for Democracy and Citizenship, directed by Harry Boyte, is a leading center for developing theory and practice of productive citizenship, or public work to create a successful, vibrant democracy as the responsibility of all citizens.

Nancy Cantor is Chancellor of Syracuse University and a prominent social psychologist. Through partnerships with the public, private and non-profit sectors, Syracuse University creates meaningful opportunities for students and faculty to learn and discover, while tackling pressing local and global issues including urban school reform. Diversity is a crucial aspect of SU's mission. Chancellor Cantor is the recipient of the 2008 Carnegie Corporation Academic Leadership award based on her national leadership on civic engagement.

Sharon Contreras is the Superintendent of the Syracuse City School District (SCDC), which is one of the largest in the state of New York. With over 19,000 students in grades K-12, it is highly diverse (53% black, 28% white, 12% Hispanic, 6% Asian, and 1% Native American/Alaskan). SCDC partners with Syracuse University to provide diverse and well-prepared student teachers and educational professionals, increase access to college for its diverse student body and build a college-going culture for all students.

Freeman A. Hrabowski, III, is President of University of Maryland, Baltimore County. He co-founded the Meyerhoff Scholars Program. Recognized as a national model, the program is open to all high-achieving students committed to pursuing advanced degrees and research careers in science and engineering, and advancing underrepresented minorities in these fields. President Hrabowski chaired the National Academies' committee that produced the recent report, Expanding Underrepresented Minority Participation: America's Science and Technology Talent at the Crossroads. In 2012, he was named chair of the newly created President's Advisory Commission on Educational Excellence for African Americans.

Scott S. Cowen is the President of Tulane University. Under President Cowen's leadership, Tulane launched Tulane Empowers, which commits the institution to social innovation and the development of the next generation of community-minded citizens and leaders. President Cowen received the 2009 Carnegie Corporation Academic Leadership Award and is a member of the White House Council for Community Solutions, which advises the President on the best ways to mobilize citizens, and the public and private sector to address community needs. President Cowen works with the Urban League of Greater New Orleans, which is partnering with Tulane University to ensure that minorities are represented in higher education.

Nolan Rollins is the President and CEO of the Urban League of Greater New Orleans, which was founded in 1938 to advocate better race relations and improve the social and economic standing of African Americans in the New Orleans area.

James B. Dworkin is Chancellor of Purdue University North Central and Chair of the Board of Directors of Campus Compact. Purdue University

North Central is committed to promoting community service, civic engagement and service learning in higher education with its many community partners, including the LaPorte Community Schools.

Glade T. Montgomery is the Superintendent of the LaPorte Community Schools in LaPorte, Indiana, which serves a diverse population (White 79%; Hispanic 12%; Multiracial 5%; Black 3%; Free/Reduced Lunch 50%). The LaPorte Community Schools partners with Purdue University North Central in dual credit/concurrent enrollment classes where high school juniors and seniors can earn both high school and college credit.

Thomas Rochon is President of Ithaca College. His book, Culture Moves: Ideas, Activism, and Changing Values, received a Distinguished Scholarship Prize from the American Sociological Association. Ithaca College has a series of collaborations with the Ithaca City School District, designed to improve student learning and college access and to create opportunities for engaged learning at Ithaca College.

Luvelle Brown is the Superintendent of the Ithaca City School District. Dr. Brown stresses raising the academic bar and eliminating achievement gaps in its dozen schools with a highly diverse enrollment (68% white, 12% African American, 5% Hispanic and 12% Asian). Dr. Brown has engaged the university community, establishing partnerships with Cornell University, Ithaca College and Tompkins County Community College. As a result, many students are graduating with multiple college credits.

James T. Harris III is President of Widener University. He is the recipient of the 2011 Chief Executive Leadership Award from the Council for Advancement and Support of Education. Widener University is a private, metropolitan university that connects curricula to social issues through civic engagement. Widener was the lead institution in the founding of the Chester Higher Education Council which created the Delaware County College Access Center.

Cheryl Cunningham is the Executive Director of the Chester Education Foundation. The mission of the Chester Education Foundation is to support educational excellence and promote the revitalization of the Chester Upland community.

SUMMARY OF ARGUMENT

In *Grutter v. Bollinger*, the Supreme Court held that higher education institutions have a compelling interest in preparing students for the leadership and citizenship necessary to maintain the "fabric of our society," and that this leadership and citizenship imperative justifies the use of race in higher education admissions. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003). *Amici* submit that the challenges facing our nation's metropolitan communities today demand racially diverse leadership with legitimacy and skills of the kind that the *Grutter* Court recognized as necessary. Metropolitan communities, with cities as the hub, are vital to the nation's economic recovery. Their leadership must figure out how to attract college graduates and engage increasingly racial and ethnically diverse communities. They must also confront the problem of racial and economic isolation, which threatens the economic and social well-being of their communities, and structures access to opportunity along racial and ethnic lines. Our nation's prosperity depends upon revitalizing metropolitan economies and bridging racial divides, which in turn depends upon developing diverse leaders across the community who can engage in collective action to solve problems.

Higher education institutions have the mission and the capacity to develop diverse leadership equipped to meet these challenges, but the vitality of their efforts depends on the Court's continued adherence to *Grutter*. Higher education institutions have a historically rooted public mandate to prepare the nation's leadership to address society's most important concerns. Beyond this, colleges and universities are serving as "anchor institutions" in metropolitan communities—participating in long-term, public-private partnerships aimed at local and regional revitalization. On campuses across the country, higher education institutions have undertaken a wide range of programs inside and outside the classroom that enable diverse students to learn and develop skills so that they can interact effectively across difference and become more effective leaders. The success of these programs crucially depends upon racial and ethnic diversity both to produce the conditions enabling learning and to build the diverse leadership needed to address these challenges in the larger community.

If the Court adopts a narrow view of diversity's educational benefits, it would be a mistake, and a departure from the Court's long tradition of deference to the considered judgment of educational experts. Moreover, higher education institutions must be able to continue to consider racial diversity through holistic admissions. If the Court were to accept Petitioner's argument, higher education institutions would be restricted in their ability to identify and admit the students who will contribute much needed leadership skills and abilities. The result would seriously limit university-community capacity to prepare leaders equipped for solving the urgent problems facing our nation. *Amici* thus urge the Court to reject Petitioner's argument and sustain *Grutter*'s holding that allows higher education institutions to consider racial diversity in admitting students.

ARGUMENT

I. THE URGENT CHALLENGES FACING THE NATION'S METROPOLITAN COMMUNITIES DEMAND THE PREPARATION OF EFFECTIVE, RACIALLY DIVERSE LEADERSHIP

The capacity of our nation to advance civic goals and address pressing public problems depends upon producing leaders, professionals, and citizens who can participate effectively in diverse workplaces, communities, and public-serving institutions. In *Grutter v. Bollinger*, 539 U.S. 306, 331-33 (2003), the Supreme Court held that these leadership, citizenship, and professional development imperatives constitute a compelling interest justifying the use of race in the higher education admissions process. The *Grutter* Court drew on prior decisions to reach this holding, including Justice's Powell's opinion in ***Regents of Univ. of Cal. v. Bakke,*** emphasizing that "nothing less than 'the nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.*, at 324 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

The Supreme Court has long acknowledged the "overriding importance of preparing students for work and citizenship." *Grutter,* 539 U.S., at 332 (citing prior case law). As Justice Powell recognized in *Bakke*, diversity helps universities "enrich[] the training of [the] student body and better equip []graduates to render with understanding their vital service to humanity." *Bakke*, 438 U.S., at 313 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 603 (1967)). *Grutter* reaffirmed this compelling interest in training students with the civic and leadership skills necessary to maintain the "fabric of our society." *Grutter*, 539 U.S., at 331. The *Grutter* Court also drew on an array of social science evidence demonstrating the need to prepare students for "the skills needed in today's increasingly global marketplace," and the ability to work in racially and ethnically diverse settings. *See Grutter,* 539 U.S., at 331. At heart, *Grutter* recognized a paramount and compelling interest in cultivating "a set of leaders with legitimacy in the eyes of the citizenry." *Id.,* 539 U.S., at 332.

We submit that the pressing challenges facing our nation's metropolitan communities today demand racially diverse leadership with legitimacy and skills of the kind that the *Grutter* Court recognized as necessary. In this Part, we present these challenges, and argue that racial and ethnic diversity is necessary to develop the effective and legitimate leadership needed to solve these tough problems. Achieving this diversity requires that all aspects of diversity relevant to leadership, including race, be taken into account in the admissions process.

A. Metropolitan Communities Are Vital to the Nation's Economic Recovery, and Must Rebuild Civic Capacity Amidst Declining Public Resources and Persistent Racial Divides

Metropolitan areas, with cities at their hub, are key arenas for advancing civic and economic prosperity. They are "the engines of our economy—the sites of new technological breakthroughs,"[3] and their revitalization is critical to the nation's economic recovery and future health.[4] Metropolitan areas are home to 84 percent of the nation's population, 86 percent of the jobs, 90 percent of the wage and salary income, and 91 percent of the country's real GDP. [5] In addition to their relationship to economic development, metropolitan governments bear responsibility for providing public services upon which many people depend, including education, public transportation, public health, and public security.

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[3] *See* MARTIN BAILY et. al., BUILDING A LONG TERM STRATEGY FOR GROWTH THROUGH INNOVATION 6 (May 2012), available at http://www.brookings.edu/research/papers/2011/05/growth-innovation.

[4] *See* THE BROOKINGS INSTITUTE METROPOLITAN POLICY PROGRAM, THE STATE OF METROPOLITAN AMERICA: ON THE FRONTLINES OF DEMOGRAPHIC TRANSFORMATION (2010), available at http://www.brookings.edu/about/programs/metro/stateofmetroamerica.

The vitality of metropolitan communities depends upon the health of the cities that are at their core. It is well established that:

> [Cities] house assets upon which their metropolitan economies particularly depend. These include intellectual and institutional assets, such as universities and hospitals; infrastructure assets, such as transportation and communication; social assets (tourism, entertainment, culture); and core service assets (financial, legal).[6]

Metropolitan areas have been hard hit by the recent economic and housing crises that threaten our nation's prosperity: "[m]any [cities] have seen all their progress in the new millennium washed away by the crippling effects of the recession."[7] Leadership must thus contend with some of the most pressing challenges facing our nation, including turning around failing schools, rebuilding crucial infrastructures, and restoring faith in our public institutions.[8] They must figure out how to solve these complex problems with reduced budgets and increased demands for public support.[9] This challenge requires shifting the tide of public confidence in federal and state government institutions.[10]

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[5] THE UNITED STATES CONFERENCE OF MAYORS, U.S. METRO ECONOMIES: OUTLOOK, GROSS METROPOLITAN PRODUCT, AND CRITICAL ROLE OF TRANSPORTATION INFRASTRUCTURE 1 (July 2012), available at http://usmayors.org/metroeconomies/0712/FullReport.pdf.

[6] ROBERT WEISSBOURD, CITIES AND ECONOMIC PROSPERITY: A DATA SCAN ON THE ROLE OF CITIES IN REGIONAL AND NATIONAL ECONOMIES 2 (2001), available at http://www.ceosforcities.org//research/cities-and-economic-prosperity/.

The success of metropolitan leadership depends upon drawing on all sectors of the community and collaborating with public and private institutions to have the "collective impact" to meet these challenges.[11] Metropolitan communities must partner with institutions, including higher education institutions, to meet the challenges of an emerging, innovation-driven economy that demands and rewards greater education and high-level skills.[12] Higher education institutions have become key partners in the development of these cross-sector collaborations. They are "anchor institutions," geographically tied to their location in communities, with "a strong economic stake in the health of the surrounding communities," and "the resources to make a genuine difference."[13] Effective partnerships with higher education institutions have proven invaluable to growing the knowledge economy, building sustainable local economies and generating employment.[14]

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[7] UNITED STATES CONFERENCE OF MAYORS, U.S. METRO ECONOMIES: GMP AND EMPLOYMENT FORECAST 7 (June 2011), available at http://www.usmayors.org/metroeconomies/2011.

[8] *See* STATE OF METROPOLITAN AMERICA, *supra* note 4.

[9] *See* Norton Frances, State and Local Spending Cuts Dampen the Recovery, July 30, 2012, available at http://www.realclearpolitics.com/2012/07/30/state_and_local_cuts_dampen_the_recovery_286071.html.

[10] *See* PEW RESEARCH CENTER, DISTRUST, DISCONTENT, ANGER AND PARTISAN RANCOR: THE PEOPLE AND THEIR GOVERNMENT (2010), available at http://www.people-press.org/2010/04/18/distrust-discontent-anger-and-partisan-rancor (providing data showing low levels of public trust in government).

[11] *See* John Kania & Mark Kramer, *Collective Impact*, STANFORD SOCIAL INNOVATION REVIEW (Winter 2011), available at http://www.ssireview.org/articles/entry/collective_impact.

Further, metropolitan areas depend upon the ability to produce, attract and retain college graduates to drive economic recovery and fuel innovation. Recent studies demonstrate that the level of education of the local population is both a strong driver of income growth[15] and a signal of civic and economic health.[16] Research has found that, by contrast, "less educated workers, as well as the metro areas in which they are most concentrated, have borne the brunt of the significant rise in unemployment."[17]

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[12] *See* BAILY, *supra* note 3, at 12 (May 2012) (finding that "the new economy will require workers to be better educated when they enter the workforce and to continually upgrade their skills throughout their working lives").

[13] PAUL C. BROPHY ET AL., RETOOLING HUD FOR A CATALYTIC FEDERAL GOVERNMENT (2009), available at http://www.margainc.com/initiatives/aitf/.

[14] IRA HARKAVY AND HARMON ZUCKERMAN, EDS AND MEDS: CITIES' HIDDEN ASSETS (The Brookings Institution 1999), available at http://www.brookings.edu/research/reports/1999/09/community-development-harkavy-zuckerman.

[15] *See* CEOS FOR CITIES, THE YOUNG AND THE RESTLESS IN A KNOWLEDGE ECONOMY 10 (2011), available at http://www.ceosforcities.org/research/the-young-and-restless-in-a-knowledge-economy/.

As metropolitan areas struggle to meet the pressing demand for increased education, they must also confront the problem of racial and economic isolation, which threatens the economic and social well-being of metropolitan communities, and structures access to opportunity along racial and ethnic lines. In many metropolitan communities, access to opportunity and mobility is a function of which community you grow up in, creating a "geography of opportunity." [18] Geographically structured access to public life limits educational quality, political influence, availability of employment, and the adequacy of public amenities.[19]

Because of a long history of structured social inequality, people of color are more likely to grow up in low opportunity communities characterized by low levels of educational attainment and high poverty.

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[16] *See* ENRICO MORETTI, THE NEW GEOGRAPHY OF JOBS 215-18 (2012).

[17] STATE OF METROPOLITAN AMERICA, *supra* note 4, at 115.

[18] Xavier de Souza Briggs, *More* Pluribus, *Less* Unum? *Changing Geography of Race and Opportunity, in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 29–32 (Xavier de Souza Briggs ed., 2005).

[19] PATRICK SHARKEY, NEIGHBORHOODS AND THE BLACK-WHITE MOBILITY GAP 6 (Pew Charitable Trusts 2009), available at http://www.economicmobility.org/assets/pdfs/PEW_NEIGHBOR HOODS.pdf.Sharkey.

Two thirds of African-American children live in high-poverty communities, compared with only six percent of white children, with grave consequences for educational, health and other social outcomes.[20]

Recent studies show that metropolitan neighborhoods remain highly separated by race and income.[21] This persistent residential separation, coupled with the concentration of poverty in inner cities and older suburbs, compounds the obstacles preventing people in these communities from participating in economic opportunity. These divides in income and opportunity have been exacerbated by the recent recession and mortgage foreclosure crisis, which hit vulnerable communities, particularly communities of color, hard.[22]

Residential separation also contributes to racial and economic isolation in schools. Students of color in racially isolated neighborhoods are more likely to attend low performing, high-poverty, under-resourced schools that do not adequately prepare students to attend college.[23] Latinos and blacks are also more likely than whites to attend high-poverty schools. For instance, more than 60 percent of black and Latino students attend high-poverty schools (defined as more than 50 percent poor). White students, by contrast, are highly concentrated in more affluent suburban districts, and only 18 percent of white students attend high poverty schools.[24]

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[20] *Id.* at 8-9.

[21] *See* George C. Galster, *Urban Opportunity Structure and Racial/Ethnic Polarization in America*, in RESEARCH ON SCHOOLS, NEIGHBORHOODS, AND COMMUNITIES: TOWARD CIVIC RESPONSIBILITY (William F. Tate ed., 2012).

[22] *See* AUSTIN NICHOLS & MARGARET SIMMS, RACIAL AND ETHNIC DIFFERENCES IN RECEIPT OF UNEMPLOYMENT INSURANCE BENEFITS DURING THE GREAT RECESSION (Urban Institute 2012), available at http://www.urban.org/publications/412596.html ("The Great Recession hit black workers harder; the unemployment rate was higher for non-Hispanic black than for non-Hispanic white or Hispanic workers.").

These economic, civic and educational challenges require the capacity to draw on the resources of increasingly racial and ethnically diverse communities, which comprise a growing proportion of the talent pool of the future. By the end of this decade, the majority of youth will be people of color.[25] The pipeline to higher education will include increasingly fewer white students in K-12 schools, and more Latino and African-American students coming from communities with high poverty and low educational attainment. [26] If existing trends continue, by 2020, the share of adults with some advanced education is projected to decline in all but six states: "The Educational Testing Service calls this a 'perfect storm' of demographic, labor market, and educational trends that threatens the American dream." [27] As a recent study found: "Any improvement in overall educational outcomes will require a substantial improvement in the equity of educational outcomes and outcomes for ethnic and racial minorities and the poor." [28] The study concluded that, as minorities become a "larger share of the population, it is their educational accomplishments that will carry a heavier and heavier influence on the overall educational level of the United States."[29]

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[23] *See* Linda Darling-Hammond, *The Color Line in American Education: Race, Resources, and Student Achievement*, 1 DUBOIS REVIEW: SOCIAL SCIENCE RESEARCH ON RACE 213, 214 (2004).

[24] *See* GARY ORFIELD & CHUNG MEI LEE, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 16-17 (The Civil Rights Project at Harvard 2005); NANCY MCARDLE, SEGREGATION AND EXPOSURE TO HIGH-POVERTY SCHOOLS IN LARGE METROPOLITAN AREAS: 2008-09, at 12-16 (2011), available at http://diversitydata.sph.harvard.edu/Publications/school_segregation_report.pdf.

[25] *See* POLICYLINK, AMERICA'S TOMORROW: EQUITY IS THE SUPERIOR GROWTH MODEL 14 (2011), available at http://www.policylink.org/atf/cf/%7B97c6d565-bb43-406d-a6d5-eca3bbf35af0%7D/SUMMIT_FRAMING_WEB_FINAL_20120127.PDF. It is projected that the US will become majority-minority by 2045; in large metropolitan areas the under-18 population reached majority non-white status in 2008. STATE OF METROPOLITAN AMERICA, *supra* note 4, at 33.

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[26] *See* William T. Trent et al., *Justice, Equality of Educational Opportunity and Affirmative Action in Higher Education* in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION 22 (Mitchell Chang et. al eds., 2002). It is estimated by 2050 that the school-age population will include 6 million *fewer* white students in K-12 schools, 5 million more African-American students, 17 million more Hispanic, and 5 million more from other groups (largely from Asian backgrounds). *See* JANET LOPEZ, THE IMPACT OF DEMOGRAPHIC CHANGES ON UNITED STATES HIGHER EDUCATION, 2000-2050 (2006), available at State Higher Education Executive Officers website, http://www.sheeo.org/pubs/demographics-lopez.pdf.

[27] POLICYLINK, *supra* note 25, at 11.

[28] Henry M. Levin, *Reconstructing Education in America*, in RESEARCH ON SCHOOLS, NEIGHBORHOODS, AND COMMUNITIES: TOWARD CIVIC RESPONSIBILITY 217, 219 (William F. Tate, ed. 2012).

Our nation's prosperity depends upon meeting the critical challenges of revitalizing metropolitan economies and bridging racial divides, which in turn depends upon developing diverse leaders across the the community who can engage in collective action to solve problems. Building this "civic capacity" thus calls for the kind of leadership training and legitimacy that *Grutter* recognized as vital to the function and role of higher education. As the Court affirmed: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter,* 539 U.S., at 332.

B. *Grutter's* Recognition of the Need to Prepare Racially Diverse Leadership Must Be Preserved to Meet the Challenges Facing Metropolitan Communities

The challenges facing metropolitan communities today give greater urgency to *Grutter's* recognition that racially and ethnically diverse higher education institutions are necessary to prepare leaders able to collaborate effectively in diverse settings. This empirical reality buttresses *Grutter's* articulation of a leadership and legitimacy imperative as a basis for seeking racial diversity on college campuses. *Grutter's* holding in this regard is not simply a rhetorical flourish. Rather, racial and ethnic diversity is essential for our nation to be able to turn around struggling public institutions and make good on democracy's promise.

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[29] *Id.*

In this Part, we show why racial and ethnic diversity is so crucial in this regard. Revitalizing metropolitan communities demands racially and ethnically diverse leadership capable of bringing together people from many different sectors, bridging racial and ethnic divides, and sustaining these collaborations over the long haul. Higher education institutions as anchors in their communities also require racial and ethnic diversity to be able to exercise legitimate leadership. More specifically, we show how racially and ethnic diverse leadership is critical to (1) building trust and confidence needed to enlist racially diverse participation, (2) building a fully informed understanding of the complexities of public problems, and (3) reducing stereotypes and engaging in cross-racial community dialogue and problem solving.

Building Trust and Confidence. The challenges facing metropolitan communities demand that a diverse array of communities participate and have confidence in our public institutions. Racial diversity is important to overcoming the legitimacy and trust deficit among communities of color that has limited this crucial public engagement. Research shows that African Americans report lower levels of trust in their local governments, and that trust among all racial groups increases when there is diverse representation in public leadership positions.[30] Considerable evidence also suggests that communities of color have less trust and confidence than whites in the public officials with whom they interact regularly, including the police, the courts, and the legal system, and that this decreased trust undermines the willingness of people of color to work with public officials to solve problems.[31]

Studies show that racial differences affect whether people build long-term relationships of trust, and that greater diversity among leadership and in working groups provides a crucial means for reducing tensions and building trust.[32] Establishing legitimacy with communities of color is a "minimum condition" for effective efforts to address the problems facing those communities.[33] Projects lacking minority involvement face suspicion due to the lack of minority voice in decision making and accompanying questions about their legitimacy.[34]

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[30] *See* SHAYLA NUNNALLY, TRUST IN BLACK AMERICA: RACE, DISCRIMINATION AND POLITICS (2012).

[31] *See* Jason Sunshine & Thomas Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for the Police*, 37 LAW & SOCIETY REV. 513 (2003).

[32] *See* NUNNALLY, *supra* note 30; Nicholas Sorenson et al., *Taking a "Hands-On" Approach to Diversity in Higher Education: A Critical Dialogic Model for Effective Intergroup Interaction*, 9 ANALYSES OF SOCIAL ISSUES AND PUBLIC POLICY 3, 20-21 (2009).

[33] TOM TYLER ET AL., TRUST BUILDING: AN HONEST CONVERSATION ABOUT RACE, REBUILDING AND RECONCILIATION (2010).

[34] *See* ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 125, 187 (2004); Matthew Luther Lindholm, *Establishing Program Legitimacy in Multiethnic Settings: The Robert Wood Johnson Foundation's*

The *amicus* brief submitted in *Grutter* by retired military officers similarly documented the role of diverse leadership in bridging the chasm with line soldiers, which had undermined military effectiveness, interfered with the development of a sense of shared mission, and impeded the flow of communication. *See Grutter,* 539 U.S., at 330-31; Brief of Lt. Gen. Julius Becton, Jr., et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-416).

As anchor institutions, universities have also found it crucial to build trust with surrounding communities, many of which must overcome histories of tension and mistrust overlaid with racial divisions.[35] Cities and universities need diverse leadership equipped to bridge these racial divides, and must also educate a diverse array of students to sustain the confidence of the surrounding community. This imperative heightens the significance of *Grutter's* insight that: "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." *Grutter,* 539 U.S., at 332.

"Fighting Back" Program, Putting the Future Together, 36 JOURNAL OF DRUG ISSUES 351 (2006).

[35] *See* NETTER CENTER FOR COMMUNITY PARTNERSHIPS, ANCHOR INSTITUTION TOOL KIT: A GUIDE FOR NEIGHBORHOOD REVITALIZATION (2008), available at https://www.nettercenter.upenn.edu/publications-resources/anchor-toolkit (describing the importance of overcoming a history of distrust as a key step in building a successful partnership between the University of Pennsylvania and the West Philadelphia community).

Knowledge and Capacity. Effective leaders benefit from firsthand knowledge about the experience of race and ethnicity in different contexts, how systems and barriers affect racially isolated communities, what strategies work to engage across difference, and other areas where direct experience with race in relevant contexts matters. This kind of information provides an important strand of experience that is relevant to developing effective and legitimate solutions to the complex problems of economic revitalization, civic reengagement, and school turn-around.

Case studies report that firsthand experience with membership in a particular racial group contributes insights which benefit cross-racial collaborations, including: (1) understanding and communicating the cultural and social pressures facing students and their families, (2) having intuitive familiarity with strategies for engaging marginalized students and their families in investing in their education, (3) achieving comfort in combining high expectations of people of color while providing strong support, (4) providing opportunities to model openness for those who have less experience with cross-racial/cross-class interactions, (5) building trust with the parents and community so that they are willing to work with the schools, and (6) maintaining concern and accountability about inequities.[36]

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[36] *See* FREEMAN HRABOWSKI, OVERCOMING THE ODDS (2002); Susan Sturm et al., Nottingham Early College High School Initiative: Understanding the Theory of Action (2012)(unpublished manuscript).

Reducing Stereotypes and Building Cross-Racial Dialogue. Racially diverse leadership is also important to overcome stereotypes affecting individuals and communities of color. Research shows that when racial tensions and dynamics are left unaddressed, stereotypes are likely to persist and undermine effective collaboration.[37] When facilitated cross-racial interaction is built into the process of leadership development, it helps cultivate respect and acceptance among people of different races. It also fosters the skills enabling participants to facilitate these constructive interactions elsewhere.[38]

The need for leadership strategies aimed at reducing stereotypes is illustrated by a report by the Institute of Medicine, which documents the role of individual provider biases and stereotypes in limiting access to health care and contributing to health disparities.[39] Another illustrative study of high school students' college prep experience documented Latino students' experience that "school staff were pessimistic about their academic potential and reported often being discouraged from attending competitive colleges."[40] This study found that Latinos struggle to communicate to school staff "higher aspirations than those established by negative racial stereotypes, and students often found themselves debating with school staff about their intellectual credibility."[41] These studies underscore the necessity of overcoming stereotypes, particularly those held by key professionals and public leaders who determine access to educational and employment opportunity.[42]

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[37] *See* Nicholas Sorensen et al., *Taking a "Hands-On" Approach to Diversity in Higher Education*, 9 ANALYSES OF SOCIAL ISSUES AND PUBLIC POLICY 3 (2009).

[38] Kenneth Maton et al., *Enhancing Representation, Retention, and Achievement of Minority Students in Higher Education: A Social Transformation Theory of Change*, in TOWARD POSITIVE YOUTH DEVELOPMENT: TRANSFORMING SCHOOLS AND COMMUNITY PROGRAMS (M. Shinn & H. Yoshikawa eds., 2008); Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 JOURNAL OF SOCIAL ISSUES 17 (2004).

[39] *See* Allen Formicola et al., *Cultural Competency: Dentistry and Medicine Learning from One Another*, 67 JOURNAL OF DENTAL EDUCATION 869 (August 2003); UNEQUAL TREATMENT:

In sum, the capacity to revitalize metropolitan communities requires diverse leadership and professionals trained to build collaborations among public and private actors and among diverse communities.

CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE, WASHINGTON DC: NATIONAL ACADEMY PRESS (2002).

[40] Evellyn Elizondo et al., *High School Students' Discourse on College Support Systems and College Readiness*, in RESEARCH ON SCHOOLS, NEIGHBORHOODS, AND COMMUNITIES 269, 273 (William F. Tate ed., 2012).

[41] *Id.*

[42] See STURM ET AL, BUILDING PATHWAYS OF POSSIBILITY INTO AND THROUGH HIGHER EDUCATION (2011), available at http://www.changecenter.org/projects/long-term-research-collaborations/from-criminal-justice-to-college.

II. HIGHER EDUCATION INSTITUTIONS ARE NECESSARY PARTNERS IN PREPARING EFFECTIVE, RACIALLY DIVERSE LEADERSHIP NECESSARY TO SOLVE METROPOLITAN PROBLEMS

Higher education institutions have the mission and capacity to develop civic leadership and professionals equipped to meet the challenges facing metropolitan communities. Building effective leadership requires racial diversity in the student body.

A. Cultivating Diverse Civic Leaders and Professionals is Core to the Mission of Higher Education Institutions

As the Supreme Court recognized in *Grutter*, universities "represent the training ground for a large number of our Nation's leaders." *Grutter*, 539 U.S., at 332 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)). Most people in leadership positions across both private and public sector industries have first obtained an undergraduate and, in many cases, an advanced degree.[43]

The complementary aims of advancing diversity and cultivating civic leadership are built into higher education's mission. Higher education institutions have a historically- rooted public mandate to prepare the nation's leadership to address society's most important concerns. Beginning with the Morrill Act of 1862, colleges and universities were called upon to fulfill America's democratic mission and serve as "engines of prosperity and agents of social mobility" in their triple mission of teaching, research and public service.[44] Institutions ranging from Johns Hopkins to University of Chicago were founded with an urban-serving mission. The mission statements of higher education institutions of all types—public and private, research and liberal arts—commit to diversity, civic engagement, and leadership development.[45] Institutions have also made diversity and civic engagement a centerpiece of their strategic plans.

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[43] Alexander W. Astin & Helen S. Astin, *Leadership Reconsidered: Engaging Higher Education in Social Change*, W. K. Kellogg Foundation (2000), available at http://www.wkkf.org.

University of Pennsylvania offers an example of the commitment to public service, leadership development and diversity made by many higher education institutions: "At Penn, local engagement is one of the core tenets of the Penn Compact –

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[44] Nitin Nohria & Rakesh Khurana, *Advancing Leadership Theory and Practice*, in HANDBOOK OF LEADERSHIP THEORY AND PRACTICE 3 (N. Nohria & R. Khurana eds., 2010); SCOTT PETERS, DEMOCRACY AND HIGHER EDUCATION: TRADITIONS AND STORIES OF CIVIC ENGAGEMENT (2010).

[45] For example, University of Maryland Baltimore County, states that it is "a dynamic public research university integrating teaching, research and service to benefit the citizens of Maryland" and "dedicated to cultural and ethnic diversity, social responsibility and lifelong learning." http://www.umbc.edu/aboutumbc/mission.php. Middlebury College "challenge[s] students to participate fully in a vibrant and diverse academic community" and strives "to cultivate the intellectual, creative, physical, ethical, and social qualities essential for leadership in a rapidly changing global community." *See* http://www.middlebury.edu/about/handbook/general/mission_statement/node/119761.

Penn's strategic vision for moving from excellence to eminence – and is an integral part of the University's mission." Penn fulfills this institutional mission weaving service learning into the curriculum: "By working alongside community leaders, civic organizations and neighborhood families to solve real-world problems, Penn students and faculty apply their intellectual skills to make positive social change." In so doing, "Penn pays homage to the principles of its founder, Benjamin Franklin, who rightly believed that the destiny of an eminent University is inextricably tied to the well being of the people it serves."[46]

Likewise, Tulane University commits to being "diverse in the broadest sense of the word - culturally, geographically, and ethnically." Tulane's purpose is "to create, communicate and conserve knowledge in order to enrich the capacity of individuals, organizations and communities to think, to learn and to act and lead with integrity and wisdom." The university "strives to connect its values and mission to the needs of the city of New Orleans, the state, and the nation. Community involvement is now more important than ever as the university participates in the rebirth of New Orleans." [47]

Higher education institutions are increasingly held publicly accountable for demonstrating that they are engaging with their communities and serving the public good. Five out of the six regional accreditation agencies reference civic engagement as part of their standards for college and university accreditation.[48] The Carnegie Foundation for the Advancement of Teaching, which provides the leading framework for recognizing and describing institutional diversity in U.S. higher education, has created a Community Engagement classification. This classification "acknowledges significant commitment to and demonstration of community engagement," and has selected over 300 institutions for this classification since it was first adopted in 2008.[49] Community engagement is also a required aspect of many grant applications for federal, state, and non-profit support of higher education research.[50]

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[46] UNIVERSITY OF PENNSYLVANIA FINANCIAL REPORT 2008-2009, at 3, available at www.finance.upenn.edu/vpfinance/.../Financial_Report_09.pdf.

[47] Tulane University Mission Statement, at http://tulane.edu/about/mission.cfm.

Additionally, many colleges and universities are serving as "anchor institutions" in metropolitan communities–participating in long-term, public-private partnerships aimed at local and regional revitalization.[51] The anchor institution strategy involves cultivating long-term partnerships with community-based organizations, schools, businesses, and other public agencies with the aim of producing concrete improvements in schools, neighborhoods, and communities.[52] More than half of the nation's colleges and universities are located in central cities and their immediate surroundings, including regions in which they are a major employer and producer of human capital. As Michael Porter and others have shown, the health of universities and other anchor institutions are "inextricably linked to their surrounding communities."[53]

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[48] Robert Cohen, Review of Regional Accreditation Agencies and Their Standards on Civic Engagement (2012).

[49] Carnegie Foundation for the Advancement of Teaching, Carnegie Selects Colleges and Universities for 2010 Community Engagement Classification (January 2011), http://www.carnegiefoundation.org/newsroom/press-releases/carnegie-selects-colleges-and-universities-2010-community-engagement-classification.

[50] *See* BROPHY, *supra* note 13, at 149.

[51] DAVID MAURRASSE, BEYOND THE CAMPUS: HOW COLLEGES AND UNIVERSITIES FORM PARTNERSHIPS WITH THEIR COMMUNITIES (2001).

As anchor institutions, colleges and universities have played a crucial role in strengthening K-12 education, fostering neighborhood revitalization, and enhancing community health.[54] Many of the nation's towns and cities depend upon higher education institutions as the primary driver of economic and social vitality.[55] For example, Syracuse University has adopted the overarching vision of "Scholarship in

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[52] RITA AXELROTH & STEVE DUBB, THE ROAD HALF TRAVELED: UNIVERSITY ENGAGEMENT AT A CROSSROADS (2010), available at http://www.community-wealth.org/articles/road-half-traveled.html; PENN INSTITUTE FOR URBAN RESEARCH, ANCHOR INSTITUTIONS AS PARTNERS IN BUILDING SUCCESSFUL COMMUNITIES AND LOCAL ECONOMIES (2009), available at http://www.margainc.com/initiatives/aitf.

[53] INITIATIVE FOR A COMPETITIVE INNER CITY AND CEOS FOR CITIES, LEVERAGING COLLEGES AND UNIVERSITIES FOR URBAN ECONOMIC REVITALIZATION: AN ACTION AGENDA (2002), available at http://www.edu-impact.com/leveraging-colleges-and-universities-urban-economic-revitalization-action-agenda.

[54] *Id.*

[55] INITIATIVE FOR A COMPETITIVE INNER CITY, ANCHOR INSTITUTIONS AND URBAN ECONOMIC DEVELOPMENT: FROM COMMUNITY BENEFIT TO SHARED VALUE (2011), *available at* www.icic.org/ee_uploads/publications/Anchor-Institutions.PDF.

Action," and undertaken a series of long-term projects aimed at revitalizing the city and surrounding metropolis, in deep collaboration with community-based partners. A major component of Syracuse's anchor institution strategy involves a collaboration between Say Yes to Education Inc., Syracuse University, Syracuse City School District, the City of Syracuse, and a diverse group of Syracuse-area corporate, non-profit and philanthropic organizations.[56] Say Yes engages diverse faculty, students, teachers, parents, and community members in a citywide effort to close achievement gaps between white and non-white students, decrease drop out rates, and increase high school and graduation rates in an entire municipal area.[57] This effort spans disciplines and institutions, and brings together the diverse, stakeholders, resources and knowledge needed to rebuild communities.[58]

More broadly, a group of national organizations have as their focus developing public policy and cross-institutional collaborations that support anchor institutions and connect higher education institutions to the goal of revitalizing democracy.

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[56] The Say Yes Foundation initiates powerful public-private partnerships aimed at creating college and career bound environment for all students. SAY YES TO EDUCATION: A CITY WIDE TURNAROUND MODEL FOR COLLEGE AND CAREER SUCCESS (2010).

[57] *Id.*

[58] SUSAN STURM & NANCY CANTOR, TRANSFORMATIVE LEADERSHIP FOR A MORE JUST SOCIETY: REVITALIZING HIGHER EDUCATION'S ROLE (2011); AXELROTH & DUBB, *supra* note 52, at 97-100.

Amici Imagining America, Campus Compact, and the Anchor Institution Task Force represent over 1300 institutions that have embraced this goal of forming long-term partnerships to solve pressing problems and increase leadership capacities and civic education of students.

In short, higher education institutions' role in educating civic-minded professionals and leaders capable of driving innovation, collaborating across racial difference, and retooling public institutions makes them crucial partners in addressing the challenges facing metropolitan communities.

B. Racially and Ethnically Diverse Student Bodies Are Crucial for the Educational Success of Leadership Development Programs

On campuses across the country, higher education institutions have undertaken a wide range of programs that enable diverse students to learn and develop skills so that they can interact effectively across difference. *See infra.* Higher education institutions dual involvement in diversity and civic engagement enhances their capacity for leadership development.[59] Anchor institutions that have built long-term partnerships with communities are combining student and community leadership development and, in the process, addressing tough problems. Student diversity is a crucial prerequisite for the success of these programs in developing effective leadership.

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[59] SUSAN STURM ET AL., FULL PARTICIPATION: BUILDING THE ARCHITECTURE FOR DIVERSITY AND PUBLIC ENGAGEMENT IN HIGHER EDUCATION (2011), available at http://www.fullparticipation.net/.

Multi-Racial Cohorts Supporting Leadership in STEM Fields. Research has documented numerous programs that have brought racially diverse groups of students together in learning and action environments enabling them to develop skills relevant to civic leadership. One documented example comes from the Emerging Scholars Program begun by Uri Treisman at Berkeley in the 1970s. Treisman's earliest experiment with cohorts engaged in ongoing mathematics problem-solving as a strategy for developing students' academic performance and enhancing the likelihood that they would become mathematics graduate students, professors and leaders.[60] Treisman's study identified as a source of the problem the social and academic isolation of African-American students on a predominantly white campus. Treisman focused on how to create a *setting* that would enable these students to learn effectively, and did so by creating multi-racial cohorts of problem solvers, and then engaging them in collaboratively solving problems that were deliberately designed to be too difficult to solve alone. The designers believed that "the settings needed to resemble the professional communities that these students would become part of in the future."[61]

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[60] Teresa Amabile & Steven Kramer, The Progress Principle: Using Small Wins to Ignite Joy, Engagement, and Creativity at Work (2011); Rose Asera, Calculus and Community: A History of the Emerging Scholars Program: National Task Force on Minority High Achievement (2001); Uri Treisman, *Studying Students Studying Calculus: A Look at the Lives of Minority Mathematics Students in College*, 23 The College Mathematics Journal 362 (Nov. 1992).

At University of Maryland, Baltimore County (UMBC), the campus has mobilized a long-term collaboration among students, faculty, administrators, philanthropists, business leaders, and other community members that is collectively committed to—and has a track record of success in—producing the next generation of diverse leadership in the STEM (Science, Technology, Engineering & Math) fields.[62] This process has been linked to a larger initiative that produces university research focused on the pressing problems of the day. UMBC has also become the anchor of a science and technology corridor, and a generator of diverse mid-career leaders.

The initiative began with the Meyerhoff program, which is now widely recognized as one of the most successful programs for increasing the participation of students of color in the STEM fields. That program became a driver of leadership development and broader institutional change at UMBC. It supported faculty who were willing to devote time and energy to the mentorship of students, and their engagement in faculty research. The Meyerhoff program also built leadership development into its model of empowerment and academic success, by creating contexts for students to collaborate regularly in supporting each others' success, in addition to working with students in the surrounding community. This process, led by the University's president, has produced cohorts of students, faculty, and administrators that support students' success, including the success of African-Americans as leaders in the STEM fields. The process has also engaged faculty, students, and community leaders in projects that produce significant research "to deal with global and national challenges involving the environment, security, health care, and the economy."[63]

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[61] *Id.*

[62] STURM & CANTOR, *supra* note 58, at 4-5.

Civic Engagement in Diverse Settings. Some of these programs take place in the context of service-learning and civic engagement programs building reflection and learning opportunities into community-based student work. Campus Compact's *Partnerships that Work* features 10 place-based regional networks of colleges and universities which forge service-learning partnerships with 300 community partners to encourage disadvantaged youth to pursue college through reading, writing, and mathematics assistance.[64]

Tulane University's post-Katrina experience is a powerful example:

> As we launch Tulane Empowers, we have identified public education, public service,

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[63] Elliot Hirshman & Freeman A. Hrabowski, *Meet Societal Challenges by Changing the Culture on Campus,* THE CHRONICLE OF HIGHER EDUCATION (2011).

[64] CHARLENE J. GRAY *et al.*, PARTNERSHIPS THAT WORK: THE STORIES AND LESSONS FROM CAMPUS/COMMUNITY (2010).

> urban revitalization, disaster response and community health as priority issues. These are areas where, post-Katrina, we have developed extraordinary expertise and well-defined mechanisms for collaboration and the delivery of services. Faculty, staff and students across every school and college are working in these five areas and they are bringing their creativity to bear on solving some of society's greatest problems.[65]

The research on service learning demonstrates its positive effect on reducing stereotypes and facilitating cultural and racial understanding. Additionally, service learning enhances the ability to work well with others, leadership, and the development of social responsibility and citizenship skills.[66]

Cross-Racial Dialogue. Intergroup dialogue courses are yet another example of courses that build effective communication across differences to forge relationships between diverse peers.[67] These programs enable students to interact with diverse groups and to explore differences, address their preconceptions, and build long-term, multi-racial relationships.[68] Educational institutions with diverse student bodies are well-positioned to equip participants with capacities needed to engage in effective collaboration with multi-racial groups. A major cross-institutional study found that intergroup dialogue courses that included guided facilitation, structured content, facilitative leadership, and other strategies produced greater intergroup empathy and understanding, and intergroup collaborative action.[69]

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[65] Tulane Empowers—Helping People Build a Better World: Priorities, at http://tulane.edu/empowers/priorities/index.cfm

[66] JANET S. EYLER et al., AT A GLANCE: WHAT WE KNOW ABOUT THE EFFECTS OF SERVICE-LEARNING ON COLLEGE STUDENTS, FACULTY, INSTITUTIONS AND COMMUNITIES, 1993-2000 (2001).

[67] Sorensen et al., *supra* note 32, at 20-22.

The combination of civic engagement and diversity programs is particularly geared to build leadership capacity. Both increase engagement and interest in social action. When done with intentionality to diversity, civic engagement activities also decrease stereotypes and increase the level of acceptance and comfort with people of different backgrounds.[70] As the Court recognized in *Grutter*, "diminishing the force of racial stereotypes is both a crucial part of [an institution's] mission, and one that it cannot accomplish with only token numbers of minority students." *Grutter*, 539 U.S., at 333. Studies demonstrate that civic engagement and diversity programs enhance students' ability to see the world from someone else's perspective and negotiate controversial issues. These programs build greater openness to having views challenged and continued socialization across race and ethnicity in the post-college years.[71]

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[68] *Id.;* CAMPUS COMPACT, A PROMISING CONNECTION: INCREASING COLLEGE ACCESS AND SUCCESS THROUGH CIVIC ENGAGEMENT (2010); GRETCHEN LOPEZ *et al.*, SPOTLIGHTING JUSTICE 2011-2012 EVALUATION REPORT (2012).

[69] Sorensen et al., *supra* note 32, at 21-23.

[70] Gurin et al., *supra* note 38; Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. SOCIAL ISSUES 595 (2005).

Similarly a study of the Bonner Scholarship Program, a leadership-oriented scholarship program, finds that structured dialogue and reflection coupled with service was instrumental in the "development of skills in understanding a person from a different background" and increased rates of Bonner Scholars' post-graduation involvement in civic activities and leadership.[72]

Anchor Institutions. Higher education institutions that use their anchor institution role to engage students in learning, have become effective training grounds for leadership and professional development, including the ability to interact effectively in multi-racial groups. Universities teach by what they do as well as what they say. Working democratically with the local community (often populations of color) is advanced significantly by the involvement of diverse student bodies.

For example, Wagner College has formed a long-term partnership with the Port Richmond community, an economically distressed community which has recently experienced a growth in the Mexican immigrant population. The Port Richmond Partnership brings "Wagner College administrators, faculty members, academic departments, classes and students together with 23 schools, churches and nonprofit organizations within Port Richmond to focus on [e]ducation, immigration, economic development and health." Since its inception, "the partnership has placed more than 1,000 collegians in programs coordinated by community agencies, including literacy acquisition, truancy prevention, after-school tutoring, nutrition campaigns, college and career readiness and business improvement research."[73]

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[71] *See* Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 HARVARD EDUCATIONAL REVIEW 615 (2008).

[72] Cheryl Keen & Kelly Hall, *Engaging with Difference Matters: Longitudinal Student Outcomes of Co-Curricular Service Learning Programs*, 80 JOURNAL OF HIGHER EDUCATION 59 (2009).

Student learning and leadership development are built into these projects and collaborations. The deep involvement of students and close working relationship with faculty and community members make these initiatives a powerful training ground for leadership development.[74]

The success of these programs depends upon racial diversity both to produce the conditions enabling learning and to build the diverse leadership needed to address the challenges in the larger community.

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[73] NYC Lauds Fort Richmond Partnership (2012), available at http://www.wagner.edu/newsroom/node/385.

[74] Keen & Hall, *supra* note 72; Kenneth Maton et al., *supra* note 38; Sorensen, *supra* note 37.

C. If the Court Adopts A Narrow View of Diversity's Educational Benefits, Higher Education's Leadership and Legitimacy Goals Would Be Imperiled

Amici have a strong interest in maintaining the ability, upheld by *Grutter,* of higher education institutions to select students based on a full assessment of their leadership potential and students ability to contribute to learning through civic engagement and partnership activities, including experiences connected to their racial background and identity. Leadership development is widely embraced by educational experts and leaders as a core mission of higher education, and diversity is widely considered to be essential to advancement of that core mission. *See* Part II, *supra.* The *Grutter* Court's deference to this considered judgment of educational experts is in keeping with a long tradition of preserving "the freedoms of speech and thought associated with the university environment." *Grutter,* 539 U.S., at 329.

It would be a mistake for the Court to adopt an overly narrow conception of higher education's mission. Consideration of whether racial diversity relates to the educational mission requires reference to the full range of "educational benefits that diversity is designed to produce." *Grutter,* 539 U.S., at 308. These benefits include but are not limited to enriching the exchange of ideas in the classroom. Leadership development requires bridging the "inside" learning experience of the classroom with the "outside" learning experience of engaging deeply with the problems facing diverse communities. The imposition of a wooden and narrow definition of educational goals of diversity would interfere with higher education's capacity to pursue leadership and citizenship development, which are core aspects of their educational mission.

To achieve this mission, it is paramount that higher education institutions consider racial and ethnic diversity in admissions. Holistic, race-conscious admissions allows higher education institutions to advance their educational mission of equipping diverse students--across all races and backgrounds--to exercise leadership. Evaluating a student's potential for leadership is critically intertwined with understanding the student's race and ethnic background, relevant experiences, and capacity to collaborate with individuals from different backgrounds. If the Court were to accept Petitioner's argument, higher education institutions would be restricted in their ability to identify and admit the students who will contribute these much needed leadership skills and abilities. The result would seriously limit the capacity of these university-community partnerships to address the urgent problems facing our nation.

Limiting the capacity of higher education institutions to seek racial and ethnic diversity in the student body would also undermine public confidence and legitimacy in higher education institutions because the path to higher education would not be visibly open to people from all different communities.

CONCLUSION

For these reasons, the Court should reaffirm its holding in *Grutter* that the pursuit of racial diversity in higher education is a compelling state interest.

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OFFICE OF [illegible]

No. 11-345

In the Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL WOMEN'S LAW CENTER, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF NATIONAL WOMEN'S LAW CENTER, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations that share a common commitment to civil rights for all Americans, with a particular interest in eradicating discrimination against women. That interest is closely aligned with the interest in eliminating race discrimination. Social-science research demonstrates, and *amici*'s own experience confirms, that successfully breaking down one form of discrimination tends to reduce others as well. Moreover, racial stereotypes often incorporate discriminatory views about women; and women of color experience the overlapping effects of race-based and gender-based discrimination.[1]

To ensure that there are no longer any barriers to academic achievement, career success, or any other aspect of a fulfilling life for women, therefore, it is necessary to eliminate all forms of sex discrimination, including those that are intertwined with race discrimination.

Because several *amici* have joined this brief, more detailed descriptions of each appear in the Appendix. The *amici* are:

- American Association of University Women.
- Association for Women in Science.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

- California Women's Law Center.
- Clearinghouse on Women's Issues.
- Connecticut Women's Education and Legal Fund.
- Equal Rights Advocates.
- Feminist Majority Foundation.
- Legal Momentum.
- National Alliance for Partnerships in Equity.
- National Association of Social Workers.
- National Association of Women Lawyers.
- National Center for Lesbian Rights.
- National Council of Women's Organizations.
- National Organization for Women Foundation.
- National Partnership for Women and Families.
- National Women's Law Center.
- 9to5, National Association of Working Women.
- Sargent Shriver National Center on Poverty Law.
- Society of Women Engineers.
- Southwest Women's Law Center.
- Washington Council of Lawyers.
- Women Employed.
- Women's Law Center of Maryland.
- Women's Law Project.

SUMMARY OF ARGUMENT

Diversity at a state university enhances the educational experience for all students, thereby furthering the State's compelling interest in cultivating a corps of civic, government, and business leaders who understand the interests of, and are capable of communicating and working with, all members of the public.

The persistent effects of impermissible stereotypes make it difficult, however, for universities to provide their students with the reality of a diverse educational experience. Stereotypical assumptions that were once grounded in law continue to exert significant influence—both on societal expectations and on individuals' perceptions of themselves. As a result of outmoded assumptions about their proper roles in society, minority students, and women of color in particular, tend to be clustered in certain fields of study. Thus, numerous degree programs and courses lack diversity despite university-wide statistics that seemingly show a significantly diverse student body. Many students are therefore deprived of the critical benefits of learning with and from people representing the widest array of backgrounds and experiences; and the future leaders of government and business that the university trains are insufficiently experienced in communicating with people of different backgrounds and experiences to fulfill those important roles effectively.

A state university seeking to ascertain whether it is in fact furthering the compelling interests served by educational diversity cannot necessarily rely, therefore, solely on gross, campus-wide statistics. It must have the discretion to undertake a program-level assessment to determine the actual diversity that students will encounter in their day-to-day academic endeavors.

For example, in a field traditionally made up of white males, such as engineering or computer science, a woman of color may, because of her background, interests, and abilities, have the potential to contribute a unique perspective that will enhance the educational experience of her fellow students, regardless of whether she happens to be admitted through a Top Ten Percent Plan. And the same may be true for a white man who wishes to enter a field, such as education or nursing, that has traditionally been made up of women.

Accordingly, a state university should have the freedom to consider those factors, among all the others that go into its admissions decisions, in order to assemble an incoming class that best serves all students and advances the State's interests in achieving a diverse educational environment.

These assessments are entirely consistent with this Court's mandate in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), that race be considered only as part of an individualized, holistic review of each applicant. Far from preferring race above all other considerations, admissions procedures like the one at issue here appropriately recognize the often-complex interplay of race with sex, geography, upbringing, academic achievement, athletic ability, academic and extracurricular interests, and career and life goals in affecting any particular student's potential to contribute something unique to the intellectual and cultural life of the academy. Truly individualized admissions decisions that are undertaken with a sensitivity to the need for students throughout the university to experience the effects of diversity are thus a critical complement to programs like the Top Ten Percent Plan. They not only offer an antidote to the persistent effects of stereotyping, but also help the university ensure that all students are receiving the education that will best prepare them for life, work, and public service in a diverse, pluralistic community.

ARGUMENT

An Educational Environment That Brings Together Individuals From Diverse Backgrounds—And Thereby Dispels Race- and Sex-Based Stereotypes—Is Essential To Enable All Students To Participate Effectively In Government, Civil Society, And The Business Community.

As Justice Powell explained, diversity, "whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring * * * experiences, outlooks, and ideas that enrich the training of [a university's] student body and better equip its graduates to render with understanding their vital service to humanity." *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 314 (1978) (opinion of Powell, J.).

That is the precise justification advanced by the University of Texas in support of the admissions plan at issue in this case. The University explained that in our pluralistic society, in which "Texas will [soon] have no majority race," achieving these goals requires an educational climate that facilitates "a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." University of Texas at Austin, *Proposal to Consider Race and Eth-*

nicity in Admissions, June 25, 2004, at 23-24, available at http://tinyurl.com/83wdz84 (quoted in *Fisher* v. *Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 602 (W.D. Tex. 2009), aff'd, 631 F.3d 213 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (2012)).

Empirical research demonstrates that education in a diverse environment does in fact further these objectives. Students learn to identify and understand values that they share with individuals from different backgrounds. They also learn to respect each other as individuals, by discovering that there is no single viewpoint associated with any particular group. Daryl G. Smith, DIVERSITY WORKS: THE EMERGING PICTURE OF HOW STUDENTS BENEFIT 29 (1997); see also Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 187, 189 (Gary Orfield ed., 2001) (students in interracial environments show "greater openness to diverse perspectives and a willingness to challenge their own beliefs").

A diverse educational environment provides another important benefit, as well. Women and minorities have long been restricted by "[o]verbroad generalizations about the[ir] different talents, capacities, or preferences," *United States* v. *Virginia*, 518 U.S. 515, 533 (1996)—a condition that applies with special force to women of color, for whom the combination of race-based and sex-based stereotypes has significantly enhanced the negative effects, both on the self-perception of these women and on the way that others perceive them. By helping to eradicate these negative effects, diversity expands the government, civic, and business opportunities open to minority women.

But universities face a significant practical problem in providing their students with the diverse educational environment that leads to these salutary results. The persistent effect of stereotypes—reflected in the choices of courses and educational programs made by most minority students, especially women of color—results in a striking lack of actual diversity in many students' actual, day-to-day academic experiences. Unless a university is able to take steps to counteract these continuing effects of stereotypes, it will be unable to provide the diversity in fact that is necessary to fulfilling the university's educational mission.

A. Diversity In A State University's Student Body Promotes The Compelling State Interests In Educational Excellence, Effective Government And Civic Organizations, And Economic Competitiveness.

A diverse educational environment improves teaching and learning for all students. Engaging with a wide array of fellow students exposes individuals to a broader set of ideas, experiences, perspectives, and values, thus fostering greater understanding of each other, of the subject matter, and of the world around them. It also equips students to succeed in government, civic institutions, and business.

1. Diversity improves the quality of education.

Social-science research unequivocally confirms this Court's conclusion that classes are "simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."

Grutter, 539 U.S. at 330 (internal quotation marks omitted). The "robust exchange of ideas" (*Bakke*, 438 U.S. at 313 (opinion of Powell, J.))—the heart and soul of higher education—can therefore best be served by maximizing the variety of perspectives that students contribute to a vibrant academic community.

Regular interaction with people of different races leads to greater cognitive development, more positive academic and social self-conceptions, higher graduation rates, growth in leadership skills and cultural awareness, higher levels of civic interest, and greater satisfaction with the college experience for students of all races. Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. IN HIGHER EDUC. 529, 530 (2004) (summarizing numerous empirical studies).

Students in diverse educational environments become more adept at recognizing the complexity of issues, defending and challenging their own perspectives, and understanding opposing viewpoints. Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. SOC. ISSUES 595, 603 (2005) ("Students who reported frequent contact with diverse peers displayed greater attributional complexity, self-confidence in cultural awareness, [and] development of a pluralistic orientation."); see also Hurtado, *Linking Diversity and Educational Purpose*, at 189 (students in interracial environments show "greater openness to diverse perspectives and a willingness to challenge their own beliefs").

2. *Diversity is essential for preparing students both to lead and to participate in our nation's government and community organizations.*

Higher education—and especially education at a State's flagship university—prepares students to be leaders and participants in their communities, their State, and the nation. See generally, *e.g.*, *Grutter*, 539 U.S. at 331 (higher education "prepar[es] students for work and citizenship"); John Rawls, A THEORY OF JUSTICE 87 (rev. ed. 1999) (education "enabl[es] a person to enjoy the culture of [the] society and to take part in its affairs").

Indeed, the connection between education and civic participation has been recognized since the earliest days of our nation. The charter of the first public university recognized that for "the common wishes of the People [to] become the Laws of the Land, their public prosperity and even existence very much depends upon suitably forming the minds and morals of their Citizens." The University of Georgia Charter of 1785, available at http://tinyurl.com/9or2tz4.

It therefore was "among the first objects * * * to place the youth under the forming hand of society that by instruction they may be moulded to the love of Virtue and good Order." *Ibid.* The Northwest Ordinance similarly emphasized that "schools and the means of education shall forever be encouraged," because an informed citizenry is "necessary to good government and the happiness of mankind." Northwest Ordinance art. 3 (1787), in OUR DOCU-

MENTS: 100 MILESTONE DOCUMENTS FROM THE NATIONAL ARCHIVES 27 (2003).[2]

These same concerns remain central to the work of public institutions of higher learning today. The University of Texas at Austin recognizes, for example, that its mission as the State's flagship university is to "produc[e] future educational, cultural, business, and sociopolitical leaders." *Proposal to Consider Race and Ethnicity*, *supra*, at 24.

And state universities do serve a unique role in preparing the future leaders of their States. For example, twenty-one of thirty-one state senators in the Texas Legislature—more than two-thirds—attended a Texas state university. Texas Tribune, *Elected Officials Directory*, available at http://www.texastribune.org/directory/.

What is true for community leaders in general is often even more so for minorities, who historically lacked the benefits of heredity, familial connections, and other traditional avenues to leadership positions. Thus, for example, eight of the nine Texas state senators who are black or Hispanic obtained their undergraduate or graduate degrees from public institutions in Texas; seven attended schools in the University of Texas system. And for those seeking the highest offices, connections to a State's flagship university are often especially important: Five of Texas's seven black and Hispanic federal legislators attended the University of Texas at Austin. *Ibid.*

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[2] See also, *e.g.*, *Ambach* v. *Norwick*, 441 U.S. 68, 75-76 (1979) (public-school teachers perform a task "that go[es] to the heart of representative government") (internal quotation marks omitted); Brief of Maryland, New York, et al., as Amici Curiae in Support of Respondents at 8, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 538556 ("One of the many functions of public education at all levels is to nurture values necessary for good citizenship and the maintenance of a flourishing democracy—a quintessentially state role.").

Experiencing diversity, day to day, is a critical part of that education: "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J.) (quoting *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 603 (1967)).

If our political and community leaders are to lead effectively, they must first "(1) learn to understand and consider the multiple perspectives that are inherent in a diverse environment; (2) deal with the conflicts that different perspectives sometimes entail; and (3) appreciate the common values and integrative forces that incorporate these differences in the pursuit of the broader common good." Patricia Gurin, *The Compelling Need for Diversity in Education*, 5 MICH. J. RACE & L. 363, 383 (1999).

Diversity in higher education not only helps "cultivate a set of leaders with legitimacy in the eyes of the citizenry," by ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 331; cf. *Plyler* v. *Doe*, 457 U.S. 202, 221-223 (1982).[3] It also provides all students with the tools that they will need to participate in the work of representative political institutions.

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[3] Social-science research confirms that leaders function best when they reflect the concerns and aspirations of the citizenry as a whole. Sue Thomas, *Introduction*, WOMEN AND ELECTIVE OFFICE: PAST, PRESENT, AND FUTURE 1 (Sue Thomas & Clyde Wilcox eds., 1998) ("[A] government that is democratically

Students who hear different viewpoints effectively expressed and considered in the classroom learn to relate to each other, work together, understand others' needs and interests, reach compromises, and solve problems together. Hurtado, *The Next Generation of Diversity*, 61 J. SOC. ISSUES at 603 ("[S]tudents who reported frequent contact with diverse peers * * * were less likely to perceive value differences with other racial/ethnic groups * * * [and] learn[ed] how to resolve conflict and practice democratic skills."); Patricia Gurin et al., *Intergroup Dialogue: Education for a Broad Conception of Civic Engagement*, available at http://tinyurl.com/8jdfdzr (dialogue among students of different races and genders increases "cognitive openness (indicated by consideration of multiple perspectives, * * * active thinking about society, and cognitive involvement in their social identities), and positivity in intergroup interaction"). Those skills are essential building blocks of leadership, political participation, and representative government.

The presence and participation of women of color in the classroom are critical to building these skills among students. The experiences of individuals who belong to historically underrepresented groups can

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organized cannot be truly legitimate if all its citizens from all races and classes and both sexes do not have a potential interest in and an opportunity for serving their community and nation."); Susan A. Banducci et al., *Minority Representation, Empowerment, and Participation*, 66 J. POL. 534, 534 (May 2004) (finding that "minority representation strengthens representational links, fosters more positive attitudes toward government, and encourages political participation").

significantly expand classroom dialogue. Including these perspectives in the learning process helps all students and future leaders better understand the needs and interests of significant portions of the citizenry, while also making clear that individuals from underrepresented groups do not hold any single set of opinions or viewpoints. This classroom experience also helps all students learn to interact with people from different backgrounds. Having representatives who genuinely understand and are able to give voice to the interests of all elements of the populace helps ensure that decision-making takes all those views into account.

Simply put, experiencing diversity in college increases and improves political participation and civic engagement. Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 REV. EDUC. RES. 29 (March 2011); Hurtado, *The Next Generation of Diversity*, 61 J. SOC. ISSUES at 603. Students educated in diverse environments are thus better prepared to be both citizens and leaders. *Cf. Grutter*, 539 U.S. at 324; *Bakke*, 448 U.S. at 313. And that is good for everyone—those who come from historically under-represented communities, and those who do not.

3. Diversity in education enhances the nation's economic well-being.

Businesses, too, recognize that workers and managers are most effective when they can interact effectively with individuals of varied backgrounds. "The ability to adapt to different perspectives and cultures has gone from being a luxury among cosmopolitan sophisticates to an absolute necessity for success in an increasingly diverse and global workplace." Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 HARV. EDUC. REV. 615, 636 (2008), available at http://tinyurl.com/cqm6x25.

Because many students come from communities and high schools where they had little if any contact with people from different cultural or racial backgrounds, a university education is often their first experience interacting with diverse peers. It is at college that they can begin to develop the skills needed to understand the different perspectives of individuals of different backgrounds—an understanding that is essential to economic competitiveness. Indeed, businesses report that "college graduates lack 'cross-functional skills,' which include leadership, teamwork, problem solving, analytical thinking, and global consciousness"—skills that "can only be acquired through greater access to diverse peers." *Id.* at 617. Diversity in higher education teaches all students to communicate and work more effectively with customers, clients, and colleagues from a broad range of backgrounds.

In addition, the nation's largest businesses seek leaders "with backgrounds that represent and reflect the variety of markets in which they compete." Brief Amicus Curiae of Equal Employment Advisory Council in Support of Neither Party at 3, *Fisher* v. *Univ. of Tex. at Austin*, No. 11-345 (U.S. May 29, 2012). That is because innovation comes "from encouraging true diversity of styles and ideas while leveraging multiple talents." Brief of BP America Inc. as Amicus Curiae in Support of Neither Party at 2, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-

241), 2003 WL 1339512; see also Toyah Miller & Maria del Carmen Triana, *Demographic Diversity in the Boardroom: Mediators of the Board Diversity–Firm Performance Relationship*, J. MGMT. STUD. 755, 755 (2009), available at http://tinyurl.com/d9nzh6j ("In a sample of *Fortune 500* firms, we find a positive relationship between board racial diversity and both firm reputation and innovation. * * * In addition, we find a positive relationship between board gender diversity and innovation."). At the end of the day, workforce diversity produces concrete financial benefits: The Federal Glass Ceiling Commission reported in 1995 that businesses committed to diversity in their hiring and promotion practices post higher average annual returns. Federal Glass Ceiling Commission, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 14-15 (1995).[4]

A diverse educational environment creates significant professional opportunities for minorities, including women of color, while at the same time helping all students negotiate more effectively the complexities of the modern workplace and the modern marketplace—skills that are essential to the prosperity of all Americans, regardless of race. Jayakumar, 78 HARV. EDUC. REV. at 632.

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[4] See also National Women's Law Center, *Affirmative Action and What it Means for Women* (July 1, 2000), available at http://tinyurl.com/cv9u27m (describing businesses' favorable views toward affirmative action).

B. The Persistent Effects Of Stereotypes Impoverish Our Educational, Political, And Social Institutions.

The history of race discrimination in this country is also the history of sex discrimination—stereotypes based on race have been intertwined with stereotypes based on gender. And the deeply rooted limitations on educational and career opportunities imposed by these discredited assumptions about individuals' talents, capacities, and preferences continue to affect students' life choices today. See, *e.g.*, *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 625 (1984) ("[A]rchaic and overbroad assumptions about the relative needs and capacities of the sexes force[ ] individuals to labor under stereotypical notions that often bear no relationship to their actual abilities," thus "depriv[ing] persons of their individual dignity and den[ying] society the benefits of wide participation in political, economic, and cultural life.").

These burdens fall especially heavily on women of color, who have been doubly excluded from access to education and from opportunities to pursue careers in business and government. But the harms resulting from this exclusion have not been theirs alone: By depriving society of the benefits of the widest diversity of views, perspectives, cultures, and values, the stereotyping that has led to the exclusion of women of color has impoverished our educational, political, and civic institutions as well as our workplaces.

1. *The histories of race- and sex-stereotyping in higher education are closely intertwined.*

Traditionally, women and racial minorities were educated, if at all, only in segregated colleges and universities that reinforced stereotypical generalizations about their talents, capacities, and preferences. As a result, women of color were excluded from a wide range of educational and career opportunities.

For much of our history, the formal exclusion of minorities and women from the nation's colleges and universities was commonplace. See, *e.g.*, *Virginia*, 518 U.S. at 537-538; *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Okla. State Regents*, 339 U.S. 637 (1950); see also, *e.g.*, Note, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296, 312-313 (1970) (exclusion of women from educational opportunities was based on assumptions about their "inferior intelligence, scarcity of geniuses, * * * and emotionalism"); Jill E. Hasday, *The Principle and Practice of Women's 'Full Citizenship': A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 785 (2002) (combined effects of race- and sex-based segregation have denied "'full citizenship stature'" to women of color) (quoting *Virginia*, 518 U.S. at 532).

Historically, schools for white males trained students for the learned professions—the clergy, the law, and the like. Schools for white females emphasized chastity, fertility, homemaking, and being "ladylike." And the rare schools for black females emphasized hard work and domestic service. Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and* *the Construction of Race and Gender,* 2004 WIS. L. REV. 15, 47, 56.

For example, the Mississippi Industrial Institute and College for the Education of White Girls was founded to serve "white ladies" exclusively, and trained its students to be teachers and secretaries. *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 719-720 (1982); Hasday, 101 MICH. L. REV. at 785. The lone postsecondary institution in Mississippi that was open to blacks, Alcorn Agricultural and Mechanical College, was a coeducational school that trained students to be farmers. Hasday, 101 MICH. L. REV, at 787 & n.135. Virginia also provided separate universities for white men and for white women, while the only school for black men and women was the coeducational Virginia State College for Negroes. *Id.* at 785 n.128. And many other states, including Alabama, Delaware, Florida, Georgia, New Jersey, North Carolina, Oklahoma, South Carolina, and Texas established Industrial Institutes for white women, much like the one in Mississippi. *Id.* at 782-783.

Although this Court invalidated formal segregation on the basis of race in public colleges and universities more than half a century ago (see *Sweatt*, *supra*; *McLaurin*, *supra*), official sex segregation was preserved in some flagship state universities until at least the 1970s. For instance, the University of Virginia excluded women entirely until 1970, in the belief that if they were permitted to attend, "there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust." *Virginia*, 518 U.S. at 537-538 (internal quotation marks omitted); see also Cynthia F. Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and The Citadel*, 4 DUKE J. GENDER L. & POL'Y 101, 102 n.11 (1997).

And the different treatment of white women and black women, though injurious to both, inflicted particularly harsh dignitary harms on the latter. Segregating white women into institutions that sheltered them and prepared them for marriage was undeniably limiting, but it was understood as reflecting a judgment that they deserved a degree of respect, at least in arenas considered domestic, such as courtship, home-life, child-rearing, and morality—thus preserving their dignity as "ladies." Hasday, 101 MICH. L. REV. at 786 & n.130; see *Williams* v. *McNair*, 316 F. Supp. 134, 136 n.3 (D.S.C. 1970) (observing that women's education focused on "designing, engraving, sewing, dressmaking, millinery, art, needlework, cooking, housekeeping and other such industrial arts as may be suitable to their sex") (quoting S.C. Code § 408, tit. 22 (1962)), aff'd, 401 U.S. 951 (1971); see also *Hogan*, 458 U.S. at 729 (university's "policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job"); *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion) ("[D]iscrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.").

Women of color were not afforded even that limited regard, thus conveying the message that they "did not need or deserve to be treated like ladies, * * * they were not entitled to even the modicum of respect otherwise associated with their sex." Hasday, 101 MICH. L. REV. at 787. Women of color were excluded from any educational institutions through which "the social capital most associated with social and political success was distributed." *Ibid.*

2. *These stereotypes still bear heavily on the perceptions and self-perceptions of women of color.*

Although this Court has made significant strides toward abolishing the laws that divided Americans on the basis of race and sex (*e.g.*, *Virginia*, 518 U.S. 515; *Hogan*, 458 U.S. at 730; *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954)), stereotypes continue to influence our society—not the least in the expectations communicated to individuals, and therefore in the educational and career choices that they, themselves make. *E.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 730 (2003) ("stereotype-based beliefs about the allocation of family duties remain[ ] firmly rooted"); *Associated Gen. Contractors of Cal., Inc.* v. *City & Cnty. of S.F.*, 813 F.2d 922, 939-940 (9th Cir. 1987) ("[M]any of the disadvantages women have suffered result from stereotypes concerning their proper roles and abilities. Only recently have women begun to assume their rightful place in business and the professions.").

Empirical studies show that although women are generally perceived favorably on college campuses today, these favorable attitudes often remain rooted not in individual abilities but in assumptions about women's nurturing and communal qualities—assumptions that continue to support expectations that women are best suited only for "domestic role[s] as well as for low-status, low-paying female-dominated jobs." Alice H. Eagly & Antonio Mladinic, *Are People Prejudiced Against Women? Some Answers From Research on Attitudes, Gender Stereotypes, and Judgments of Competence*, 5 EUR. REV. SOC. PSYCHOL. 1, 1-2 (1994) (studying attitudes among U.S. and Canadian university students).[5]

Women are still perceived as inferior to men in terms of leadership qualities, such as assertiveness, competitiveness, independence, and courageousness, that are traditionally regarded as necessary for managing subordinates effectively. As a result, women continue to be viewed as less fit for paid employment generally, and for management and high-status positions in particular.[6]

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[5] See also, *e.g.*, Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. J. RES. 143, 149 (2004) (both men and women "implicitly favor male leaders over female leaders" and "spontaneously associate women with communal traits like 'sensitive'").

[6] Eagly & Mladinic, 5 EUR. REV. SOC. PSYCHOL. at 25-26; see also, *e.g.*, Dasgupta, 17 SOC. J. RES. at 156 (describing study finding that people who held strong implicit gender stereotypes associating women with "communal" traits (*e.g.*, helpful) and men with "agentic" traits (*e.g.*, ambitious) were more likely to evaluate female candidates for leadership jobs as having poor social skills while evaluating similar male candidates positively). These differences in perception extend to other areas as well. See, *e.g.*, Catherine Hill et al., WHY SO FEW? WOMEN IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS 74, 76 (2010) ("[E]ven individuals who consciously refute gender and science stereotypes can still hold th[e] belief at an unconscious level" that women are not as good at math and science as men are. "[M]ore than 70 percent of [respondents] more readily associate 'male' with science and 'female' with arts.").

This unconscious stereotyping not only informs the perceptions of women's aptitudes held by others, but—just as important—it affects how individuals themselves behave and how they perform. Those who have been treated as inferior or unsuited to particular fields of study or to positions of status and responsibility often internalize the beliefs, and as a result may severely limit their own ability to succeed, even in the absence of external constraints.[7] Stereotypes about the "reproductive and domestic" roles of Latinas, for example, continue to include pervasive beliefs "that they are inferior to men." Berta Esperanza Hernandez-Truyol, *Las Olividadas–Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 353, 376 (1998).

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[7] See, *e.g.*, Hill, WHY SO FEW?, at 77 ("Stereotypes linking science with male may create gender differences in performance among students, and those gender differences in performance may reinforce the stereotypes linking science with male."); Brian A. Nosek et al., *National Differences in Gender–Science Stereotypes Predict National Sex Differences in Science and Math Achievement*, 106 PROC. NAT'L ACAD. SCI. 10,593, 10,596-10,597 (2009) (multinational study finding direct correlation between strength of stereotypical association of science with men and degree to which eighth-grade boys outperformed eighth-grade girls in science); Dasgupta, 17 SOC. J. RES. at 161 (describing study finding that black students' "implicit racial attitudes" were associated with "self-handicapping" in academic-testing situations); Patricia M. Gonzales et al., *The Effects of Stereotype Threat and Double-Minority Status on the Test Performance of Latino Women*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 659, 660, 666-669 (2002) (stereotypes about subservience impair academic performance); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101, 108 (2002) (survey of more than 60,000 respondents yielded "robust associations," both implicit and explicit, "of male with science and female with liberal arts"); Brian A. Nosek et al., *Math = Male, Me = Female, Therefore Math ≠ Me*, 83 J. PERSONALITY & SOC. PSYCHOL. 44, 52, 57 (2002) (finding that the more strongly that women believe in stereotype associating math with men, "the weaker was their liking for math, the lower was their identification with math, and the worse was their performance on math SATs"); Steven J. Spencer et al.,

What is more, implicit and often unconscious bias particularly disadvantages women of color. Studies show that individuals who intend to be evenhanded and believe themselves to be unbiased nonetheless will often unconsciously assign unfavorable traits to members of these groups, and will find superficially neutral reasons to treat them as objectively less qualified than their competitors.[8]

And even when stereotypes on the basis of race and sex begin to break down, women of color often do not benefit from these positive social changes. "[T]he narratives of gender are based on the experience of white, middle-class women, and the narratives of race are based on the experience of Black men."

Stereotype Threat and Women's Math Performance, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 6-8, 21-26 (1999).

[8] Eva Patterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1186-1187 (2008); see, *e.g.*, Dasgupta, 17 SOC. J. RES. at 156 ("implicit stereotypic beliefs * * * influence important judgments such as people's impressions of others [and] decisions about who should be hired for a job") (emphasis and citation omitted); Denise Sekaquaptewa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. EXP. SOC. PSYCHOL. 75 (2003) (finding that white men who exhibited implicit racial bias were more likely to ask racially stereotypic interview questions to black women than to white job candidates during simulated job interviews).

Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1298 (1991).

Thus, women of color have the unique experience of falling into two stereotyped groups but not fitting the paradigm for empowerment of either. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 ("Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not reflect the interaction of race and gender.").

3. These stereotypical views continue to affect the fields of study selected by women of color.

Despite real progress in opening the doors of our nation's great universities to women and minorities, statistical diversity in the aggregate often does not translate into real diversity in classrooms, majors, and degree programs. That is because the persistent effects of stereotyping—on minorities and women themselves, as well as on society at large—result in members of these groups being clustered in "traditional" fields.

According to the U.S. Department of Education's National Center for Education Statistics, women make up more than half of all students earning bachelor's degrees. See NCES, Table 301: Bachelor's degrees conferred by degree-granting institutions, by sex, race/ethnicity, and field of study: 2009-10, available at http://tinyurl.com/9uhhlf4.

While white women thus attend college in large numbers, they are disproportionately concentrated in fields that correspond to the social roles once formally assigned to them. For example, women receive 77% of the bachelor's degrees in psychology, 79.5% in education, 82% in public administration and social-services fields, and 85% in health professions and related programs. *Ibid.* By contrast, they receive only 18.2% of the bachelor's degrees in engineering, 18.1% in computer science, and 10.1% in other engineering-related fields. *Ibid.*

The effect is more pronounced for minority women, in part because they make up such a small proportion of college students overall. Black women earned only 6.5% of bachelor's degrees in 2010, and Hispanic women only 5.1%. Black women accounted for just 3.7% of computer-science majors and 0.4% of engineering majors. *Ibid.* And Hispanic women were only 1.5% of the computer-science majors and 1.4% of the engineering majors.

The result of these skewed selections of programs of study is that the real, day-to-day experience for many students, as they attend classes, form study groups, and participate in special projects, can be a largely homogeneous cohort—even if there is statistical diversity on campus when the student body is considered as a whole. Thus, for example, in a field—such as engineering or computer science—that has traditionally been made up of white men, a student may receive few, if any, of the educational benefits of diversity. And the university's goal to afford those benefits to all students may go unrealized.

Homogeneity in undergraduate classes and majors also leads to homogeneity in graduate and professional programs, thus denying to students the benefits of a diverse group of colleagues just at the point when that educational environment might do the most to prepare them for their future careers.[9] Because, for example, engineering and computer-science courses and majors are overwhelmingly populated by white men, the pools of qualified candidates for graduate degrees in those fields are similarly narrow: In 2010, black women earned just 3% of the master's degrees in computer science; Hispanic women, 0.8%. And each group received only 0.9% of the master's degrees in engineering. NCES, Table 304: Master's degrees conferred by degree granting institutions, by sex, race/ethnicity, and fields of study: 2009-10, available at http://tinyurl.com/bmhbqj7. The effect is even more extreme for doctoral degrees: In 2010, just 55 black women and 70 Hispanic women earned doctoral degrees in engineering, and 17 black women and 8 Hispanic women earned doctoral degrees in computer science, nationwide. *Ibid.*

The story in professional schools is similar: Black women received only 4.6% of the medical degrees; Hispanic women, 2.5%. Black women received 4.4% of the law degrees; Hispanic women, 3.6%. Black women receive 3.2% of the dentistry degrees; Hispanic women 3.1%. NCES, Table 309: Degrees conferred by degree-granting institutions in selected professional fields, by sex, race/ethnicity, and field of study: 2009-10, available at http://tinyurl.com/c82wksb.

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[9] See, *e.g.*, Lisa Dickson, *Major Choices: Race and Gender Differences in College Major Choice*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 108 (2010) ("Studies have documented the relatively low representation of women, blacks, and Hispanics with degrees in the sciences and engineering * * * [, which] affects occupational choice, earnings, and the probability of pursuing advanced degrees.").

What is true in higher education inevitably affects the composition of the skilled workforce. Men still make up a majority of doctors, architects, engineers, and politicians—professions that were long formally closed to women of color, who were unable to get the education or training needed to pursue a career in those fields. Even today, less than 5.3% of the physicians and surgeons in this country are black women; less than 6.6% are Hispanic women. Among lawyers, less than 5.3% are black women; less than 3.2% are Hispanic women. And among architects, less than 1.6% are black women and less than 3.2% are Hispanic women. Bureau of Labor Statistics, Table 11: Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity [2011], available at http://www.bls.gov/cps/tables.htm.

In addition to obstructing universities' efforts to promote a diverse educational environment, the persistent effects of these discredited stereotypes have a continuing effect on the effectiveness of the nation's workforce. Even though the nation's largest businesses and the federal government have long sought to hire individuals with actual experience in dealing with individuals of diverse backgrounds, as well as to increase the diversity of their own workforce, their recruitment of skilled workers and managers is often limited by the continuing homogeneity of the majors and degree programs from which they recruit. See, *e.g.*, Brief of BP America Inc. as Amicus Curiae in Support of Neither Party, *supra*, at 4 ("it is difficult to ignore that historically fewer women and persons of color have pursued careers in the technical sciences"); Brief of ExxonMobil Corp. as

Amicus Curiae in Support of Neither Party at 6, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 554411 ("ExxonMobil and other companies * * * draw their human resources largely from scientific, engineering, and technical fields. Minorities and women have historically been underrepresented in those areas, and invalidating all efforts directed toward increasing enrollment by minorities would exacerbate that concern.").

As for leadership positions in business and industry, black and Hispanic women each hold only 1.9% of the director positions on the boards of U.S. Fortune 500 companies. See Alliance for Board Diversity, MISSING PIECES: WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 5 (2010). Black women hold less than 2.7% of the chief-executive positions; Hispanic women less than 4.1% Bureau of Labor Statistics, Table 11, *supra*.

Women of color remain concentrated for the most part in lower-status occupations and sectors of the economy. For example, over half of all black women in the workforce fall into one of three fields: health services, such as nursing or home care; education; and wholesale and retail trade. Bureau of Labor Statistics, Table 15: Employed women by industry, race, and Hispanic or Latino ethnicity, 2009 annual averages, available at http://www.bls.gov/cps/wlf-databook-2010.pdf.

C. Assessing Diversity On The Program Level—And Not Simply By University-Wide "Raw Numbers"—Is Essential To Achieving The Benefits of Diversity.

Recognizing the significant benefits that a diverse educational environment provides to all students, and to society at large, this Court held in *Grutter* that a university might appropriately determine that in order to secure those benefits, it should consider race as part of an individualized assessment of all facets of an applicant's background, achievements, and interests. 539 U.S. at 334.

Even when a university admits a significant number of minority students without undertaking this sort of individualized assessment—such as through the Top Ten Percent Plan—it cannot rely on school-wide statistics regarding minority enrollment alone to determine whether it will be able to provide the benefits that come from a diverse educational environment. University-wide numbers will inevitably obscure the fact that, because of the dramatic effect of stereotypes, minority applicants are often clustered in particular areas of study and specific career paths.

To create a diverse environment in fact and not simply in theory, therefore, a university must assess its student body from the perspective of students' interactions in the course of pursuing particular fields of study and other activities.

If the university reasonably concludes, based on such a program-level analysis, that it is not in fact supplying some of its students with a diverse educational environment, it may employ the individual assessments authorized in *Grutter* to remedy that deficiency.

This sort of analysis is entirely in keeping with *Grutter*'s mandate of individualized, holistic review of each applicant. Individual assessments need not—and for practical purposes cannot—be undertaken with a blind eye to the demographics of the particular part of the academic environment in which the students will function, because it would not be possible to assess how much any prospective student's experiences, interests, and viewpoints might add to a particular course of study without reference to the contributions that might be made by the others in the same program.

Nor would it be possible to serve a university's goal of breaking down stereotypes without carefully considering how any particular applicant might affect the diversity of the educational environment that students actually experience day to day. To realize the benefits of diversity, students should interact with people of other races in sufficient numbers to see that not all members of a racial group have identical interests: "stereotypes lose their force * * * because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Grutter*, 539 U.S. at 319-320.

An approach that assesses only university-wide statistics would, by contrast, present a significant risk of reinforcing stereotypes. It is likely to produce a student body in which, for example, women of color remain disproportionately concentrated in "traditional" categories of endeavor—a result that enhances the preexisting stereotypes while denying to everyone the unique perspectives that these students might contribute to classroom discussion and academic discourse throughout the university's academic departments and disciplines.

Rather than assessing across-the-board representation of broad racial categories, therefore, a well-designed admissions program should seek to increase the likelihood that students in any given field will actually interact in their classes with individuals possessing a wide array of experiences and perspectives that are informed by, among many other factors, the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333. A suitably individualized review, like Michigan Law School's in *Grutter*, or the University of Texas's here, does not rest on overbroad generalizations or presuppositions that minorities are fungible or will hold identical views based simply on their race. It considers race as well as other individual characteristics such as sex, geography, family background, and applicants' particular aptitudes and interests, thus taking into account the full measure of what each individual might offer to the academic community in the near term, and to government, industry, and civic associations down the road.

The approach might therefore permit assigning a "plus factor" to an African-American woman who wishes to study engineering, or to a man who wishes to study nursing, regardless of the overall demographics of the campus, because admissions officers may have good reason to expect that those individuals have the potential to increase the overall diversity in their chosen fields of study and the courses in which they are likely to enroll—thus benefitting all students.

What is more, to further its compelling interest in "producing future educational, cultural, business, and sociopolitical leaders" (*Proposal to Consider Race and Ethnicity*, at 24), a state university may consider the likely composition of the citizenry that these individuals will lead—just as the military academies consider the likely population in the rank-and-file that the officer corps will command.[10] That is not to say that a university may apply a rule admitting students on the basis of race in the same proportion as the racial composition present in the population; that approach plainly violates the Constitution. *Grutter*, 539 U.S. at 334. But a State's need for a diverse group of future leaders that bears some reasonable relationship to the composition of the State's future population permits a state university to take race into account as a factor, among the many others in a holistic assessment of applicants for admission.

Here, the University of Texas has implemented a system of individualized review that properly recognizes the fact that students enjoy the benefits of diversity only when the diversity actually touches them in their particular programs, classes, and day-to-day academic experiences. The University considers students' academic achievements, interests, "leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service," along with a host of other factors, allowing it to admit highly qualified students who will contribute to the robust exchange of ideas within the school, but who would not have been admitted under the Top Ten Percent Plan. *Fisher* v. *Univ. of Tex. at Austin*, 631 F.3d 213, 227-

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[10] It is for similar reasons that 29 retired leaders of the nation's military advised this Court in *Grutter* that the military academies sought to enroll minorities at levels proportional to their "representation in the national population and in the national pool of college bound people, and their representation in the Army." Consolidated Brief of Lt. Gen. Julius W. Becton et al. as Amici Curiae in Support of Respondents at 17-19, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 1787554.

228 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (2012).[11] And by doing so with an eye to the particular course of study that each applicant intends to pursue, the University properly considers every aspect of applicants' "talents, experiences, and potential to contribute to the learning of those around them." *Grutter*, 539 U.S. at 315 (internal quotation marks omitted).

Because the educators at the University of Texas have developed an admissions program that serves the State's compelling interest in diversity and is "focused on each applicant as an individual, and not simply as a member of a particular racial group," their judgments are entitled to deference. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist.*, 551 U.S. 701, 722-723 (2007) (citing *Grutter*, 539 U.S. at 337); see also *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (school officials have "broad discretionary powers" to adopt policies that ensure diversity "in order to prepare students to live in a pluralistic society"). See generally *Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 (1985) ("the multitude of academic decisions that are made daily by faculty members of public educational institutions * * * require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'") (quoting *Bd. of Curators of Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, 90 (1978)). The University's efforts to obtain the real benefits of diversity for all its students and for the State are entirely consistent with the Constitution, and should be left in place by this Court.

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[11] See also Joseph Berger, *Adjusting a Formula Devised for Diversity*, N.Y. TIMES B7 (Dec. 13, 2006) (quoting University of Texas's director of admissions as stating that admitting entire class through Top Ten Percent Plan "'doesn't give you the opportunity to recognize other kinds of merit,'" and explaining that individualized review allows for admission of "high school class presidents, high SAT scorers, science fair winners, immigrant strivers, artists and the like" who would not have been admitted under Top Ten Percent Plan).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

Descriptions Of The *Amici Curiae*

American Association of University Women

In 1881, the American Association of University Women was founded by like-minded women who had defied society's conventions by earning college degrees. Since then, AAUW has worked to increase women's access to higher education through research, advocacy, and philanthropy of over $90 million supporting thousands of women scholars. Today, AAUW has approximately 150,000 members and supporters, approximately 1000 branches, and more than 600 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and chief among them is increased access to higher education. In adherence to our member-adopted Public Policy Program, AAUW supports affirmative-action programs that establish equal opportunity for women and minorities and improve gender, racial, and ethnic diversity in educational institutions.

Association for Women in Science

In 1971, at the annual Federation of American Societies for Experimental Biology meeting, flyers were posted inviting women scientists to a champagne mixer and meeting to encourage the exchange of ideas and solutions for overcoming job discrimination, lower pay, and professional isolation. Those 27 women who took the initiative to make science a better place for women founded the Association for Women in Science, today's premiere leadership organization advocating the interests of women in science and technology. For nearly 40 years, the Association for Women in Science has fought for equity and career advancement for women—from the bench to the board room. We unite women through our nationwide network of chapters and partnerships with aligned professional organizations.

California Women's Law Center

The California Women's Law Center is a nonprofit public-interest law center specializing in the civil rights of women and girls. Established in 1989, CWLC works in the following priority areas: Gender Discrimination, Women's Health, Violence Against Women, and Reproductive Justice. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination in education. The *Fisher* v. *University of Texas at Austin* case raises questions within CWLC's expertise and concern. Therefore, CWLC has the requisite interest and expertise to join in the *amicus* brief in this case.

Clearinghouse on Women's Issues

The mission of the Clearinghouse on Women's Issues is to provide information on issues relating to women, including discrimination on the basis of gender, age, ethnicity, marital status, and sexual orientation, with particular emphasis on public policies that affect the economic, educational, health, and legal status of women, and to take action and positions compatible with our mission.

Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund is a nonprofit women's rights organization dedicated to empowering women, girls, and their families to achieve equal opportunities in their personal and professional lives. For the past 38 years, CWEALF has provided legal information and conducted public policy and advocacy to ensure that all students have equal access to educational programs. CWEALF supports affirmative-action programs that result in equal opportunities for both women and minorities, and that encourage diversity in educational institutions, workplaces, and communities.

Equal Rights Advocates

Equal Rights Advocates is a national civil-rights advocacy organization dedicated to protecting and securing equal rights and economic opportunities for women and girls. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA litigates high-impact cases, engages in policy and legislative work, performs education and outreach, and gives advice and counseling to individuals who have experienced discrimination in education, employment, and other spheres. ERA has filed hundreds of suits and appeared as *amicus curiae* in numerous cases to enforce civil rights in state and federal courts, including before the United States Supreme Court. ERA is committed to ensuring equal access for all, including racial minorities, to education, employment, and the political process through enforcement of the Equal Protection Clause of the United States Constitution and other state and federal laws.

Feminist Majority Foundation

The Feminist Majority Foundation, a 501(c)(3) nonprofit organization founded in 1987, is dedicated to the pursuit of women's equality, using research and action to empower women economically, socially, and politically. FMF actively supports diversity in public education, including at the university level, which helps to reduce stereotypes and enriches the educational experience for all students.

Legal Momentum

Legal Momentum, the Women's Legal Defense and Education Fund, is a leading national nonprofit civil-rights organization that has used the power of the law to define and defend women's rights for over forty years. It has participated as counsel and as *amicus curiae* in numerous cases in support of affirmative action. Legal Momentum is interested in these cases because of the positive impact affirmative-action programs have in promoting equality and eliminating barriers for women, particularly for women of color, and for racial minorities.

National Alliance for Partnerships in Equity

The National Alliance for Partnerships in Equity is a consortium of state and local agencies, corporations, and national organizations committed to the advancement of equity and diversity in classrooms and workplaces. Through its four lines of business—professional development, technical assistance, research and evaluation, and advocacy—NAPE strives to achieve its vision and mission by pursuing certain goals and objectives.

National Association of Social Workers

The National Association of Social Workers is the largest professional membership organization of social workers in the world, with nearly 145,000 social workers and 56 chapters. With the purpose of developing and disseminating high standards of practice while strengthening and unifying the social-work profession as a whole, NASW promulgates professional standards and criteria, conducts research, publishes studies of interest to the profession, provides continuing education, and enforces the NASW Code of Ethics. Recognizing that racism is pervasive in American society and that it remains a silent code that systematically closes the door of opportunity for many individuals, NASW supports affirmative action for groups that have historically been or are currently oppressed, underserved, and underrepresented, including people of color; people with disabilities; people who are gay, lesbian, bisexual or transgendered; women; older people; and people who are disadvantaged or oppressed because of life circumstances.

National Association of Women Lawyers

The National Association of Women Lawyers is the oldest women's bar association in the country, founded in 1899. Today, it is a national voluntary organization with members in all 50 states, devoted to the interests of women lawyers, as well as all women. Through its members, committees, and the Women Lawyers Journal, it provides a collective voice in the bar, courts, Congress, and workplace. We stand committed to ensuring equal educational opportunity for all women, including women of color, and support the ability of educational institutions to use gender- and race-conscious measures to increase diversity and overcome discrimination.

National Center for Lesbian Rights

The National Center for Lesbian Rights is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public-policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. As an organization committed to challenging the complex forms of systemic discrimination that lie at the intersection of race and gender, we are especially interested in this case because race-conscious admissions are critical tools for providing opportunities for women and girls of color. Moreover, we are committed to ensuring that all youth have equal access to quality education, and racial diversity is an important part of providing a fulfilling and enriching educational environment.

National Council of Women's Organizations

The National Council of Women's Organizations is a nonprofit, nonpartisan coalition of more than 240 prominent women's groups that advocates for the 12 million women they represent. While these groups are diverse and their membership varied, all work for equal participation in the economic, social, and political life of their country and the world. The Council addresses critical issues that affect women and their families: from workplace and economic equity to international development; from affirmative action and Social Security to the women's vote; from the portrayal of women in the media to enhancing girls' self-image; and from Title IX and other educational rights to affordable access to health care. A focus since the Council's founding has been working for access for women of color to quality education, employment, and healthcare. The Council strongly supports the rights of educational institutions to use race- and gender-conscious measures to increase diversity and overcome discrimination.

National Organization for Women Foundation

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with hundreds of thousands of contributing members in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have been to achieve equal rights for all women and to assure that women and girls have equal access to all aspects of education, including equal access for women of color to a postsecondary education.

National Partnership for Women and Families

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, access to quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and race discrimination in education and employment.

National Women's Law Center

The National Women's Law Center is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the expansion of women's opportunities. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. The Center has participated in numerous cases involving sex discrimination before this Court and the federal courts of appeals.

9to5, National Association of Working Women

9to5, National Association of Working Women is a multi-racial national membership organization of women in low-wage jobs working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by sex and other forms of discrimination. Our 39-year-old organization has a long-standing commitment to and history of working to promote equal opportunity in employment, education, and business. The issues in this case are directly related to 9to5's work to end discrimination, promote equal opportunity, and strengthen women's ability to achieve economic security. The outcome of this case will directly affect our members' and constituents' access to equal opportunity, as well as their long-term economic well-being and that of their families.

Sargent Shriver National Center on Poverty Law

The Sargent Shriver National Center on Poverty Law provides national leadership to promote justice and improve the lives and opportunities of people with low income. The Shriver Center is particularly interested in justice for racial and ethnic minorities who disproportionately make up those living in poverty, including minority women. Education is key to economic security and advancement. Policies and practices that encourage diversity and help minorities overcome discrimination are essential for their immediate and long-term educational and employment opportunities. Racial diversity benefits all students and helps break down both racial and gender stereotypes. The Shriver Center has a strong interest in the continuation of policies and practices like those of the University of Texas at Austin that promote race- and gender-conscious admissions, which are important to opening pathways to opportunity for minorities and women.

Society of Women Engineers

Since its inception in 1950, the Society of Women Engineers has been the driving force that establishes engineering as a highly desirable career aspiration for women. SWE strongly believes that the United States has an untapped pool of potential technical workers, and we must leverage the diversity of these individuals to fuel the innovation necessary for our future global competitiveness. SWE's mission is to stimulate women to achieve full potential in careers as engineers and leaders, expand the image of the engineering profession as a positive force in improving the quality of life, and demonstrate the value of diversity.

Southwest Women's Law Center

The Southwest Women's Law Center is a legal and policy advocacy nonprofit organization that seeks to create the systemic changes that are needed to improve the lives of girls and women of color in our communities, states, and throughout our country. We harness the power of law, research, and creative collaborations to create greater opportunities for women and girls by helping them to fulfill their personal and economic potential. The Southwest Women's Law Center supports racial diversity that will benefit and advance the opportunities of women of color in the field of education and beyond. The race-conscious admissions policy employed by the University of Texas at Austin is important to opening pathways to opportunity for women of color in ways that the Top Ten Percent Plan alone does not provide. We believe that the Top Ten Percent Plan, combined with an additional race-conscious policy, work together and are narrowly tailored to achieve the educational benefits of diversity in the classroom and the broader community.

Washington Council of Lawyers

The Washington Council of Lawyers is a nonprofit organization of lawyers and legal workers committed to the spirit and practice of law in the public interest. Founded in 1971, the Washington Council of Lawyers is the Washington, DC, area's only voluntary bar association dedicated exclusively to promoting pro bono and public-interest law. Council members represent every sector of the Washington legal community—lawyers and pro bono coordinators from large and small law firms and law schools; lawyers from public-interest groups, government agencies, and congressional offices; as well as law students and members of law-related professions. We share a common concern for the well-being of our community and the integrity of our civil and constitutional rights.

Women Employed

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination, monitored the performance of equal-opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed strongly supports the ability of educational institutions to use race- and gender-conscious measures to increase diversity and overcome discrimination.

Women's Law Center of Maryland

The Women's Law Center of Maryland, Inc., is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination in the workplace and in family-law issues. The Women's Law Center operates an Employment Law Hotline to provide workers with information about their legal rights regarding issues that particularly affect women, such as pregnancy discrimination and family leave. Through direct services and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law.

Women's Law Project

The Women's Law Project is a nonprofit public-interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public-policy development, public education, and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil-rights laws. The WLP has a strong interest in the proper application of the law to ensure equal treatment in education.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NEW YORK STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the New York State Bar Association ("NYSBA") is the largest voluntary state bar association in the United States with approximately 77,000 members.[1] Among its functions, the NYSBA develops forward-looking policies relevant to the profession and takes positions in litigation (either as party or amicus) concerning matters of interest to its members and the legal profession as a whole. The NYSBA previously has submitted amicus briefs in the Supreme Court of the United States. This amicus brief is limited to highlighting the importance of racial and ethnic diversity within the legal profession and the concomitant need to maintain an adequate flow of diverse students in the undergraduate "pipeline" to fill seats in law schools and ultimately enter the profession. The NYSBA is actively committed to increasing diversity in the legal profession including developing and running undergraduate and high school "pipeline" programs (*see*, *infra*, at 15-16, 19).[2]

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[1] This brief is submitted pursuant to the blanket consent letters from all parties on file with the Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution.

[2] Counsel for *amicus* are actively involved in the NYSBA and its diversity programming. Seymour W. James, Jr. is President of the NYSBA. David M. Schraver is President-Elect of the NYSBA and will begin service as the 116th president of the Association on June 1, 2013. David H. Tennant is the immediate past chair of the NYSBA's Commercial and Federal Litigation Section, which is a leader in diversity programming for the Association (described herein).

The American Bar Association ("ABA") has bestowed its Partnership Award on the NYSBA in recognition of its continuing diversity initiatives. *See*, *infra*, at 19.

In advocating for the compelling government interest in promoting diversity in the legal profession, the NYSBA takes no position on whether the specific steps taken by the University of Texas fall within the educational interests in student body diversity endorsed n *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

The government has a compelling interest in promoting diversity in the legal profession because of the central role that lawyers, judges and legal institutions play in resolving civil and criminal matters and maintaining social order. The Framers of the Constitution understood the essential role that lawyers and judges would play in carrying out the founders' stated mission "to establish justice, insure domestic tranquility . . . and secure the blessings of liberty to ourselves and our posterity." U.S. Const. (Preamble). A commitment to diversity in the legal profession recognizes the undeniable fact that the demographics of the United States' population are changing—becoming more diverse racially and ethnically—and that institutions in the United States will lose credibility and effectiveness if they fail to adapt to these changes. For the legal profession, the consequences of failing to become more diverse in a "majority-minority" America are profound. The legitimacy and effectiveness of our civil and criminal justice systems will be undermined if the profession does not reflect the changing demographics. The lack of diversity among lawyers and judges today fuels distrust of the legal system in many minority communities. Allowing such underrepresentation to persist while the society at large becomes increasingly diverse is untenable. It will lead to a stark racial divide that will only strengthen the distrust and disaffection among people of color and leave the majority of Americans to view the legal profession as an out-of-touch holdover from an earlier era. For the legal profession to continue serving its vital mission in a "majority-minority" America, colleges must graduate in substantial numbers qualified and talented diverse candidates for the nation's law schools. That is the only way the legal profession can become meaningfully diverse and earn the confidence of an increasingly diverse nation.

ARGUMENT

THE GOVERNMENT HAS A COMPELLING INTEREST IN PROMOTING DIVERSITY IN THE LEGAL PROFESSION.

1. To Remain Effective The Legal Profession Must Reflect The Changing Demographics Of The United States' Population.

The legal profession is overwhelmingly white in a country that is increasingly diverse. As of the 2000 Census, more than 90% of attorneys in the United States were white (not Hispanic). *See* ABA Report and Recommendations, *The Next Steps, Diversity in the Legal Profession* (April 2010) ("ABA 2010 Report") at 12, at http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf.[3] Minority attorneys made up less than 10 percent of the profession. *Id.* This pattern held true in New York in 2000. Even though New York has a more diverse population than most states, and the NYSBA has taken aggressive steps to increase diversity in the profession (*infra*, at 15), the bar in New York remained 89% white. *Miles to Go in New York: Measuring Racial and Ethnic Diversity Among New York Lawyers* (NYSBA Committee on Minorities in the Profession)(September 2007) ("NYSBA Report") at 6, at http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Minorities_in_the_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=12709.[4]

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[3] This brief relies on the ABA 2010 Report and other recent bar studies of diversity within the legal profession as the

The lack of diversity in the legal profession nationally and in New York stands in sharp contrast to "the browning" of the general population of the United States from 1970 to 2009.[5]

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best measure of the limited inroads into the profession made by minorities, with the reports culling data from the 2000 Census. Comparable bar studies of the 2010 Census data are not yet available. As documented outside the Census process, minority entry into the profession over the past decade has been very limited. *See, infra*, at 10-11. Membership in the NYSBA remained 88% white in 2012. *See, infra*, at 18.

[4] The 11 percent of attorneys "of color" in New York in 2000 were broken down as follows: 4.2 percent African American, 3.3 percent Hispanic, 3.4 percent Asian American and .1 percent Native American. NYSBA Report, at 6.

[5] The phrase "browning of America" (often attributed incorrectly to author Richard Rodriguez) "has been used regularly to describe an increase in the mixing of cultural, racial, and ethnic identities in the United States in the past century. . .The phrase is commonly applied to the current demographic shift towards a higher proportion of minorities in the total population in the

	1970	1980	2000	2009
Whites	87.4	83.2	70	66.1
Afr. Am	11.1	11.7	12.3	12.8
Am. Ind	.4	.6	1.5	1
Asian Am.	.8	1.5	4.3	4.4
Hisp.	4.5	6.5	12.5	15.1
Other	.3	3		1.6

[Table Reproduced from ABA 2010 Report at 10.]

Given these population trends, the United States is projected to be less than 50% white in 25 years or so. *See* http://inamerica.blogs.cnn.com/2012/05/17/census-2011-data-confirm-trend-of-population-diversity ("If the trend continues, . . . several decades from now, possibly in the late 2030s or early 2040s, the U.S. population will become less than 50% non-Hispanic white"). By 2050, the United States' population is projected to be 47 percent non-Hispanic white; 29 percent Hispanic; 13 percent African American; 9 percent Asian American and 1 percent Native American. Jeffrey S. Passel & D'Vera Cohn, U.S. Population Projections: 2005-2050, Pew Hispanic Center

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United States. It can be used neutrally as a name for the current demographic shift in the United States . . . ." http://en.wikipedia.org/wiki/Richard_Rodriguez. *See, e.g.*, The Washington Post, *The Browning of America*, May 18, 2012, at http://www.pressdisplay.com/pressdisplay/viewer.aspx; William A. Henry III, *Beyond the Melting Pot*, 135(15), Time Magazine, Apr.9, 1990 ("In the 21st century—and that's not far off— racial and ethnic groups in the U.S. will outnumber whites for the first time. The "browning of America" will alter everything in society. . . .").

(Feb. 11, 2008), at http://www.pewhispanic.org/files/reports/85.pdfU.S., at 9-10.[6]

African-Americans and Hispanics remain seriously underrepresented in the legal profession relative not only to their numbers in the general population but also to their participation rates in other professions. While minorities comprised just under 10 percent of all lawyers in the United States in 2000, minorities represented 20.8 percent of accountants, 23.1 percent of computer scientists and 24.6 percent of physicians. NYSBA Report at 6.[7] The very slow rate of entry into the legal profession by traditionally underrepresented minority populations coupled with rapid increases in racial and ethnic diversity in the general population will lead to a serious demographic disjuncture with potentially serious consequences for the administration of justice. Former ABA President (and former Mayor of Detroit and Michigan Supreme Court Justice) Dennis Archer observed:

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[6] The demographic changes are dramatic. The population of the United States is projected to increase from 296 million in 2005 to 438 million in 2050, an increase of 48 percent. *See* Pew Report at 1, 8. During that same period, it is estimated that the Hispanic population will triple in size from 42 to 128 million; the Asian-American population will nearly triple in size from 14 to 41 million; the African-American population will increases by a little more than half, from 38 to 59 million; and the white (not Hispanic) population will grow less than 5 percent, increasing from 199 to 207 million. *Id*. at 9-10.

[7] An ABA study confirms that "minority representation in the legal profession is significantly lower than in most other professions, with only dentistry and natural science demonstrating worse records." *See Miles to Go 2000: Progress of Minorities in the Legal Profession* (ABA Commission on Racial and Ethnic Diversity in the Profession July 2000) Executive Summary at http://apps.americanbar.org/abastore/products/books/abstracts/4520014_2005%20execsumm.pdf.

> Too often, where white people see justice in our legal system, people of color see justice shortchanged. When you recognize that in the United States, it is the ability to petition our courts for fairness that keeps people from seeking justice in the streets then you understand that diversity in the legal profession is critical for democracy to survive.

ABA Presidential Advisory Council on Diversity in the Profession, *The Critical Need to Further Diversify the Legal Academy & the Legal Profession* (October 2005), at http://apps.americanbar.org/op/pipelineconf/acdreport.pdf.[8]

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[8] Dennis Archer was the first lawyer of color to lead the American Bar Association in its 125-year history and remains an outspoken advocate of diversity in the legal profession. *See* Dennis W. Archer, *The Value of Diversity: What the Legal Profession Must Do to Stay Ahead of the Curve*, 12 Wash. U.J.L. & Pol'y 25 (2003); *id.* at 27 ("What we need are more lawyers of color. We need them as judges in all jurisdictions. We need them as law clerks, law professors, general counsel, and partners in large law firms.") ABA President Carolyn B. Lamm (ABA Report at 3): "we are committed to see a bench that reflects our population." Increasing racial and ethnic diversity among lawyers and judges will help to address differing perceptions of justice in minority communities. ABA *Perceptions of Justice Project, A Dialogue on Race, Ethnicity and the Courts*, at http://www.americanbar.org/content/dam/aba/administrative/lawyers_conference/2011_poj_writtenreport.authcheckdam.pdf The ABA convened a series of town hall meetings between 2009 and 2011 to identify

Justice Sandra Day O'Connor, writing for the Court in *Grutter v Bollinger*, 539 U.S. 306 (2003), recognized the compelling government interest in educating a racially and ethnically diverse student body to enter the legal profession:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.
>
> * * *
>
> Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training necessary to succeed in America.
>
> 539 U.S. at 332-333.

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and document the perceptions of justice across racial and ethnic groups. At the April 7, 2009 symposium, held at SMU Dedman School of Law, speakers "shared statistics demonstrating that people of color have a disturbingly low level of confidence in our justice system and are convinced that color blind and fair justice does not exist." *Id.* at 3. The ABA is now developing strategies to address the identified concerns. *Id.* at 1. Increasing the number of persons of color working in the justice system is widely viewed as an essential step. *Id.* at 5, 7, 9.

It is critical to the legal profession–and to society–to attract more minorities to law school, to "feed the pipeline." This is not a cosmetic concern. It goes to ensuring the legitimacy and trustworthiness of the legal institutions we prize as lawyers and judges. We need to be more diverse in a more diverse society to have those institutions accepted, respected, valued and trusted – indeed to remain relevant and useful to a majority of the people who live and work here, own homes, run businesses, elect judges and political leaders, serve on juries and otherwise exercise rights as citizens. If the legal profession is not broadly reflective of that multi-cultural society, it cannot help but be viewed as "out of touch" by members of that society. In that case, the value of legal pronouncements, whether from courts or other legal institutions, necessarily will carry less weight.

The need for a racially and ethnically diverse bar—to be responsive to and accepted by the diverse members of society who are the consumers of the legal system—finds support in the previously recognized need for a diverse officer corps to lead the American military. As detailed in the consolidated amicus brief filed on behalf of certain former senior military officers in *Grutter*[9] (cited at length in the *Grutter* opinion)[10], in 2003 more than 31% of service men and women were African American or Hispanic (and another 5% Asian American or Native American) (Becton Amicus Br. at 4)—reflecting current general population demographics. The amicus brief explained that an effective military requires a diverse officer corps to lead diverse soldiers. *Id.* at 7.[11] By increasing racial and ethnic diversity among the officer corps, the military was able to reduce racial polarization, perceptions of discrimination and disciplinary problems. *Id.* at 5-7. The Becton Amicus Brief directly identified the need for race-conscious admissions policies at the service academies and other colleges to turn out in numbers talented and qualified officers "of color." *Id.* at 6 ("The military must be permitted to train and educate a diverse officer corps to further our compelling interest in an effective military. . . to expand the pool of highly qualified minority candidates in a variety of race-conscious ways.").

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[9] Consolidated Brief of Lt. General Julius W Becton, Jr. et al., No. 02-241, 02-516, February 19, 2003 (Virginia A Seitz, Sidley & Austin, Counsel of Record) ("Becton Amicus Brief").

[10] *Grutter*, 539 U.S. at 331 (citing to pages 5 and 29 of Becton Brief).

In a similar vein, increasing the diversity of lawyers and judges will help legal institutions to be more responsive to minority concerns and to be viewed more favorably by diverse communities, and thereby reduce the significant alienation from the legal system felt by many people of color. Judicial pronouncements will be met with greater acceptance and less suspicion, and the resolution of legal disputes, both civil and criminal, will be aided. *See Grutter*; 506 U.S. at 332-333; Becton Amicus Br. at 9 (noting that "broad access to the education that leads to leadership roles is essential to public confidence in the fairness and integrity of public institutions, and their ability to perform their vital functions and missions.").[12]

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[11] As of February 2003 the officers corps was 81% white (with 8.8% African-American, 4% Hispanic, 3.2% Asian-American and .6% Native American). Becton Amicus Br. at 7.

[12] The ABA Report (April 2010) identified four rationales for creating greater diversity in the legal profession:

The legal profession must be permitted to train and educate diverse law students to further the mission of the legal system as well as to produce diversity among the many political and business leaders who hold JD degrees.[13]

- Democratic Rationale: Lawyers and judges have a unique responsibility for sustaining a political system with broad participation by all of its citizens. A diverse bar and bench create greater trust in mechanisms of government and the rule of law.

- The Leadership Rationale: Individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civil leadership positions both in and out of politics. Justice Sandra Day O'Connor recognized this when she noted in *Grutter v Bollinger* that law schools serve as the training ground for such leadership and therefore access to the profession must be inclusive.

- The Demographic Rationale: ... With respect to the nation's racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a 'majority minority' country.

- The Business Rationale: Business entities are rapidly responding to the needs of global customers, suppliers and competitors by creating workforces from many backgrounds, perspectives, skill sets and tastes. Ever more frequently, clients expect and sometimes demand lawyers who are culturally and linguistically proficient.

ABA Report at 5, 9-10.

[13] In the 112th Congress, "law is the dominantly declared profession of Senators" and is listed by 148 Members of the House. *See* Membership of the 112th Congress: A Profile, CRS 7-5700 (August 1, 2012).

Broad access to undergraduate education is essential to ensure that an adequate pipeline of qualified and talented diverse applicants exists for law school.

Regrettably, diverse enrollment and graduation rates in U.S. law schools are slipping. While over-all law school enrollment increased dramatically between 1993 and 2008, African-American enrollment and Mexican-American enrollment remained relatively steady (despite improvements in grade point averages and LSAT scores). *A Disturbing Trend in Law School Admissions*, at http://blogs.law.columbia.edu/salt/. This has resulted in a 7.5 percent decline in the representation of African-American students entering the class of 2008 and an 11.7 percent drop in Mexican-American students in the same entering class. *Id.*[14]

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[14] In keeping with this documented drop in African Americans entering law school, the legal profession has seen a decline in the number of African Americans serving as federal law clerks. *Statistics Show No Progress in Federal Court Law Clerk Diversity*, The National Law Journal, May 2, 2012 ("The decrease for African American clerks between the fiscal years 2006 and 2010 was most pronounced, with a decline from 3.5 percent of appellate level law clerks in 2006 to 2.4 percent in 2010 . . . "). Clerking provides recent law school graduates with excellent training while expanding employment opportunities. The experience also provides a chance for diverse law clerks to influence their surroundings, whether by having the "judge's ear" when discussing the court's work, or by interacting with court staff and counsel. Because of these benefits, the NYSBA sponsors a minority law clerk program that places minority law students in a paid summer position in the chambers of a Justice of the New York State Supreme Court Commercial Division. NYSBA believes the experience will attract minority law students to a career in commercial litigation and spark interest in clerking after graduation.

The relative decline in African-American and Mexican-American enrollment in law school is particularly troubling because the demand for admission has remained steady for 15 years, the quality of the applicant pool has improved, and 3,000 seats have been added for first year students in that period as 24 new ABA-accredited law schools opened. *Id.* Yet these two diverse groups have seen their relative enrollment substantially decline. *Id.* ("Even in real numbers, there are fewer African-American and Mexican-American matriculants in the 2008 class (4,060 combined) than existed in the Fall 1993 class (4,142 combined).").

2. The National Focus On The Diversity "Pipeline."

The American Bar Association is supporting pipeline initiatives directed at all levels of education (undergraduate, high school, elementary, and kindergarten) in a broad and deep effort to attract traditionally underrepresented students to the legal profession. The ABA's Presidential Advisory Council on Diversity in the Profession in 2006 prepared a report and recommendation that endorsed the following pipeline resolutions:

> FURTHER RESOLVED, the American Bar Association urges all state, territorial and local bar associations to collaborate with colleges and universities to develop pre-law programs that will increase minority applications to law schools and will increase the readiness of minority applicants for law school.

> FURTHER RESOLVED, the American Bar Association urges all states, territorial and local bar associations to collaborate with elementary and secondary schools to develop and support programs that will increase minority applications and will increase the readiness of minority applicants for college.

ABA House of Delegates Recommendation, adopted August 7-8, 2006, and Report ("ABA 2006 Report"), at http://blogs.law.columbia.edu/salt/files/2009/08/American-Bar-Association.pdf.

These and related diversity pipeline resolutions were adopted by the ABA House of Delegates based on the Pipeline Diversity Conference sponsored by the ABA and the Law School Admissions Council. ABA 2006 Report at 2. More than seventy bar groups and associations – including the NYSBA – signed on as official cosponsors of the ABA Pipeline Diversity Resolution.[15]

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[15] The co-sponsors (listed at http://www.americanbar.org/groups/diversity/pages/Co_Sponsors.htm) are: Advisory Council on Diversity in the Profession; Kansas Bar Association; American Immigration Lawyers Association; National Association of Women Judges; National Bar Association; Bar Association of Erie County; Association of the Bar of the City of New York; **New York State Bar Association**; The Florida Bar; New Jersey State Bar Association; Section of International Law; San Diego County Bar Association; National Lesbian and Gay Law Association; State Bar of New Mexico; King County Bar Association; Maryland State Bar Association Bar Association of Baltimore City; Section of Taxation Bar Association of San Francisco; Section of Administrative Law and Regulatory Practice; New York County Lawyers Association; Section of Business Law; Senior Lawyers Division; Section of Dispute Resolution; Oregon State Bar; Judicial Division; Tennessee Bar Association; Illinois

The ABA 2010 Report noted an apparent "consensus on the need for the legal profession to help dramatically improve the P-20 (pre-school through advanced degree) pipeline . . . students, lawyers, judges and clients are increasingly involved in pipeline activities, which emphasize law and civic engagement, aim to keep diverse students in school, facilitate the involvement of students' families, and help all students improve their academic performance to pursue higher education." *Id.* at 12. The ABA 2010 Report further observed that:

State Bar Association; State Bar of Wisconsin; Los Angeles County Bar Association; Hennepin County Bar Association; Ohio State Bar Association; South Carolina Bar; Dade County Bar Association; Health Law Section; DuPage County Bar Association; Section of Litigation; Section of Intellectual Property Law; Santa Clara County Bar Association; Section of State and Local Government Law; Bar Association of the District of Columbia; Law Student Division; Tort Trial and Insurance Practice Section; Washington State Bar Association; Utah State Bar; Austin Bar Association; Arkansas Bar Association; Kentucky Bar Association; Maricopa County Bar Association; Nashville Bar Association; Louisville Bar Association; Monroe County Bar Association; Pennsylvania State Bar Association; Minnesota; State Bar Association; National Association of Women Lawyers; Section of Antitrust Law; Energy Bar Association; Hispanic National Bar Association; State Bar of South Dakota; Commission on Immigration; Massachusetts Bar Association; Section of Real Property Probate and Trust Law; Columbus Bar Association; Council on Legal Education Opportunity Commission on Women in the Profession; Council on Racial and Ethnic Justice; Association of American Law Schools; Commission on Racial and Ethnic Diversity in the Profession; Chicago Council of Lawyers; Section of Labor and Employment Law; Section of Individual Rights and Responsibilities; Young Lawyers Division; San Fernando Valley Bar Association; and National Asian Pacific American Bar Association.

> State bars and bar associations are beginning to realize the need for a paradigm shift along the educational pipeline. Diversity programs that 'take the long view,' such as law-oriented pipeline programs focused on high school, college and even middle school are following other professions with robust pipeline programs such as math and science curricula developed by engineering schools."

Id. at 14. *See id.* at 23 (identifying "pipeline" best practices).

3. The NYSBA's Commitment To Increasing Diversity In The Profession.

The NYSBA has long recognized the need to increase diversity in the legal profession and has taken practical and creative steps to address this critical shortcoming but like many other bar groups is not able to report significant increases in the number of diverse lawyers entering the profession. That remains a core concern and focus of NYSBA's diversity programming.

The NYSBA formed its first committee on minorities in the profession in 1984, examining concerns about the lack of diversity in the legal profession, especially the absence of traditionally underrepresented groups. That committee—and its successor, the Committee on Diversity and Inclusion—has for more than two decades designed and implemented diversity programs for the NYSBA to benefit its members and the profession. These programs include career development programs in the private sector (e.g., a Minority Hiring and Counsel project to facilitate referral of legal work from corporations to minority attorneys and firms) and efforts to make the judiciary more diverse. As the result of efforts by the NYSBA and other groups, the state court bench, especially downstate, has become substantially more diverse.[16]

In 1993, the State Bar selected its first black president, Archibald Murray, who was born in Barbados. Kenneth G. Standard became the second State Bar President "of color" serving from 2004-2005. President Standard was concerned about the low numbers of African-American law students (especially male) and commissioned a Special Committee on Youth Outreach to identify the causes of and possible responses to the "leakage" in the educational pipeline. *A Major Concern: The Shortage of Minority Lawyers – NYSBA President Heads Committee to Seek Solutions* (The Metropolitan Corporate Counsel, Inc. Vol. 13 No. 3) (March 2005), at http://www.ebglaw.com/files/7342_article_1329.pdf. As a result, the NYSBA developed a new program designed to introduce high school students to law school, including by attending a mock law school class.[17]

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[16] NYSBA Report at 9, Table 6 New York Judges by Race/Ethnicity and Gender (2000) and at 10 (noting 22.8 % minority representation among judges).

[17] A description of the NYSBA high school pipeline program (Youth Law Day Program), together with sample agendas, planning timeline and course materials is available on the NYSBA website. *See* Youth Law Day, New York State Bar Association's Special Committee on Youth Outreach , at http://www.nysba.org/AM/PrinterTemplate.cfm?Section=Youth_Law_Day1

Also during President Standard's tenure reforms were made to the NYSBA's governance structure to open up leadership opportunities for attorneys of color. The Association's by-laws were amended to increase by two seats the size of its executive committee, going from 24 to 26 members, with those two additional seats dedicated for diverse attorneys. At the same time, the NYSBA also added 12 minority seats to the association's House of Delegates, expanding the number of seats from 283 to 295. In recognition of these efforts, the NYSBA was awarded the ABA's Partnership Award in 2005. *See* http://www.americanbar.org/content/dam/aba/migrated/barserv/partnership/2005/partner10.authcheckdam.pdf.

For his work in promoting diversity in the profession, former President Standard in 2011 received the ABA's Life Achievement Award for Excellence in Pipeline Diversity.

The NYSBA's current president Seymour W. James, Jr., is African-American. President James, like his predecessors, has a deep commitment to diversity:

> At the State Bar, we know how much we benefit from having diverse perspectives inform our work, and we continue to make our association more inclusive. A long-standing priority of the State Bar has been to ensure that our association reflects the diversity of our profession and our society. We have been making steady progress in that area and through the President's Section Diversity Challenge, our immediate past president Vince Doyle has done an outstanding job continuing

> this tradition. I look forward to building upon his work and that of past presidents.

Making a Difference, NYSBA Journal (June 2012) at 5.

In keeping with the State Bar's long-standing commitment to diversity, and the ABA's efforts on the national stage, the NYSBA commissioned a report that comprehensively examined the state of diversity in the legal profession in New York in 2007 (*see* NYSBA Report, *supra*, at 4) and charted in a 2008 report the next steps for the State Bar to pursue.[18] The Executive Committee of the NYSBA adopted a resolution endorsing the 2008 report and its recommendations to bring greater diversity to the profession.

The NYSBA's Commercial and Federal Litigation ("ComFed") Section established in 2006 a significant new diversity initiative designed to attract attorneys of color to NYSBA and the ComFed Section: the Smooth Moves CLE Program and Awards Ceremony. The event offers complimentary CLE programming relevant to career development such as practice development techniques and public sector career opportunities. It also recognizes an esteemed attorney or jurist of color through the presentation of the Section's Honorable George Bundy Smith "Pioneer Award." The Pioneer Award is given each year to an attorney of color whose career accomplishments exemplify those of the retired New York Court of Appeals judge for whom the award is named: legal excellence, community involvement, and mentoring.[19] Judge Smith was a pioneer in the civil rights movement and devoted 30 years of public service in the New York judiciary, including 14 years as an associate judge of the Court of Appeals. In its six years, the Smooth Moves program has drawn together more than one thousand lawyers and judges of color for networking and career development, and attracted hundreds of new diverse members to the NYSBA.

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[18] NYSBA Special Committee on Civil Rights, *Steps Towards a More Inclusive New York and America* (October 2008), at http://www.nysba.org/Content/NavigationMenu42/November2008HouseofDelegatesMeetingAgendaItems/FinalCivilRightsAgendaReport.pdf.

Through these various diversity initiatives, the membership of the State Bar has become more diverse, with attorneys of color increasing from around 8 percent in 2003 to nearly 12 percent in 2012.

The NYSBA's Immediate Past President Vincent E. Doyle III launched the Section Diversity Challenge in which he personally challenged each of the Association's 25 sections to take concrete steps in 2011-2012 to increase diversity in the association and the profession as a whole. The outpouring of ideas from the sections, supported by concrete action plans with both short and long-term goals, earned accolades from the NYSBA leadership—and, in turn, national recognition by the ABA. On August 3, 2012, the ABA presented the ABA's Partnership Award to the NYSBA for its "substantial and innovative efforts to advance diversity" within the association and broader legal community. *See* ABA Press Release, New York State Bar Association and Baton Rouge Bar Foundation Honored with 2012 ABA Partnership Award (August 1, 2012), at http://www.abanow.org/2012/08/new-york-state-bar-association-and-baton-rouge-bar-foundation-honored-with-2012-aba-partnership-awards.

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[19] Recipients of the Pioneer Award include Hon. George Bundy Smith himself (who received the inaugural award in 2007); Cesar Perales, the Co-Founder and past President and General Counsel of Latino Justice, who is currently serving in the Cuomo Administration as the Secretary of State for the State of New York; Elaine R. Jones, Director-Counsel Emeritus of the NAACP Legal Defense and Educational Fund; the father-son named partners of the esteemed Manhattan law firm of Kee & Lau-Kee; the Honorable Carmen Beauchamp Ciparick, Associate Judge of the New York Court of Appeals; and the Honorable Samuel L. Green, retired Senior Associate Justice of the New York State Supreme Court Appellate Division, Fourth Department.

4. The NYSBA's New State-wide Diversity Pipeline Initiative.

One of the new diversity initiatives that came out of the NYSBA's Section Diversity Challenge is a state-wide pipeline program aimed at undergraduate students of color. The concept, developed and spearheaded by the NYSBA's ComFed Section, is to have each law school in New York State reach out to nearby colleges and recruit minority undergraduates to participate in an abbreviated moot court competition at the law school. The competition consists of reading a handful of cases, meeting with an attorney advisor, and participating in a half-day competition consisting of two or three rounds of oral argument. The model is designed to spark interest in law school by exposing undergraduate students to law students, lawyers, judges, and law school admissions staff in a fun and supportive atmosphere with the chance to win cash prizes—and without requiring participants to make a burdensome time commitment (there is no writing component). The inaugural competition was held at the State University of New York at Buffalo Law School in April 2012, and drew contestants from the undergraduate program at the State University of New York at Buffalo and one other area school. The program was well received by the participating college students, attorney advisors, judges and administrators. The program is now poised to reach additional colleges and junior colleges in the Buffalo area and target an expanded group of students outside pre-law and criminal justice majors—and the Buffalo program will serve as a template for other schools to follow. At least two other law schools in New York are expected to establish similar moot court programs in 2012-2013.

Responsibility for these undergraduate moot court programs is shared among the minority law student organizations at each law school. The NYSBA program is designed to be multi-cultural and attract students of color across the spectrum. Through this and other pipeline efforts the NYSBA strives to attract more diverse students to law school, a goal that remains critical to the future of the profession.

CONCLUSION

The government has a compelling interest in promoting diversity in the legal profession. That can be achieved only if colleges and universities graduate students of color in substantial numbers to fill law school seats. Accordingly, the holding in *Grutter* that racial diversity in law school is a compelling state interest should be re-affirmed in the context of the undergraduate program at issue here, and that aspect of the court of appeals' decision affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, HAWAII, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEW MEXICO, NORTH CAROLINA, VERMONT, WASHINGTON, WEST VIRGINIA, THE DISTRICT OF COLUMBIA, AND THE TERRITORY OF THE U.S. VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The amici States operate systems of public colleges and universities to educate their citizens and others, and prepare them to be productive and valuable contributors to the workplaces and communities of their States, of the Nation, and of the world.[1] Although amici's institutions of higher learning vary widely in the challenges they face and the goals and priorities they seek to pursue, the amici States all share a strong interest in preserving the flexibility of their varied institutions to pursue a range of strategies to achieve the educational benefits of diversity in higher education.

Every State in the nation operates a system of higher education—from California, with 148 public institutions of higher learning; to New York, with seventy-eight; to Rhode Island, with three.[2] States provide an array of postsecondary schools, including two-year community colleges, four-year colleges and universities, research and doctoral institutions, and professional, vocational, and technical schools. The missions of these schools differ significantly, as do their resources, their governing structures, and the characteristics of the populations they serve.

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[1] Amici the District of Columbia and the U.S. Virgin Islands are not States but operate their own systems of public higher education, and therefore also have a strong interest in the issue before the Court. In addition to the States that join this brief, a number of other States are represented by briefs expressing similar views filed either on their own behalf or on behalf of their state universities.

[2] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics: 2011*, at 409 (tbl. 280), *available at* http://nces.ed.gov/pubs2012/2012001.pdf ("*2011 Education Statistics*").

Indeed, a single State's system of public higher education typically includes a wide variety of institutions. For example, the State University of New York system includes institutions ranging from major research universities to four-year colleges to community colleges. These diverse institutions are located in rural, suburban and urban areas; have varying degrees of selectivity; and draw from markedly different applicant pools.

Overall, public universities and colleges enroll the vast majority of Americans pursuing postsecondary education. In 2009-2010, for example, such institutions enrolled about seventy-two percent of postsecondary school students nationally.[3] For students of moderate means, public schools play an especially important role: the average expense of attending a private undergraduate college is almost three times greater than the cost of the public equivalent.[4]

To successfully fulfill their long-standing role in providing public higher education, States must have the freedom and flexibility to create strong institutions tailored to the needs of each particular State and its citizens. In striving to meet these objectives, the amici States have learned, through decades of experience, that the existence of a diverse educational community enriches the learning environment for all students and better prepares them to excel in a heterogeneous world.

The amici States recognize that because of our nation's history of slavery and segregation enforced by law, the Constitution limits how racial classifications may be used, even when those classifications are intended to broaden the intellectual discourse and further the goals of equality and democracy. Consequently, the amici States have worked to formulate admission policies that promote diversity in a manner consistent with constitutional requirements. In doing so, state colleges and universities across the nation have relied for more than three decades on the guidance provided by this Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and for nearly a decade on the further guidance provided by *Grutter v. Bollinger*, 539 U.S. 306 (2003). Amici States urge this Court to reject petitioner's invitation to alter that guidance (Pet. Br. 24), and thereby destabilize the careful judgments that each State has made in light of the conditions and needs facing its own particular institutions of higher learning.

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[3] *2011 Education Statistics*, supra, at 291 (tbl. 199).

[4] *2011 Education Statistics*, supra, at 4.

BACKGROUND

The University of Texas at Austin (UT)—like many of the public colleges and universities operated by the amici States—has a decades-long history of working to ensure that its undergraduates experience the educational benefits of diversity. For many years, UT's undergraduate admissions process focused largely on standardized test scores and high school class rank, but also considered applicants' racial and ethnic background to achieve greater diversity in its academic community. Pet. App. 15a-16a.

In 1996 the United States Court of Appeals for the Fifth Circuit decided *Hopwood v. Texas*, which held in broad terms that UT's law school could no longer consider applicants' race in the admissions process in any way or for any purpose. 78 F.3d 932, 962 (5th Cir. 1996). Following the *Hopwood* decision, UT stopped taking race into consideration in its undergraduate admissions decisions also. S.J.A. 41a. This change led to a large decrease in the enrollment of African-American first-year students, and a smaller but still significant decrease in the enrollment of Hispanic first-year students. Pet. App. 19a.

Thereafter, UT and the Texas Legislature adopted two main strategies that, while race-neutral on their face, were designed to achieve racial and ethnic diversity at the institution. First, the Legislature enacted the Top Ten Percent Law, a mechanical rule requiring the State's public colleges and universities to admit any Texas high school senior who was in the top ten percent of his or her graduating class. Tex. Educ. Code § 51.803. The law's announced target and principal purpose was to increase the admission of underrepresented minorities at UT. Because of the presence of de facto racial and ethnic segregation in Texas's high schools (*see* Pet. App. 57a n.150), the law succeeded in increasing the percentages of African-American and Hispanic enrollment at the school. Pet. App. 20a.

For the spots in the entering class not filled by the mechanical Top Ten Percent Law, UT employed a holistic process that considered applicants on an individualized basis. This holistic evaluation of applications did not explicitly consider applicants' racial or ethnic background, but it was nonetheless partially designed to increase minority enrollment by considering factors, such as socio-economic status, that were thought to be correlated with minority status. Pet. App. 121a.

In 2003, this Court in *Grutter* resolved a conflict in authority between the Fifth Circuit's decision in *Hopwood* and decisions from the Sixth and Ninth Circuits holding that institutions of higher education could, consistent with the Constitution, consider race in admissions in a narrowly tailored fashion to promote educational diversity. *Grutter* confirmed that colleges and universities may consider race as a "plus" factor as part of an individualized and holistic admissions process. 539 U.S. at 334.

Grutter thus rejected *Hopwood's* sweeping prohibition on all consideration of race in university admissions and restored a measure of flexibility to public educational institutions within the Fifth Circuit (and elsewhere) seeking to achieve the educational benefits of diversity. UT thereafter reviewed whether to exercise that restored flexibility, commencing "several months of study and deliberation, including retreats, interviews, review of data of diversity in the classroom, and other factors." J.A. 396a; *see also* J.A. 432a.

Based on its review, in 2004 UT decided to add the consideration of race as one factor "within a larger admissions scoring index" used for its holistic process for evaluating those applicants who were not admitted pursuant to the Top Ten Percent Law. Pet. App. 23a. UT found that it had not yet achieved a "critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity." Pet. App. 23a.

When the Top Ten Percent Law was first implemented in 1998, about thirty-seven percent of UT's entering class consisted of in-state applicants admitted under the law. S.J.A. 31a. The percentage grew rapidly over the ensuing decade. By the time this litigation commenced in 2008, about seventy percent of the entering class consisted of in-state applicants admitted pursuant to the Top Ten Percent Law. Accordingly, UT's *Grutter*-type holistic admissions process was used to select about thirty percent of its entering class.[5]

In 2010, the Texas Legislature imposed a cap on the use of the Top Ten Percent Law, providing that it could be used to fill at most three-quarters of those seats reserved for Texas residents. Pet. App. 19a; Tex. Educ. Code § 51.803(a-1). The statutory cap reflects a legislative judgment that at least one-quarter of the seats reserved for Texas residents in UT's entering class, and thus about one-third of the total spaces in the entering class,[6] must now be filled through the holistic, individualized process. The statutory cap effectively arrested, and perhaps modestly reversed, the prior decade-long trend of rapid growth in the proportion of UT's entering class filled through the Top Ten Percent Law.

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[5] These 2008 statistics differ from those contained in the district court's opinion and Petitioner's Brief for two reasons. First, the district court misread a table in the record as presenting data on total enrollment at UT; the table in fact presents data on enrollment of Texas residents only. *Compare* Pet. App. 129a *with* S.J.A. 159a (tbl. 2b). Second, we use University of Texas statistical tables published more recently than were included in the record in this case. These tables also contain enrollment data for other University of Texas campuses. Univ. of Texas System, Office of Inst'l Studies and Policy Analysis, *Facts and Trends 2010*, at 5, *available at* http://www.utsystem.edu/isp/StatHndbk/2010/FullReport.pdf.

This publication also shows that of the thirty percent enrolled through the holistic process in 2008, about one quarter—or almost eight percent of the entering class—were out-of-state residents of the United States and international students and thus about twenty-two percent of the entering class consisted of Texas residents selected by the *Grutter*-type holistic process. UT typically reserves about ten percent of the spaces in its entering class for out-of-state and international students as part of its commitment "to being an international institution." J.A. 188a. Of course, the top ten percent plan is completely infeasible for such students because UT cannot accommodate the top ten percent of all students outside Texas.

The statutory cap will automatically be lifted if any final court order prohibits UT from considering race in its holistic undergraduate admissions process. Tex. Educ. Code § 51.803(k)(1).

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment does not prohibit state colleges and universities from including race as a factor in a holistic, individualized admissions process in order to achieve the significant educational benefits that result from diversity within academic communities.

UT's use of race as a plus factor in a holistic, individualized admissions process would be upheld under *Grutter* if it were used to fill the institution's entire entering class. The institution's choice to use the *Grutter*-type process for a subset of the spaces in its entering class, in conjunction with use of a mechanical percentage plan for another subset, is no less valid under the Constitution.

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[6] Because about ninety percent of the entering class is reserved for Texas residents, the minimum of one-fourth of entering Texas residents who must be admitted pursuant to the holistic process equals about 22.5% of the total entering class (.25 × .90 = .225). Adding the ten percent of the entering class made up by non-Texas residents gives a total of at least 32.5% percent of the entering class that must be filled through the holistic process, subject of course to year-by-year fluctuations in the applicant pool and in the decisions of admitted applicants to enroll.

The decision of the court of appeals upholding UT's use of *Grutter*-type admissions process should be affirmed because it properly ensures equal protection of the laws, fosters academic freedom at institutions of higher learning, and respects the traditional role of States in developing differing solutions to difficult and important problems. This process reflects the balance originally struck by Justice Powell's opinion in *Bakke*, and reaffirmed by the Court in *Grutter*—a balance upon which the States have relied for almost thirty-five years.

The adoption of a percentage plan like the Top Ten Percent Law does not exhaust a State's compelling interest in pursuing the educational benefits of diversity. Although such a percentage plan can lead to increased racial and ethnic diversity under some circumstances, such plans have important limitations and deficiencies that may properly lead state colleges and universities, or state legislatures, either to reject them outright or to decide, as UT has done, to use them for only a portion of the entering class and to supplement them by selecting another portion of the class through a *Grutter*-type individualized, holistic admissions process.

A good-faith educational judgment about whether to adopt a percentage plan, a *Grutter*-type plan, or some combination of the two, is therefore one to which this Court should accord substantial weight. The educational judgment about how and whether to use a percentage plan is informed by numerous factors, including the educational institution's mission, size, selectivity, and traditions, as well as the characteristics of the applicant pool, and many policy considerations. A public institution should have the flexibility to determine that *Grutter*-type individualized assessment of applicants serves as a useful complement to a percentage plan and offsets some of the percentage plan's drawbacks.

ARGUMENT

I. STRICT SCRUTINY ANALYSIS OF RACIAL CLASSIFICATIONS ALLOWS EDUCATIONAL INSTITUTIONS A MEASURE OF FLEXIBILITY IN FORMULATING ADMISSIONS PRACTICES TO FURTHER DIVERSITY

This Court has for decades recognized that the selection of students for admission to public colleges and universities implicates important principles of academic freedom in an area traditionally committed to the discretion of the States. *See Grutter*, 539 U.S. at 328-29. Therefore, although race-conscious admissions policies are subject to strict scrutiny under the Equal Protection Clause, in applying strict scrutiny in the context of public higher education, the Court has given "a degree of deference to a university's academic decision[]" that diversity among students is a compelling state interest, *id.* at 328, and has left room for a university to consider all aspects of its educational mission in selecting specific methods to achieve diversity, *id.* at 339-40. In particular, the Court has held that narrow tailoring does not require a university "to exhaust[] . . . every conceivable race-neutral alternative [or] . . . to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.* at 339.

Bakke and *Grutter* both emphasize that strict scrutiny does not require a court to blind itself to other, equally important, constitutional values. *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J.); *Grutter*, 539 U.S. at 328-29. On the contrary, the "fundamental purpose" of strict scrutiny is to "take 'relevant differences' into account." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995) (remanding for application of strict scrutiny consistent with opinion).

Citing principles of academic freedom and the superior expertise possessed by university officials in the area of admissions practices, the Court has recognized that university administrators must be given some flexibility, subject to defined limits, in designing admissions programs to achieve diversity and the many other goals of an institution of higher learning. Justice Powell's dispositive opinion in *Bakke*—which has become integrated into "the fabric of our law," *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring), as well as the fabric of our university communities—accorded a degree of deference to a public university's judgment about the need to achieve diversity and its good-faith selection of a permissible method of doing so. *Bakke*, 438 U.S. at 312, 318-19 (opinion of Powell, J.). The Court's decision in *Grutter* reaffirmed that strict scrutiny analysis permits breathing room to be given to university administrators in designing admissions programs. 539 U.S. at 339-40; *see also id.* at 329 (a university's good faith is "'presumed' absent 'a showing to the contrary'" (quoting *Bakke*, 438 U.S. at 318-19)).

Such breathing room is grounded, first and foremost, in long-standing constitutional principles of academic freedom. The Court has recognized that the academic freedom of our universities is a "transcendent value," and that its safeguarding is "a special concern of the First Amendment" to which "[o]ur Nation is deeply committed." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decisionmaking by the academy itself." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citations omitted) (citing *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)). An institution's "selection of its student body" is an important component of this academic freedom. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). It is thus essential that universities retain "[d]iscretion to determine, on academic grounds, who may be admitted to study." *Ewing*, 474 U.S. at 226 n.12 (citing *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)); *see also Grutter*, 539 U.S. at 328-29.

The need to accord respect to administrators' judgments about admissions policies, within boundaries, is further rooted in the Court's recognition that such judgments rely on specialized experience, knowledge, and expertise and are subject to ongoing revision and refinement based on conditions observed in the university community. Federal courts are not well-suited to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Ewing*, 474 U.S. at 226 (quoting *Board of Curators v. Horowitz*, 435 U.S. 78, 90 (1978)).

The admissions policies adopted by UT—which combine a mechanical percentage plan with a *Grutter*-type holistic admissions process—exemplify how state institutions' academic freedom allows them to fulfill the traditional role of the States as "laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring), *quoted in Grutter*, 539 U.S. at 342. An approach to equal protection analysis that prevents States from "experimenting and exercising their own judgment in [this] area to which States lay claim by right of history and expertise," *id.* at 583 (Kennedy, J., concurring), would significantly curtail public institutions' ability to nurture the intellectual atmosphere of "'speculation, experimentation and creation'" that the First Amendment aims to foster and protect, *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy*, 354 U.S. at 263).

For these reasons, the Court should harmonize the various constitutional interests at play here in the same manner that *Bakke* and *Grutter* did—by affording measured weight to UT's considered judgment regarding its need for greater diversity and its chosen method for achieving diversity. This does not dilute strict scrutiny analysis, but rather appropriately recognizes the special challenges posed by applying that analysis to review admissions policies and practices of public institutions of higher learning.

II. THIS COURT SHOULD RESPECT STATES' CONSIDERED EDUCATIONAL JUDGMENTS ABOUT WHETHER TO ADOPT PERCENTAGE PLANS FOR UNIVERSITY ADMISSIONS AND WHETHER TO SUPPLEMENT THEM WITH A *GRUTTER*-TYPE HOLISTIC APPROACH

In *Grutter*, this Court reaffirmed that public universities have "a compelling interest in obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. *Grutter* upheld as narrowly tailored a public institution's use of an individualized, holistic approach to admissions that took applicants' race and ethnicity into account in pursuing the educational benefits of diversity. *Id.* at 334.

The holistic approach endorsed by *Grutter* calls for the exercise of multifactored educational judgments on an applicant-by-applicant basis, and therefore resonates deeply with the tradition of academic freedom discussed in Point I. But narrow tailoring does not require all institutions seeking diversity to use a single universal admissions system. Neither the holistic *Grutter*-type approach nor the Top Ten Percent Law favored by petitioners is the only method by which institutions may pursue educational diversity.

Indeed, because of differences in their educational missions, histories, geographic locations, and sizes, and in the characteristics of their applicant pools, universities rely upon a variety of methods to attain diversity. Some public universities employ a *Grutter*-type plan in their admissions. Other universities may rely on a percentage plan to achieve some of the educational benefits of diversity, or like UT, may employ a percentage plan in conjunction with a *Grutter*-type plan. The choice of which methods to use and in which combinations and proportions is quintessentially an academic judgment.

Petitioners assert that they do not contend that a percentage plan is constitutionally required, but argue only that, having adopted a percentage plan to fill a portion of the entering class, Texas is barred from complementing it with a *Grutter*-type approach to selecting students for the remaining spots in the class. Pet. Br. at 35 n.9. But the logic of that position is questionable. If the *use* of a percentage plan for part of the entering class makes a supplemental holistic approach unnecessary, or insufficiently tailored, to pass constitutional muster, then the *possibility* of using a percentage plan would seem to have the same effect. And on the other hand, if it is constitutionally permissible for a university to select its *entire* entering class through a holistic approach, even though a percentage plan might also produce a diverse student body, then it is hard to see why the university should be barred from using that same holistic approach to select *part* of the class, while using a percentage plan to select another part.

The Constitution does not require States to use percentage plans to achieve diversity. *Grutter*, 539 U.S. at 340. Nor does it require States to make an all-or-nothing choice between percentage plans and holistic plans. The choice among permissible methods to achieve diversity should be left to the discretion of state education officers, who are equipped by experience and expertise to assess how the various methods will work as to their particular applicant pools and how the results of those methods will promote the educational benefits of diversity.

A. Percentage plans have important disadvantages.

Percentage plans may have a role to play in university admissions, but they also have real and important limitations. In many places, and for many state colleges and universities, percentage plans may be ineffective in achieving racial and ethnic diversity. Even in those situations where percentage plans can succeed in increasing numerical diversity, there are sound reasons that state university administrators may either reject such plans or choose to supplement them with *Grutter*-type holistic plans, as UT has done.

1. Mechanical percentage plans that base admissions solely on high school class rank can be successful in achieving diversity gains only if specific underlying conditions are present. Most plainly, the ability of a percentage plan to enhance numerical diversity along racial and ethnic lines at a college or university depends on the presence of significant racial and ethnic segregation within the state high school system from which the applicant pool is drawn. *See Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting) ("[p]ercentage plans depend for their effectiveness on continued racial segregation at the secondary school level"). In addition, a percentage plan can succeed only if the population of seniors graduating with high class rank is sufficiently diverse.

Moreover, the success or failure of a mechanical percentage plan will also vary with the characteristics of the particular college or university: a percentage plan may produce different results at a flagship state university (like UT) from the results it would produce at a public college or university that is smaller, draws from a narrower or different geographic area, or has a weaker reputation. First, the non-flagship schools may attract fewer members of the top ten percent, and second, the members they do attract may not be as diverse as at the flagship schools. The experience in Texas confirms this: in 2008, the Top Ten Percent Law filled seventy-six percent of the spots reserved for Texas residents at UT-Austin, but less than nine percent of those spots at UT-San Antonio, presumably because top ten percenters chose to enroll elsewhere.[7] And those top ten percenters who choose to enroll in a non-flagship school may not always enhance racial and ethnic diversity, if minority members of the top ten percent are vigorously and effectively recruited by private as well as public universities.

UT's experience further demonstrates that a percentage plan that produces numeric gains in racial and ethnic diversity university-wide may nonetheless fail to yield sufficient diversity within particular programs. *See* Pet. App. 56a ("minority students remain clustered in certain programs"). Petitioners characterize the concern for diversity within programs as a search for "diversity in every small classroom" (Pet. Br. 29), but they are mistaken. College and university officials may properly seek to provide students with the educational benefits of diversity as they engage in their academic work, and not merely as those students walk across the campus. *See Grutter*, 539 U.S. at 330 (emphasizing that one of diversity's substantial benefits is producing better classroom discussion). And to accomplish that goal, it is necessary to select a diverse student body for particular programs and courses of study, and not merely for the campus as a whole—particularly at a school like UT, where the undergraduate enrollment is exceptionally large and where students apply and are admitted to particular programs. *See* J.A. 164a.

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[7] *Facts and Trends 2010*, supra, at 5-6; *see also id.* at 1 ("At . . . U. T. System institutions [other than Austin], the top 10% represented less than one-third of first-time enrolled students from Texas."). These statistics do not show whether or to what extent the Top Ten Percent Law contributes to racial and ethnic diversity at UT institutions other than UT-Austin.

Indeed, where students are admitted to particular programs, the Top Ten Percent Law may have the perverse effect of reducing racial and ethnic diversity in the most challenging programs, while it increases the numbers of minority entering students overall. Judge Higginbotham made precisely this point. Under the Top Ten Percent Law, "UT must admit a top ten percent student from a low-performing high school before admitting a more qualified minority student who ranks just below the top ten percent at a highly competitive school." Pet. App. 57a n.149. As a result, the diversity produced by the Law may be concentrated in less demanding programs and not in "difficult majors like business or the sciences." *Id.* For all of these reasons, percentage plans may fail to achieve the educational benefits of diversity, or have limited success in achieving those benefits, for many public colleges and universities.

2. Even when the conditions are present that would allow a mechanical percentage plan to achieve meaningful increases in racial and ethnic diversity at a particular university, an institution could reasonably reject the use of such a plan in the exercise of sound educational judgment. Percentage plans replace individualized admissions judgments with a mechanical rule based on

a single applicant characteristic: high school class rank. A public institution could reasonably wish to retain the ability to consider additional factors in its admissions decisions, including, for example, scores on standardized tests, strength of high school curriculum, extracurricular activities, and personal essays. For example, according to the University of North Carolina at Chapel Hill, implementation of a top ten percent plan at the institution would have only a marginal effect on racial diversity, and "would . . . depress almost every . . . indicator of academic quality," thereby resulting in "a significantly less satisfactory admissions system for UNC in most respects." Brief of Amicus Curiae The University of North Carolina at Chapel Hill Supporting Respondents, at 34.

Relatedly, the Court observed in *Grutter* that a percentage plan "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340. The record here bears out that percentage plans are "at best a blunt tool for securing the educational benefits that diversity is intended to achieve." Pet. App. 61a; *see also* Pet. App. 57a ("the Top Ten Percent Law crowds out other types of diversity that would be considered under a *Grutter*-like plan").

3. State college and university officials may have additional policy reasons for rejecting percentage plans, even where such plans may be successful in achieving diversity gains. As noted above, a percentage plan for college or university admissions depends for its success in achieving diversity on a high degree of *de facto* racial segregation in a State's high schools. *See Grutter*, 539

U.S. at 340 ("assuming" without deciding that percentage plans are race-neutral). A State may reasonably choose not to rely on a plan with that feature, because it is in tension with the State's efforts to reduce segregation of its elementary and secondary schools.

Indeed, percentage plans may create incentives for students to undermine important educational goals of the secondary school system. Percentage plans may lead students to choose segregated schools, or less competitive schools, or less difficult high school courses in order to increase their chance of obtaining the benefit of the percentage plan. A recent study found that the Top Ten Percent Law encourages prospective and current high school students in Texas to choose less competitive high schools so as "to improve the chances of being in the top ten percent." Julie Berry Cullen, Mark C. Long & Randall Reback, *Jockeying For Position: Strategic High School Choice Under Texas' Top Ten Percent Plan* 3 (NBER Working Paper No. 16663, 2011), *available at* http://www.nber.org/papers/w16663.

Thus, mechanical percentage plans carry drawbacks that may lead States and their colleges and universities to reject them, even where such plans could be successful in achieving gains in racial and ethnic diversity.

B. A State may adopt a hybrid system that selects part of a class through a percentage plan and part through a *Grutter*-type plan.

The shortcomings and limitations of mechanical percentage plans, as outlined above, may lead state university administrators to reject the use of such plans, or they may instead provide sound reasons to supplement a percentage plan with complementary admissions policies to pursue racial and ethnic diversity. The States' colleges and universities should be given the flexibility to employ percentage plans in combination with a holistic *Grutter*-type admissions policy, as UT has done.

Petitioner's effort to excise UT's *Grutter*-type admissions policy from the institution's overall plan to achieve diversity is misguided. Were UT to employ a *Grutter*-type program to fill its entire entering class, the plan would indisputably qualify as narrowly tailored under the Court's precedents. The result should be no different merely because UT is using the *Grutter*-type policy only as to the subset of its entering class that is not filled through the Top Ten Percent Law.

By using a holistic, individualized evaluation process to fill the spaces remaining in its entering class after application of the Top Ten Percent Law, UT enhances its overall ability to realize the educational benefits of diversity. The holistic process, unlike the mechanical percentage plan, allows UT to pursue diversity "along all the qualities valued by the university," *Grutter*, 539 U.S. at 340, rather than merely replicating whatever diversity there happens to be in the population of students finishing in the top ten percent of their respective high school classes. The holistic approach enables academic judgments to be made on an individualized basis as to some percentage of applicants, thereby mitigating the effects of the percentage plan's mechanical nature. The approach therefore complements the percentage plan by allowing for the admission of some students (both those from underrepresented groups and others) who fall below the percentage cut-off at their particular schools, but who are nevertheless as qualified as, or more qualified than, other applicants automatically admitted under the percentage plan.

The *Grutter*-type holistic approach also allows UT to strive for greater racial and ethnic diversity in specific academic programs and in students' classroom experiences, rather than merely achieving numeric diversity in campus-wide demographics. For example, the record here shows that the holistic policy enables UT to admit underrepresented minorities whose applications or whose interests and talents indicate that they will enroll in programs and courses that otherwise lack racial and ethnic diversity. *See* Pet. App. 57a n.149.

The holistic policy further permits UT to calibrate its overall admissions program on an ongoing basis through periodic review of the characteristics of its academic communities. As the Court of Appeals observed, "some year-to-year fluctuation in enrollment numbers is inevitable . . . [and] the University needs to maintain critical mass in years when yield [from the Top Ten Percent Law] is low just as it does when yield is high." Pet. App. 68a; *cf. Facts and Trends 2010*, supra, at 5-6 (showing significant annual fluctuations in enrollment from Top Ten Percent Law across the University of Texas system from 2005-2009).

As UT's example shows, States should be permitted to exercise their educational judgment to decide that these and other important benefits of a *Grutter*-type admissions policy, employed as a complement to a mechanical percentage plan, may create a stronger admissions policy than a mechanical percentage plan standing alone. The educational judgment about whether the "blunt tool" of a percentage plan (Pet. App. 61a) is sufficient to attain the educational benefits of diversity, or whether some additional and complementary policy should also be pursued, is an academic judgment best made by universities, not courts.

Moreover, courts are ill-suited to second-guess a university's judgment about the appropriate allocation of spaces in its entering class between the percentage-based and holistic components of its admissions program. The judgment about how many admissions slots should be filled using a percentage plan depends on many factors, including what percentile in class rank entitles applicants to automatic admission, how that number was selected, the desirability of the particular institution employing the plan, and particular applicant choices in any given admissions year. For example, as the experience of Texas shows, a statewide percentage plan is likely to fill a far smaller percentage of available undergraduate slots at some of the State's colleges and universities than the same plan fills at a State's flagship university. See supra at 16. Thus, either component of a combined approach may have a limited impact on diversity at any particular college or university.

Contrary to petitioners' arguments (Br. at 38-42), the fact that the complementary and compensatory benefits of the *Grutter*-type component of an admissions program may be limited at a particular institution, because the holistic approach applies only to a subset of admissions decisions, should not lead a court to excise the *Grutter*-type approach from the institution's admissions program.

The same observation could equally support expanding the *Grutter*-type component of the admissions program and reducing the scope of the percentage plan—as Texas has now done by enacting a legislative cap on the proportion of UT's enrollment reserved for Texas residents that may be filled through the percentage plan. Because a percentage plan and a *Grutter*-type approach are both constitutionally permissible methods to achieve the educational benefits of diversity, determinations about precisely where to strike the balance between the percentage-based and holistic components of an admissions program, and decisions about the exact point at which the benefits of a *Grutter*-type component may become too small to justify its continued use, should be left to university administrators in the exercise of their considered academic judgment.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit upholding the constitutionality of UT's admissions program should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AMERICAN CIVIL RIGHTS INSTITUTE, NATIONAL ASSOCIATION OF SCHOLARS, AND PROJECT 21 IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the University of Texas at Austin's race-based admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation, the Center for Equal Opportunity, the American Civil Rights Institute, National Association of Scholars, and Project 21 respectfully submit this brief amicus curiae in support of the Petitioner Abigail Fisher.[1]

For nearly 40 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to be free of racial discrimination. PLF participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The Center for Equal Opportunity (CEO) is a nonprofit research, education, and public advocacy organization. CEO devotes significant time and resources to studying racial, ethnic, and gender discrimination by the federal government, the states, and private entities, and educating Americans about the prevalence of such discrimination. CEO publicly advocates for the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved*, 551 U.S. 701; *Grutter*, 539 U.S. 306.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The American Civil Rights Institute (ACRI) is a nonprofit research and educational organization. ACRI monitors and researches laws that ban government's use of race, sex, or ethnicity in public contracting, public education, or public employment. ACRI devotes significant time and resources to the study of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. ACRI has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Ricci*, 129 S. Ct. 2658; *Parents Involved*, 551 U.S. 701; *Grutter*, 539 U.S. 306. CEO, ACRI, and PLF participated in this case in the court below. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011).

The National Association of Scholars (NAS) is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. NAS supports intellectual integrity in the curriculum, in the classroom, and across the campus. NAS is dedicated to the principle of individual merit and opposes race, sex, and other group preferences. As a group comprised of professors, graduate students, administrators, and trustees, NAS is intimately familiar with the issues relevant to the analysis of this case. NAS, CEO, ACRI, and PLF participated in this case in the court below. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213.

Project 21 is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work. Project 21 has participated as amicus curiae in this Court numerous times. *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity in undergraduate admissions at public universities may be deemed a compelling governmental interest sufficient to justify discriminatory policies based solely on the students' race. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Texas at Austin discriminated against Abigail Fisher in the admission process because of the color of her skin. *Fisher*, 631 F.3d at 216-17. In the decision below, the Fifth Circuit held that because the University was following the reasoning of this Court in *Grutter*, 539 U.S. 306, the race-based admissions program did not violate the Equal Protection Clause. *Fisher*, 631 F.3d at 247.

The Equal Protection Clause mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. This rule admits no exception for expert-endorsed discrimination. "[A]ll governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry." *Grutter*, 539 U.S. at 326 (citations omitted). The language of Title VI of the 1964 Civil Rights Act is even more explicit. *See* 42 U.S.C. § 1981.

After reciting the proper standard for judging race-based discrimination, *Grutter* held that government may employ racial classifications to secure "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. The Court noted that its finding did not sanction "outright racial balancing," but was inextricably linked "to the educational *benefits* that diversity is designed to produce." *Id.* at 330 (emphasis added). Thus, the Court's compelling interest finding necessarily employs a cost/benefit analysis with respect to diversity's educational role.

In the abstract, any number of benefits can be attributed to a diverse student body. Greater diversity might teach tolerance, acceptance, and open-mindedness about other racial groups. It might lead to exposure to people with different ideas or experiences.

But no proffered benefit can justify the high costs of racial discrimination. Therein lies the error with the *Grutter* Court's compelling interest finding. Diversity cannot be viewed in a vacuum as an abstract good; constitutional scrutiny arises because of the means—racial classifications—that are being used to achieve the end—"the educational benefits that flow from a diverse student body."

Strict scrutiny of race-based classifications requires that the government show "that its purpose or interest is both constitutionally permissible and substantial." *In re Griffiths*, 413 U.S. 717, 721-22 (1973). Only one interest—remedying the effect of past, intentional discrimination—has ever repeatedly been found sufficiently compelling to allow classification based on race. *See Green v. Cnty. Sch. Bd. of New Kentucky*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Unlike remedying past intentional discrimination, which has its roots in the historical evils of the slave trade, slavery, and Jim Crow, the benefits flowing from a diverse student body was an invention of politically interested social scientists. Previously, this Court had rejected such flimsy justifications. Segregation, the "role model theory," and "societal discrimination," were rejected by this Court as insufficiently compelling to justify racial discrimination. Put simply, until *Grutter*, this Court had never found a social science exception to the Equal Protection Clause. The social science foundation of *Grutter* was never sound, has grown shakier with contrary empirical findings, and crumbles in light of evidence that universities have thrived without racial preferences. This evidence became available when states across the country began prohibiting universities from differentiating students on the basis of race. *See, e.g.*, Cal. Const. art. I, § 31; Mich. Const. art. I, § 26.

Grutter further ignored the costs that arise when the state employs racially discriminatory practices to achieve a diverse student body. "If the need for the racial classifications . . . is unclear, . . . the costs are undeniable." *Parents Involved*, 551 U.S. at 745 (plurality op.). Those costs are discussed in this and other amicus briefs. Racial classifications destroy our very form of constitutional government by requiring governments to stereotype individuals, assuming they act in accordance with their race. So long as the "undeniable" costs outweigh the speculative benefits, the state simply cannot have a compelling interest in employing racial classifications.

Grutter is irredeemably flawed and should be overruled. Principles of *stare decisis* cannot save it. *Stare decisis* should give way when "such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). By deferring to the university, *Grutter* undermines decades of strict scrutiny review. Further, as noted in the court below, *Grutter* provides no guidance on how to apply strict scrutiny to university admissions policies. "[I]t is impossible to subject such uses of race to strict scrutiny. *Grutter* rewards admissions programs that remain opaque." *Fisher*, 631 F.3d at 253 (Garza, J., concurring specially). And because there are few if any reliance interests in continuing racially discriminatory admissions policies, *Grutter* can be overruled without causing students or university officials any legitimate harm.

Lastly, *Grutter* should be overruled because public universities across the country invoke it as an unqualified endorsement of race-based admissions standards. At a time when the changing demographics of America makes ethnic-sorting increasingly untenable, university officials strive to inject race into their decisionmaking. *Grutter* was not intended to be a blanket endorsement of racially discriminatory admissions policies, yet that is its legacy. In *Grutter*, the Court surmised that employing racial classifications would no longer be justified by 2028. 539 U.S. at 322. In fact, they are not justified now. The only way to stop rampant discrimination by the nation's public universities is to overrule *Grutter*.

ARGUMENT

I

A "COMPELLING INTEREST" MUST BE OF OVERWHELMING AND INDISPUTABLE GOVERNMENTAL IMPORTANCE

The Equal Protection Clause protects "persons, not groups." *Adarand*, 515 U.S. at 227. "It follows from that principle that all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Id.* The Fourteenth Amendment's intent is to ensure that all persons will be treated as individuals, not "simply as components of a racial . . . class," because "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'" *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (citation omitted).

For this reason, "racial classifications are simply too pernicious to permit" anything but the most needed justifications. *Gratz*, 539 U.S. at 270. Indeed, since the inception of strict scrutiny analysis for race-based classifications in *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (accepting national security as a compelling interest during wartime), this Court has found very few interests sufficiently compelling to justify state-sponsored racial discrimination. Notably, *Korematsu* is today ridiculed for its abhorrent result and its lackadaisical approach to strict scrutiny. *See Adarand*, 515 U.S. at 236. ("Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.") The *Adarand* Court's renunciation of *Korematsu*, reinforces the modern Court's reluctance to find a "compelling interest" based on mere speculation. *See* Brandon M. Carey, *Diversity in Higher Education: Diversity's Lack of a "Compelling" Nature, and How the Supreme Court Has Avoided Applying True Strict Scrutiny to Racial Classifications in College Admissions*, 30 Okla. City U. L. Rev. 329, 345 (2005).

In a number of school desegregation cases following *Brown*, this Court found racial classifications constitutional when employed to remedy past intentional discrimination. *Swann* is of particular importance because the Court distilled its reasoning behind the compelling interest of remediation:

> Our objective in dealing with the issues presented by these cases is to see that school

> authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

402 U.S. at 23.

Before *Grutter*, this Court never approved a race classification that was not designed to remedy the effects of past intentional discrimination.[2] In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-277 (1986), this Court rejected racial classifications to further an interest "in providing minority role models for its minority students." This Court also rejected racial classifications to remedy the effects of societal discrimination. *See Croson*, 488 U.S. at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group."). This Court also rejected Florida's interest in protecting the welfare of a child as sufficiently compelling to permit race-based discrimination. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("[P]rivate biases and the possible injury they might inflict are [im]permissible considerations for removal of an infant child from the custody of its natural mother.").

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[2] *Bakke* cannot be said to endorse the position that the state has a compelling interest in "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. While Justice Powell certainly wrote that "diversity is compelling," he was the only Justice to do so. *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). Only two points commanded a majority of the Court: (1) Alan Bakke was entitled to admission; and (2) some amorphous consideration of race is allowable under the Constitution. *Id.* at 271-72.

"Simply because the [government] may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny." *Parents Involved*, 551 U.S. at 743 (plurality op.). A compelling interest must be of paramount government importance before it can be used as the basis to racially discriminate against individuals.

II

THE "BENEFITS THAT FLOW FROM A DIVERSE STUDENT BODY"ARE HIGHLY DUBIOUS

With *Grutter*, 539 U.S. at 328, this Court abandoned decades of equal protection jurisprudence by finding a compelling interest untethered to remedying the past effects of intentional discrimination: the interest in reaping "the educational benefits that flow from a diverse student body." This "benefits" analysis is flawed for two primary reasons. First, the nature of social science evidence in general—and the evidence relied upon in *Grutter* in particular—is an inherently poor rationale for infringing constitutionally protected rights. Second, students are thriving in states that have banned the use of racial preferences in education, undercutting the claim that preferences are sufficiently compelling to justify racial discrimination.

A. There Should Be No Social Science Exception to the Equal Protection Clause

For decades, this Court rejected social scientists' rationales for separating, classifying, and discriminating against individuals on the basis of race. *Grutter*, however, relied heavily upon social science studies in substantiating its compelling interest finding. 539 U.S. at 330. The Court was wrong to do so. "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

"[W]hen racial segregation was challenged in the 1940s and 1950s, the improved-education argument was made by social science experts on behalf of the proponents of segregation." Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 428 (2005). In *Davis v. Cnty. Sch. Bd.*, which was a companion case to *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), the State of Virginia presented scores of testimony and social science research to demonstrate that "segregated education at the high school level is best for the individual students of both races." Clegg, *Attacking Diversity*, *supra*, at 428. Texas similarly defended segregation in *Sweatt v. Painter*, 339 U.S. 629 (1950), by citing studies by the U.S. government and the President of Harvard to argue that "there is ample evidence today to support the reasonableness of the furnishing of equal facilities to white and Negro students in separate schools." Clegg, *Attacking Diversity*, *supra*, at 429.

These "studies" were by the leading social scientists of their day, and given the demonstrated flexibility of the discipline, the Court has viewed subsequent studies with skepticism. In *Wygant*, the Court was inundated with amicus briefs extolling the benefits of the "role model theory."[3] The same is true with *Croson*, where amicus briefs recited the necessity of racial preferences towards ending societal discrimination in public contracting.[4] Despite social science evidence purporting to demonstrate the utility of these race-based classifications, this Court consistently and properly rejected the idea that a compelling government interest could be manufactured through social science evidence. "There are few government functions that cannot be described as rooted in some interest that seems 'compelling,' and it will always be possible to find some social scientist who supports the notion that the consideration of race will improve that function." Roger Clegg, *Race-Based Review*, National Review Online (Nov. 28, 2006).[5]

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[3] *See, e.g.*, Brief for Nat'l Educ. Ass'n, et al., as Amici Curiae Supporting Respondents, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84-1340); Brief for Nat'l Bd., YWCA of the USA, et al., as Amici Curiae Supporting Respondents, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84-1340).

[4] *See, e.g.*, Brief for the Md. Legislative Black Caucus as Amicus Curiae in Support of Appellant, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (No. 87-998); Brief for the Minority Bus. Enter. Legal Def. & Educ. Fund, Inc. & the La. Ass'n of Minority & Women Owned Businesses, Inc., as Amici Curiae in Support of Appellant, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (No. 87-998).

The diversity rationale adopted by the *Grutter* Court was created out of social science-backed whole cloth; it was dubious then, and has not withstood the test of time. In particular, the rationale and evidence underlying the educational benefits that flow from a diverse student body have been significantly undercut since the Court's decision. *See, e.g.*, Clegg, *Attacking Diversity*, *supra*, at 425-30 (collecting studies that the social science evidence purporting to tout diversity's educational benefits was and is seriously flawed); Roger Clegg, *The Educational Benefits of 'Diversity'*, National Review Online, Feb. 1, 2010 (describing new studies confirming that the evidence touting diversity is "marginal" and "uncertain");[6] John Rosenberg, *"Diversity" Research ~~Advances~~ ~~Progresses~~ Accumulates*, Discriminations, Feb. 6, 2010.[7]

B. The Benefits That Flow From a Diverse Student Body Can Be Accomplished Without Racial Discrimination

If the benefits that flow from a diverse student body can be achieved without resorting to racial discrimination, the asserted race-defined interest cannot be compelling.[8] In 1996, California banned its public universities from considering race in admissions decisions. Cal. Const. art. I, § 31. Recognizing California's race-neutral admission policy, this Court in *Grutter* recommended that "[u]niversities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." 539 U.S. at 342. The results are in. Since California's ban on racial discrimination in admissions, its universities continue to thrive and racial diversity continues to increase on public university campuses.

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[5] *Available at* http://www.nationalreview.com/articles/219343/race-based-review/roger-clegg#.

[6] *Available at* http://www.nationalreview.com/phi-beta-cons/39876/educational-benefits-diversity?page=1.

[7] *Available at* http://www.discriminations.us/2010/02/"diversity"-research-advances-progresses-accumulates/.

The University of California (UC) system consists of nine undergraduate campuses.[9] The UC schools tracked the offers for admission by race and/or ethnicity from 1997 through 2011. These data show:

- University-wide, underrepresented minorities (defined as American Indian, African American, and Chicano/Latino students) constituted 19.6% of the students (7,385 total) to whom admission was offered as freshmen in 1997.[10] By 2010, underrepresented minorities received 28.3% of the freshmen offers of admission (16,635 total), an increase of 9,250 offers of admission to underrepresented minority students. Meanwhile, offers of admission to white students declined from 42.6% in 1997 to 30.6% in 2010.[11]

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[8] This argument is similar to, but distinct from, a narrow tailoring analysis. A compelling interest is only required where the government has classified individuals according to their race. Thus, the *Grutter* Court necessarily held that the benefits that flow from a diverse student body was "compelling" in order to justify the law school's racial discrimination. But, if those benefits can be secured without resorting to discrimination, the interest can no longer be seen as compelling. In contrast, a narrow tailing inquiry accepts the compelling interest as given and analyzes whether the means chosen "work the least harm possible." *Bakke*, 438 U.S. at 308 (op. of Powell, J.).

[9] The new Merced campus, and campuses dedicated solely to graduate level courses, are not included in the data set forth in this brief, except as noted.

- The percentage of offers of freshmen admission that were extended to underrepresented minorities was higher or the same in 2010 than 1997 on six of the eight UC campuses that had data for 1997 through 2010.[12] Preliminary data for 2011 shows the same result for seven of the eight campuses.[13]

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[10] While Proposition 209 was passed in 1996, an injunction delayed its effective date until August of 1997. *See* Eva Paterson & Oren Sellstrom, *Equal Opportunity in a Post-Proposition 209 World*, 26 Hum. Rts. 9 (Summer 1999). The UC initially stopped considering race in its undergraduate admissions decisions pursuant to Regents Resolution SP-1, effective January 1, 1995. UC Irvine website, Office of Equal Opportunity & Diversity, *A Brief History of Affirmative Action*, *available at* http://www.eod.uci.edu/aa.html (last visited May 21, 2012).

[11] Univ. of Cal., Office of the President, *California Freshman Admissions for Fall 2008* (UC 2008 Admissions), Table 4, *available at* http://www.ucop.edu/news/factsheets/fall2008adm. html (last visited May 21, 2012); Univ. of Cal., Office of the President, *California Freshman Admissions for Fall 2010* (UC 2010 Admissions), Table 3, *available at* http://www.ucop.edu/ news/factsheets/fall2010adm.html (last visited May 21, 2012); Univ. of Cal., Office of the President, *New California Freshman Admits Fall 1997, 1998, 1999, and 2000*, Table A, *available at* http://www.ucop. edu/ucophome/commserv/preadm_a0400.pdf (last visited May 21, 2012). Preliminary data for 2011 show that these trends have continued (for 2011, underrepresented minorities received 30.8% of the freshman offers of admission, while offers to white students fell to 30.6% of offers), but, for reliability, this brief uses the finalized 2010 data. Univ. of Cal., Office of the President, *California Freshman Admissions for Fall 2011* (UC 2011 Admissions), Table 3, *available at* http://www.ucop.edu/news/fact sheets/fall2011adm.html (last visited May 21, 2012).

Since 1997, minorities continue to seek and be offered admission to the University of California in greater numbers without resorting to racial preferences. California has thus enjoyed the educational benefits that flow from a diverse student body without resorting to racial discrimination.

III

THE COSTS ATTENDANT TO RACIAL CLASSIFICATIONS OUTWEIGH ANY "BENEFITS THAT FLOW FROM A DIVERSE STUDENT BODY"

The speculative benefits of a diverse student body must be weighed against the inherent, undeniable, and well-known costs. "If the need for the racial classifications . . . is unclear, . . . the costs are undeniable." *Parents Involved*, 551 U.S. at 745 (plurality op.). The harm caused by government policies that prefer some individuals over others based on race is well known by this Court.[14] Government racial classifications tear at the very fabric of our society, dehumanize us as individuals, and significantly hamper the very students they are designed to protect.

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[12] UC 2008 Admissions, Table 4 and UC 2010 Admissions, Table 3.

[13] UC 2011 Admissions, Table 3.

[14] This brief focuses only a few of the well-known costs of governmental race-based preferences and discrimination. For a more exhaustive list *see* Clegg, *Attacking Diversity*, *supra*, at 435-36.

A. Government Racial Classifications Are Destructive of Democratic Society

"Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). "The equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand*, 515 U.S. at 240 (1995) (Thomas, J., concurring). Discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society." *Croson*, 488 U.S. at 521.

These costs are especially high in an increasingly multi-cultural and multi-ethnic society.[15] A state's "[p]referment by race . . . can be the most divisive of all policies." *Grutter*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting). Such a policy "contain[s] within it the potential to destroy confidence in the Constitution and the idea of equality," *id.*, and "escalat[es] racial hostility and conflict." *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting). Wherever governments implement policies that prefer one race over another, the destructive effects of such a policy in every society that adopts it is not a matter of speculation or prediction.

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[15] In the past ten years the number of Americans who identify as belonging to "two or more races" has increased 32.0%. Further, growth in the number of individuals self-identifying as Hispanic, Asian, American Indian, Black, or Native Hawaiian has far outpaced that of individuals who self-identify as "white alone." *See* United States Census 2010, 2010 Census Data, *available at* http://2010.census.gov/2010census/data/ (last visited May 21, 2012). Indeed, there are now more "minority" than "nonminority" babies born each day in the United States today. Carol Morello & Ted Mellnik, *Census: Minority Babies Are Now a Majority in the United States*, Washington Post, *available at* http://www.washingtonpost.com/local/census-minority-babies-are-now-majority-in-united-states/2012/05/16/gIQA1WY8UU_story.html (last visited May 22, 2012).

> [E]ven a broad-brush look at what affirmative action programs have actually done in various countries reveals a failure to achieve their goals may be the least of the problems created by these programs. Poisonous intergroup relations and real dangers to the fabric of society have also been produced by affirmative action.

Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* 22 (2004).

The only way to justify the destructive consequences of a governmental policy of racial preferences is to declare that "any amount of social redress, however small, is worth any amount of costs and dangers, however large." *Id.* at 198. This Court should reject that premise.

B. Government Racial Classifications Dehumanize Us as Individuals

The intent of the Fourteenth Amendment is to ensure that all persons will be treated as individuals, not "as simply components of a racial . . . class." *Miller*, 515 U.S. at 911 (internal quotation marks omitted, citation omitted). "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring). Moreover, "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'" *Miller*, 515 U.S. at 912 (citation omitted).

Most public universities classify students according to broad racial categories of "African-American" or "Hispanic" or "Asian," *see Fisher*, 645 F. Supp. 2d at 593-99, thereby defining individuals within these groups as the embodiment of their group identities. But nothing intrinsic in these categories assures a commonality of experience. *See* Peter Wood, *Diversity: The Invention of a Concept* 25 (2003) ("The term 'Hispanic' clearly doesn't describe common social background; it doesn't designate a common language; and it doesn't, for that matter, describe gross physical appearance."). The same can be said of the term "Asian" which, to name a few examples, includes individuals of Japanese, Vietnamese, Indian, or Chinese descent.

The diversity movement perpetuates group-based stereotypes, weakening one of the greatest achievements of the Civil Rights Movement—laying bare the perniciousness of stereotyping. *See* Wood, *supra*, at 43. This group-right diversity concept contravenes the very premise of the Constitution:

> Diversity raised to the level of counterconstitutional principle promises to free people from the pseudo-liberty of individualism and to restore to them the primacy of their group identities . . . . Real equality according to [diversity proponents], consists of parity among groups, and to achieve it, social goods must be measured out in ethnic quotas, purveyed by group

> preferences, or otherwise filtered according to the will of social factions.

Id. at 14. "Once we allocate political rights by group identity, the assignment of group identity becomes the crucial determinant of everything else for the individual." *Id.* at 43. Such a result cannot be countenanced under the United States Constitution designed to thwart precisely the dangers now promoted as goals. Racial preferences stigmatize recipient groups by implying that the recipients are inferior and need special protection, thus generating the "politics of racial hostility." *Id.* at 173-74. "'Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become [ ] truly irrelevant.'" *Adarand*, 515 U.S. at 229 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)).

C. Racial Preferences in College Admissions Cause Serious Harm to the Very Students the Preferences Are Intended to Benefit

Several studies reveal that racial preferences in college admissions result in an "academic mismatch" that leads to lower grades and higher drop-out rates among minority students. *See, e.g.*, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004) (describing academic mismatch at law schools); Rogers Elliott, et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, Research in Higher Education*, Vol. 37, No. 6 (1996) (mismatch at elite colleges and universities). Academic mismatch begins when elite universities lower their academic standards to admit a more racially diverse student population. Schools one or two academic tiers below must do likewise, since the minority students who might have attended those lower ranking universities based on their own academic record are instead attending the elite colleges. The result is a significant gap in academic credentials between minority and nonminority students at all levels.

Scholars identified the academic mismatch phenomenon even before race-conscious admission policies became entrenched at leading universities:

> If Harvard or Yale, for example, admit minority students with test scores 100 to 150 points below that normally required for a nonminority student to get admitted, the total number of minority students to get a legal education is not increased thereby. The minority students given such preference would meet the normal admissions standards at Illinois, Rutgers or Texas. . . . Thus, each law school, by its preferential admission, simply takes minority students away from other schools whose admissions standards are further down the scale . . . . In sum, the policy of preferential admission has a pervasive shifting effect, causing large numbers of minority students to attend law schools whose normal admission standards they do not meet, instead of attending other law schools whose normal standard they do meet.

Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. Tol. L. Rev. 377, 384 (1970). Later research confirms this phenomenon.

Even supporters of racial preferences have had to acknowledge that students who attend schools where their academic credentials are substantially below those of their fellow students will tend to perform poorly. "College grades [for students admitted based on race] present a . . . sobering picture." William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 72 (1998). "The grades earned by African-American students . . . often reflect their struggles to succeed academically in highly competitive academic settings." *Id.* For example, in 1990, the average grade point average of African-American freshmen at the University of Texas was 1.97, compared to 2.45 for nonminority freshmen, whose average SAT scores were over 100 points higher. Charles J. Sykes, *The Hollow Men: Politics and Corruption in Higher Education* 47 (1990).

These struggles tend to result in shifting majors as African-American and Hispanic students find the coursework too difficult or advanced given their skill level. *See* Elliot, et al., *supra*; Stephen Cole & Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124, 212 (2003) ("African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools."). The lower an African American student's academic credentials are relative to the average student at his undergraduate college or university, the lower his grades are likely to be and the less likely he is to graduate. Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. Lab. Econ. 289, 301, 303 (1995); Audrey Light & Wayne Strayer, *Determinants of*

College Completion: School Quality or Student Ability?, 35 J. Hum. Resources 299, 301 (2000).

This leads to African-American students failing or dropping out of school at much higher rates than white students (19.3% vs. 8.2%). Sander, *supra*, 437 n.1. tbl.5.5. The high drop-out rate was associated with poor performance, and not financial hardship. *Id.* at 439, tbl.5.6. In 1987, almost a quarter of African American students at M.I.T. failed to graduate. Arthur Hu, *Minorities Need More Support*, The Tech (M.I.T.), Mar. 7, 1987, at 8. Although the average math SAT scores of the African American students were in the top 10% nationwide, they were in the bottom 10% at M.I.T. *Id.* A 1988 study showed that African American students at the University of California at Berkeley had a 70% drop-out rate, despite average SAT scores well above the national average. John H. Bunzel, *Affirmative Action Admissions: How it 'Works' at Berkeley*, Pub. Interest, Fall 1988, at 124-25. The problem was that the average SAT scores of nonminority students at Berkeley were several hundred points higher. *Id.* These effects are replicated in lower tier schools as well: In 1997, the University of Colorado graduated only 37% of African-American students compared to 72% of nonminority students. Robert Lerner & Althea K. Nagai, *Racial Preferences in Colorado Higher Education*, Prepared for the Center for Equal Opportunity 34-36 (1997).[16]

Minority law school students who graduate still fail to pass the bar more often than white students. *Id.* at 454 (only 45% of African Americans law school graduates passed the bar on their first attempt as compared to over 78% of whites). That is, law school students who struggle academically because of mismatch will most likely not achieve subject matter mastery, and will suffer lower pass rates on the bar, and increased problems in the job market. Sander, *supra*, at 370. The poor performance by minority students at universities and law schools is not the result of students' race, but is "simply a function of disparate entering credentials, which in turn is primarily a function of the schools' use of heavy racial preferences." Sander, *supra*, at 429.

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[16] *Available at* http://www.eric.ed.gov/PDFS/ED418193.pdf.

Racial preferences in college admissions impose significant costs on minority students. No matter where academic mismatch occurs, lower grades lead to lower levels of academic self-confidence, which in turn increases the likelihood that minority students will lose interest in continuing their education and drop out. Generations of minority students who would have succeeded without race-based admission policies are saddled with far greater risks of failure because of academic mismatching. Eliminating racial preferences in student admissions will eradicate academic mismatch and restore confidence and success to students of all races.

IV

GRUTTER SHOULD BE OVERRULED

Amici urge this Court to overrule *Grutter*. Amici do not make the suggestion lightly, as *stare decisis* is "of fundamental importance to the rule of law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citations omitted). Yet, this Court has demonstrated its willingness to overrule prior decisions "where the necessity and propriety of doing so has been established." *Id.* at 172; *see also Adarand*, 515 U.S. at 232-33 (1995) (opinion of O'Connor, J.) (collecting instances in which the Court overruled erroneous decisions). The necessity and propriety of overruling *Grutter* are clear.

So long as universities are allowed to weigh race, there will an irresistible tendency to do so mechanically and with an eye toward achieving a predetermined racial mix. If such discrimination is banned, schools will instead consider an applicant's life circumstances and perspectives on an individual basis, which is what "individualized consideration" should mean anyway. There is no real reason, then, to uphold *Grutter*—and overwhelming practical reasons to overturn it.

A. Principles of *Stare Decisis* Do Not Support Preservation of the Highly Flawed *Grutter* Decision

Where a conflict exists between prior precedent and the Constitution's text, justices are bound to uphold the Constitution. *See South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) ("I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991). This Court's primary obligation is to interpret the text of the Constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). Although courts should generally be reluctant to overrule their prior decisions, the principle of *stare decisis* is not an inexorable command. *See Patterson*, 491 U.S. at 172 (*stare decisis* "[is] not a mechanical formula of adherence to the latest decision").

The key principles that should guide the Court are that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. Because there are no textual exceptions, and racial distinctions are "odious to a free people," racial classifications are always subject to strict scrutiny. *Adarand*, 515 U.S. at 214; *see also Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *Parents Involved*, 551 U.S. at 745-46.

Grutter departs from the text of the Constitution and the requirement that all race-based classifications must undergo the strictest constitutional scrutiny to survive. The guiding principle of *Grutter*—"not every decision influenced by race is equally objectionable," 539 U.S. at 327—stands in stark contrast to *Rice* (decided three years earlier), which held that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517. The *Grutter* Court erred by creating a compelling interest only after deferring to the Law School's "academic freedom," thus imbuing the strictness of the scrutiny with relativity based on contextual factors. *Grutter*, 539 U.S. at 328; *see also* Paul Brest, *Some Comments on Grutter v. Bollinger*, 51 Drake L. Rev. 683, 690-91 (2003).

Grutter's unprecedented deference to the University was, and remains, a sharp departure from strict scrutiny. *See Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part, dissenting in part) ("[T]he Constitution [does not] countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny"); *id.* at 394 (Kennedy, J., dissenting) ("[D]eference is antithetical to strict scrutiny, not consistent with it"). Moreover, First Amendment free speech considerations of academic freedom have nothing to do with racial classifications, which are not speech and might result in the violation of someone's equal protection rights. Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 Hous. L. Rev. 459, 469, 479 (2004).

Deferring to the University's interest in diversity also undercuts strict scrutiny because the University's interest "is too theoretical and abstract. It cannot be proved or disproved." *See Fisher*, 631 F.3d at 255 (Garza, J., concurring specially). Meanwhile, in other contexts, the government actor must prove the existence of the past intentional discrimination it is attempting to remedy through its race-conscious policy. *See, e.g., Croson*, 488 U.S. at 499, 500, 505, 507, 509 (government must show "identified discrimination" with specificity); *Bakke*, 438 U.S. at 307 ("judicial, legislative, or administrative findings of constitutional or statutory violations" must be made); *Wygant*, 476 U.S. at 276 (warning that "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

Because race-based classifications must always be subject to nondeferential strict scrutiny, this Court previously overturned decisions that mistakenly applied less demanding review. *See Adarand*, 515 U.S. at 222, 233-34, *overruling Metro Broad.*, 497 U.S. 547 ("*Metro Broadcasting* itself departed from our prior cases—and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it.").

In *Patterson*, another case involving *stare decisis* in the context of race-based classifications, the Court identified three factors as particularly relevant to the *stare decisis* analysis: subsequent developments in the law; whether the challenged precedent is a "positive detriment to coherence and consistency in the law"; and whether the precedent is "inconsistent with the sense of justice." 491 U.S. at 173-74. Each of these factors favors overruling *Grutter*.

Subsequent developments in the law reveal *Grutter*'s aberrant analysis, as this Court has since applied nondeferential strict scrutiny and rejected the use of race-based classifications. *See, e.g., Johnson v. California*, 543 U.S. 499 (2005); *Parents Involved*, 551 U.S. 701. In *Parents Involved*, this Court held that a race-based school assignment policy violated the Equal Protection Clause. 551 U.S. at 711. Indeed, a plurality of the Court recognized the perilous similarity between race-based classifications in the name of "diversity," and those that were found unconstitutional for the rejected goal of "racial balancing." *Id.* at 732 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'") (plurality op.) (citation omitted).

Further, in the wake of *Grutter*, states around the country have continued to flatly prohibit the type of racial classifications that *Grutter* sanctioned. To date, California, Louisiana, Washington, Michigan, Arizona, Nebraska, Florida, and New Hampshire all prohibit

racial classifications in university admissions. *See* Cal. Const. art. I, § 31; *La. Associated Gen. Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (La. 1996) (interpreting Louisiana Constitution as banning all racial classifications); Wash. Rev. Code Ann. § 49.60.400; Ariz. Const. art. II, § 36; Neb. Const. art. I, § 30; Fla. Exec. Order No. 99-281; N.H. Rev. Stat. Ann. § 187-A:16-a. A constitutional ban on racial classifications in university admissions will be on the Oklahoma ballot this year.[17]

The second *Patterson* factor is whether the challenged precedent "may be a positive detriment to coherence and consistency in the law." 491 U.S. at 173 (citations omitted). *Grutter*, which is logically incoherent and gives courts little to no guidance on how to interpret race-based admissions policies, fails this factor.

In the court below, Judge Garza related how *Grutter* is logically incoherent:

> But it is not clear, to me at least, how using race in the holistic scoring system approved in *Grutter* is constitutionally distinct from the point-based system rejected in *Gratz*. If two applicants, one a preferred minority and one nonminority, with application packets identical in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz*? Although one system

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[17] *Available at* https://www.sos.ok.gov/documents/questions/759.pdf?6,6 (last visited May 21, 2012).

> quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.

Fisher, 631 F.3d at 252 (Garza, J., concurring specially). The result of this *Grutter*/*Gratz* incoherency is that "*Grutter* eliminated any chance for courts to critically evaluate whether race is, in fact, the defining feature of an admissions packet." *Id.* at 252 (Garza, J., concurring specially).

Grutter also fails to provide any consistency in the law. "[B]y using metaphors, like 'critical mass,' and indefinite terms that lack conceptual or analytical precision, but rather sound in abject subjectivity, to dress up constitutional standards, *Grutter* fails to provide any predictive value to courts and university administrators tasked with applying these standards consistently." *Fisher*, 631 F.3d at 258 (Garza, J., concurring specially). Because *Grutter* is "unworkable in practice," resulting in "mischievous consequences to litigants and courts alike," *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965), the case should be overruled.

The last *Patterson* factor is whether the challenged precedent, having been "tested by experience," proves to be "inconsistent with the sense of justice or with the social welfare" and, in particular, "with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." 491 U.S. at 174 (citations omitted). *Grutter* fails any test that turns on "the sense of justice" or "the eradication of discrimination." As Ms. Fisher's experience in this case exemplifies, and as our Nation's history demonstrates, there is no justice in race discrimination; and *Grutter* has fostered, not eradicated, race discrimination in higher education. As noted below, public universities, in the remaining states that permit race-based classifications, are using *Grutter* as a framework to classify and burden their students according to their race.

Finally, overturning *Grutter* would not raise the same reliance concerns that were present in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). "The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." *Id.* at 855. The nature of race-based preferences simply doesn't create significant reliance interests. No government institution is required to institute race-based preferences, and states are moving to prohibit the continued use of race-based classifications. Even *Grutter* itself recognized that "all race-conscious admissions programs have a termination point." 539 U.S. at 342.

Under the Court's *stare decisis* principles, the flawed *Grutter* decision should be overruled. The sooner the aberrational *Grutter* decision is explicitly rooted out of the law, the better the purposes of *stare decisis*—stability, coherence, and predictability—will be served.

B. Universities and Colleges Throughout the Country View *Grutter* as an Unqualified Endorsement of Race-Based Admissions Standards

Too many public universities across this country assume that *Grutter* always permits the use of race. They read *Grutter* not as a narrowly tailored exception to the general prohibition of racially motived decisionmaking, but as a blueprint for creating a student body with their preferred racial composition.[18] Amicus Center for Equal Opportunity has produced many studies examining the admission practices of dozens of institutions of higher education. Each study has resulted in the same conclusion—public universities are using race to favor preferred minorities and turn away applicants for admission of disfavored races.

CEO's studies assess the degree of racial and ethnic admission preferences in admissions by using a statistical model that predicts the probability of admission at a university for members of different ethnic and racial groups, holding other qualifications constant. A multiple logistic regression equation, and its corresponding odds ratio, allowed CEO's statisticians to present admissions data in terms of the relative odds of members of Group A being admitted as compared with members of Group B, while controlling for other important variables like test scores, grades, and residency status.

The following chart shows the admissions practices at the University of Wisconsin Law School for the 2005 and 2006 applicant pools, where blacks and

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[18] The extent of racial preferences is generally conceded even by those who advocate in favor of them. *See, e.g.*, Bowen & Bok, *supra*, at 26-27 ("[A]lmost all academically selective institutions [share] a commitment to enrolling a diverse student population—and, as one way of achieving this objective, to paying attention to race in the admissions process."); Thomas J. Espenshade & Alexandria Walton Radford, *A New Manhattan Project*, Inside Higher Ed., Nov. 12, 2009, *available at* http://www.insidehighered.com/views/2009/11/12/radford.

Hispanics were strongly preferred to whites.[19] The odds ratio measures the magnitude of the preference given relative to the baseline group (in these studies, whites). An odds ratio equal to or greater than 3.0 to 1 reflects a strong association; an odds ratio less than 3.0 to 1, but greater than 1.5 to 1, reflects a moderate association; an odds ratio of 1.5 or less to 1 indicates a weak association. A very strong association might be taken to be the rough equivalent of the relative odds of smokers versus nonsmokers dying from lung cancer, which one-well known study calculated as 14 to 1. Nagai, *University of Wisconsin Law School*, *supra*, at 13-14.

University of Wisconsin Law School

Univ. of WI - Law	Odds Ratio[20]
Black over White	61.4 to 1
Hispanic over White	14.2 to 1

The law school numbers, however, are not nearly as extreme as those found in the 2007-2008 University of Wisconsin-Madison undergraduate admissions—the most severe discrimination CEO has ever found, either before or after *Grutter*.[21]

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[19] Althea K. Nagai, *Racial and Ethnic Preferences in Admission at the University of Wisconsin Law School*, Center for Equal Opportunity, at 12-13, *available at* http://www.ceousa.org/component/option.com_docman/task,doc_view/gid,275/ (last visited May 21, 2012).

[20] The odds ratio here, and in all subsequent tables, is arrived at after controlling for both academic (LSAT/SAT, GPA, class rank) and nonacademic factors (year of admission, gender, residency, etc.).

University of Wisconsin-Madison

Univ. of WI-Madison	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	576 to 1	1330 to 1
Hispanic over White	504 to 1	1494 to 1
Asian over White	1 to 1	1 to 1

Blacks and Hispanics were preferred at ratios of between 500 and 1500 to 1 over both Asian and white students. Other reports confirm that it is increasingly the case that Asians are discriminated against in addition to, and sometimes even more than, whites. *See* Russell K. Nieli, *How Diversity Punishes Asians, Poor Whites and Lots of Others*, Minding The Campus, July 12, 2010.[22]

CEO's studies, all post-*Grutter*, also found that the law schools at the University of Nebraska, Arizona State University, and the University of Arizona have granted very strong preferences for preferred minorities (blacks and Hispanics), and comparatively small (but still significant) preferences for non-preferred minorities (Asians).

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[21] Althea K. Nagai, *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Wisconsin-Madison*, Center for Equal Opportunity, at 16, *available at* http://www.ceousa.org/attachments/article/546/U.Wisc.undergrad.pdf (last visited May 21, 2012).

[22] *Available at* http://www.mindingthecampus.com/originals/2010/07/how_diversity_punishes_asians.html.

University of Nebraska College of Law
(2006 and 2007 applicant pools)[23]

Univ. of NE - Law	Odds Ratio
Black over White	442 to 1
Hispanic over White	90 to 1
Asian over White	6 to 1

Arizona State University College of Law
(2006 and 2007 applicant pools)[24]

ASU - Law	Odds Ratio
Black over White	1,115 to 1
Hispanic over White	85 to 1
Asian over White	2 to 1

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[23] Althea K. Nagai, *Racial and Ethnic Preferences in Admission at the University of Nebraska College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/628/100/ (last visited May 21, 2012).

[24] Althea K. Nagai, *Racial and Ethnic Admission Preferences at Arizona State University College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/623/119/ (last visited May 21, 2012).

University of Arizona College of Law
(2006 and 2007 applicant pools)[25]

Univ. of Ariz. - Law	Odds Ratio
Black over White	250 to 1
Hispanic over White	18 to 1
Asian over White	3 to 1

Undergraduate admissions at universities in Ohio also recently demonstrated strong preferences for certain preferred minorities.

Ohio State University and Miami University

Miami University	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	8.0 to 1	10.2 to 1
Hispanic over White	2.2 to 1	2.2 to 1
Asian over White	2.1 to 1	1.6 to 1
OH State University	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	3.3 to 1	7.9 to 1
Hispanic over White	4.3 to 1	6.5 to 1
Asian over White	1.5 to 1	2.1 to 1

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[25] Althea K. Nagai, *Racial and Ethnic Preferences in Admission at the University of Arizona College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/affirmative-action/affirmative-action-news/education/577-racial-and-ethnic-preferences-at-arizona-college-of-law (last visited May 23, 2012).

Even at the University of Michigan itself, severe undergraduate, law, and medical school admission preferences prevailed after *Grutter*.[26]

These odds ratios indicate the extent of racial and ethnic preferences at the different schools. Because the statistical analysis holds all factors constant except for race, the ratios demonstrate the strength of preferences given to preferred minority students over white students. The schools grant very strong preferences to blacks, and generally to Hispanics as well. In other words, blacks and Hispanics are preferred minorities who are given significant admission preferences *solely because of their race*, while Asians are nonpreferred minorities who fare no better than similarly situated white applicants. Admission preferences are pervasive among institutions of higher education.

◆

CONCLUSION

Our nation is increasingly multiethnic and multiracial, and individual Americans are more and more likely to be multiethnic and multiracial. In such a nation, it is dangerous to allow the inevitably divisive racial and ethnic discrimination by public institutions to become wider and more entrenched. For the foregoing reasons, Amici respectfully request that thisCourt overrule *Grutter*, 539 U.S. 306, and reverse the decision below.

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[26] *See, e.g.*, Althea K. Nagai, *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/521/100/ (last visited May 21, 2012); Althea K. Nagai, *Racial and Ethnic Admission Preferences at the University of Michigan Medical School*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/523/100/ (last visited May 21, 2012); Althea K. Nagai, *Racial and Ethnic Admission Preferences at the University of Michigan Law School*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/522/100/ (last visited May 21, 2012).

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ABIGAIL NOEL FISHER

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v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF DEAN ROBERT POST AND DEAN MARTHA MINOW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amicus Martha Minow is the Dean and the Jeremiah Smith, Jr. Professor of Law at Harvard Law School, where she has taught since 1981. *Amicus* Robert Post is the Dean and the Sol & Lillian Goldman Professor of Law at Yale Law School, where he has taught since 2003.[1] Harvard Law School and Yale Law School are esteemed private educational institutions established in 1817 and 1824, respectively. Deans Minow and Post are filing this brief in their personal capacities.

Both Dean Minow and Dean Post help set policy for the admission of new students at their respective schools, oversee implementation of admissions procedures, and have personally reviewed many applications during their careers. Both Harvard Law School and Yale Law School have respected and rigorous admissions procedures. Each school assesses each applicant individually and holistically. Each takes into account all aspects of an applicant's achievements and background in attempting to predict accurately an individual's potential.

This form of individualized assessment is consistent with—and indeed, based upon—principles this Court has recognized and approved in the past. For more than three decades, Harvard and Yale Law Schools have used admissions procedures that treat

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk in accordance with this Court's Rule 37.3(a).

"each applicant as an individual in the admissions process." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (opinion of Powell, J.). *Id.* at 317 (opinion of Powell, J.). These resource-intensive admissions procedures seek to assure that each admitted student will succeed long after graduation. The procedures involve "individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose." *Id.* at 319 n.53 (opinion of Powell, J.). In both schools' admissions programs, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317 (opinion of Powell, J.). Neither law school admits students as measured merely by "numbers" derived from standardized testing and grade point averages.

Amici write to urge the Court to reaffirm these basic principles. As constituent parts of private institutions that accept federal funds, both Harvard and Yale Law Schools are subject to the strictures of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. As a consequence, the admissions policies and practices of both schools will be governed by this Court's pronouncements concerning the constitutional propriety of respondent's use of race-conscious admissions factors in conjunction with its state-mandated "percentage plan." *Amici* urge that the Court resolve this case by confirming the propriety of admissions procedures like those used by the Harvard and Yale Law Schools.

Harvard and Yale Law Schools have each been successful in selecting and training leaders for the American legal profession. They have done so by carefully evaluating each applicant based on the entirety of his or her record. Race can be an inescapable part of that record. It is neither feasible nor desirable to assess each applicant individually without also giving appropriate significance to race, particularly when applicants themselves deem race to be central to their identities or life experiences. An assessment that ignores what a candidate identifies as a salient aspect of his or her experience is neither holistic nor consistent with the dignity of that applicant.

Were this Court altogether to preclude considerations of race from the admissions process, each school would be disadvantaged in its efforts to select individuals who will produce the most effective classroom experience for training students to succeed in the opportunities and challenges that lawyers, whether practicing or not, must inevitably confront. Neither school could plausibly employ a percentage plan of the sort that Texas has mandated. Both schools would find themselves in the untenable position of directing applicants to suppress references to their own race and to censor discussion of any experiences that might reveal their race.

Amici submit this brief to urge the Court to respect the fundamental framework of law school admissions that has served the legal profession so well for decades and that will help ensure that the profession will continue to lead the nation in the future.

BACKGROUND

This Court has recognized that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders." *Grutter* v. *Bollinger*, 539 U.S. 306, 332 (2003). "Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United

States Senate, and more than a third of the seats in the United States House of Representatives." *Id.* This "pattern is even more striking when it comes to highly selective law schools," which "account[] for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges." *Id.*[2] Indeed, every current member of this Court attended either Harvard Law School or Yale Law School.

Both schools seek to educate future leaders of the American legal profession. For more than 188 years, "[t]he primary educational purpose of Yale Law School [has been] to train lawyers and to prepare its students for leadership positions in the public and private sectors both in the U.S. and globally."[3] Similarly, the mission of Harvard Law School is "[t]o educate leaders who contribute to the advancement of justice and the well being of society."[4]

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[2] These observations remain as true today as they were a decade ago. *See* Jennifer E. Manning, Cong. Research Serv., R41647, *Membership of the 112th Congress: A Profile* 4 (2011) ("Law degrees are held by 167 Members of the House (38% of the total House) and 55 Senators (55% of the total Senate)."); Am. Bar Ass'n, *Lawyers in the 112th Congress—House of Representatives* (2012), http://www2.americanbar.org/calendar/ABAday/Documents/lawyersincongress_112h.pdf (listing the law schools which members of the House of Representatives attended); *Am. Bar Ass'n, Lawyers in the 112th Congress—Senate* (2012), http://www2.americanbar.org/calendar/ABAday/Documents/lawyersincongress_112s.pdf (listing the law schools which members of the Senate attended).

[3] *See* Yale Univ., *Mission Statements of the Schools of Yale University* 3, http://www.yale.edu/about/yale-school-mission-statements.pdf.

[4] *See* Harvard Law Sch, *Harvard Law School's Mission / Values*, http://www.law.harvard.edu/about/

Both schools are fortunate to have large pools of talented applicants from which they can select those students whom they believe have the greatest potential to succeed in public and private life. For the class of 2014, Yale Law School enrolled just 205 students out of 3,173 applicants.[5] That same year, Harvard Law School enrolled 559 students out of 6,364 applicants.[6]

Both schools could entirely fill each entering class with students who have the highest possible Grade Point Averages ("GPAs") and Law School Admission Test ("LSAT") scores. But neither school chooses to do so. In isolation, these "objective" measures cannot identify the future leaders of the bar. Both schools deny admission to more than half of the applicants who have either a 4.0 or greater GPA or a 174 or greater LSAT (99th percentile).

Although GPAs and LSAT scores are certainly relevant, they inevitably reveal only a partial view an applicant's potential. To be meaningful, objective "numbers" must be set in the context of an applicant's background and circumstances.

Both Harvard and Yale recognize from long experience that intangible virtues like courage, commitment, leadership, and moral compass are highly relevant to an applicant's potential to succeed in the legal profession. The "numbers" do not identify such virtues, which become visible only when the life story

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administration/hr/careers/mission.html (last accessed Aug. 10, 2012).

[5] *See* Yale Law Sch., *Entering Class Profile*, http://www.law.yale.edu/admissions/profile.htm (last accessed Aug. 10, 2012).

[6] *See* Harvard Law Sch., *Class Profile and Fact Sheet*, http://www.law.harvard.edu/prospective/jd/apply/classprofile.html (last accessed Aug. 10, 2012).

of an applicant is carefully scrutinized in all its gritty details. Both schools therefore invest heavily in admissions processes that aspire to undertake such scrutiny. These processes allow us to admit students we believe to be of the highest quality, meaning students we believe are most likely to become successful lawyers and leaders in the American legal profession.

The application processes at both schools share certain common features. Each application includes a personal statement, letters of recommendation, a list of professional experiences, an academic transcript, and an LSAT score. At both schools, the admissions office reviews every individual application and essay and can directly reject less competitive applications. The admissions offices then distribute a subset of applications to faculty members, who assess each application according to its individual strengths and weaknesses, with the missions of their respective school in mind. Finally, both schools aggregate feedback from faculty to make final decisions about who to admit and who to place on a waiting list.[7]

Each school assesses applicants individually, based upon their unique experiences and promise. We do so for two reasons. The first is that intangible qualities are often apparent only when each applicant is given the opportunity to express his or her own personal story. The quality of our students would be immeasurably poorer if we were to select them only "on the numbers."

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[7] Each school's application process also has a few unique features. Once Yale Law School distributes applications to faculty, three faculty members individually review each application and rate it on a scale of two to four. At Harvard Law School, the admissions office works with faculty to review and rate applications. At least two people, and sometimes as many as five, read every application. In addition, Harvard Law School conducts candidate interviews by invitation as part of the evaluation process.

The second is that our pedagogical responsibility as educators is to select an entering class which, when assembled together, will produce the best possible educational experience for our students. Law students learn not merely from their faculty or their books, but also from each other. No one who has graduated from a law school can seriously doubt that the hours of peer debate among individual students and within study groups contribute at least as much to the education of law students as does time spent in class. Each year, therefore, we aspire to assemble a student body in which the potential for students to learn from and with each other is maximized. This requires selecting a class in which students have different points of view, are committed to diverse aspirations, and have complementary strengths.

Rigorous individualized assessments do *not* in any way utilize numerical matrices, formulas, guidelines, or set-asides for any groups, including children of alumni or individuals of color or other minority status. Stated simply, race is not considered in any systematic way by either law school. Race is not quantified, nor does it have a fixed role in the qualitative assessment of applications.

Yet race cannot be excluded as relevant to the effort to obtain a full appreciation of an applicant's perspectives, accomplishments, and leadership potential. It is neither feasible nor desirable to ignore race in the evaluation of an applicant's file. To do so would be inconsistent with the aspiration to have a holistic, individualized assessment. It would be as arbitrary and misleading as ignoring what an applicant studied previously, how demanding was her education, or whether English was her first language. Careful, respectful, individualized consideration is therefore necessary to select the best students who together will create the most effective educational environment.

SUMMARY OF ARGUMENT

At the core of the admissions processes of Harvard and Yale Law Schools is respect for the individual. Both schools perform an individualized, holistic, and careful assessment of each applicant, with a focus on understanding the complex forces, struggles, and experiences that illuminate an applicant's achievements, perspectives, and potential. This intensive process serves compelling educational interests.

To select the most meritorious applicants, it is necessary to evaluate intangible aspects of their character. This same evaluation process is indispensable to our efforts to create a rich and dynamic learning environment. We use individualized assessments to assemble a broadly diverse student body that can robustly debate ideas inside and outside the classroom in ways that are essential for legal education. A diverse student body is also of great pragmatic value in preparing students for the practice of law in today's increasingly globalized and heterogeneous economic world.

If this Court were to interpret the Fourteenth Amendment in a manner that precluded considerations of race, even in the context of truly individualized assessments, the admissions processes of both Harvard and Yale Law Schools would be severely undermined. Were Title VI to prevent us from recognizing the race of applicants, even for those applicants for whom race is a salient aspect of identity, we would be unable to conduct holistic evaluations. It is neither feasible nor desirable to suppress race from the self-presentation of applicants. Not only would it exclude relevant aspects of individual files, but it would also censor applicants' self-understandings.

Considering race as part of an individualized, holistic process is entirely consistent with the Fourteenth Amendment. Just as classifications that reduce "an individual to an assigned racial identity," *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1,* 551 U.S. 701, 795 (2001) (Kennedy, J., concurring), are inconsistent with the dignity of persons, so rules that would force institutions entirely to ignore what an individual has to say about his or her race can be incompatible with the respect that each person is due. In our admissions process, we invite applicants to share their personal and unique stories. Title VI would deny the dignity of applicants were it to compel us to ignore to what applicants have to say about the meaning of race in their own lives.

A constitutional rule that would prohibit all considerations of race would also have severe adverse effects. Not only would it upset the substantial reliance interests of schools that have designed admissions policies on the foundations of *Bakke* and *Grutter*, but it would also effectively force schools either to censor the essays of applicants or to abandon the very process of individualized assessment that has heretofore been at the core of our admissions procedures. The educational consequences would be devastating.

ARGUMENT

I. HOLISTIC EVALUATIONS SERVE A COMPELLING EDUCATIONAL INTEREST IN SELECTING THE BEST APPLICANTS WHO TOGETHER WILL CREATE THE BEST EDUCATIONAL ENVIRONMENT.

Harvard and Yale Law Schools—and other educational institutions with similar missions—have found it necessary to consider each applicant individually in order to identify and train the leaders of tomorrow. The process of individualized assessment enables us to select the best applicants and to establish the pedagogical atmosphere that is most conducive to learning.

A. Holistic Consideration Is Necessary To Select The Most Meritorious Applicants.

Numerical qualifications, like GPA and LSAT scores, are useful in making threshold determinations of an applicant's academic abilities. Yet essential dimensions of character and commitment are not revealed by simple test scores.

An admissions process must be able to distinguish students who can only memorize facts and apply existing legal principles, from students who can understand the deep social policies and implications of the law. The latter kind of student is more likely to contribute to classroom and hallway discussions, and in the future to become a leader of the legal profession. The challenge of the admissions process at Harvard and Yale Law Schools is to differentiate one kind of student from the other.

We try to meet this challenge by examining the entire record of applicants. We hope to identify individual qualities like curiosity, flexibility, judgment, responsiveness, and the ability to move easily between so-called big picture concerns and detailed analysis. We have found these traits to be most useful in predicting the future success of students and graduates. Test scores and grades do not capture these essential qualities.

Numbers alone do not reveal character. They do not reveal the drive or determination to become a leader or to use the advantages of one's education to give back to society. Harvard and Yale Law Schools can accept only a small number of applicants, and we each feel responsible to accept students who are committed to preserving and advancing the practice and study of law, as well as to the provision of justice.

In other countries, elite institutions may select students entirely by standardized test scores. But this has never been true of post-graduate institutions in the United States. We know of no American law school that selects students merely on the basis of numerical scores.[8] In America, we understand the relationship between moral fiber and ability.

Character matters, because it is relevant to the prediction of future achievements. Character, which includes integrity, compassion, tenacity, courage, and resilience, is most tellingly revealed in how persons respond to the challenges they face. We use a holistic review process because we seek to discern the character of applicants, which can shine out in circumstances like military service; prior success in business, nonprofit advocacy, journalism, or engineering; overcoming disadvantage or disappointment; or a demonstrated ability to engage and interact successfully with people from different communities and backgrounds (*e.g.*, racial, religious, political, class). The individualized assessment of character is our best hope for identifying applicants whom we believe to be most meritorious.

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[8] Indeed, the American Bar Association's accreditation standards explicitly state that schools should "not use the LSAT score as a sole criterion for admission." Am. Bar Ass'n, *2011-2012 Standards and Rules of Procedure for Approval of Law Schools* 169 (2011). The ABA warns that "while LSAT scores serve a useful purpose in the admission process, they do not measure, nor are they intended to measure, all the elements important to success at individual institutions." *Id.* Much less can those scores indicate how an individual will perform after graduation.

B. Holistic Consideration Is Necessary To Create The Best Educational Environment.

The individual assessment of each applicant is also necessary to create the best possible educational atmosphere. This is true for two reasons.

1. Student Body Diversity Has Significant Pedagogic Value.

"The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Bakke,* 438 U.S. at 312 (opinion of Powell, J.). This Court has accordingly held that a public law school has "a compelling interest in attaining a diverse student body." *Grutter*, 539 U.S. at 328.

A diverse student body is as important today as it was a decade ago. There is now even more evidence to support this conclusion. In deciding this case, therefore, the Court should in no way retreat from affirming the fundamental importance of a diverse student body.

Our experience as educators at Harvard and Yale Law Schools confirms the wisdom of Justice Powell's conclusion in *Bakke*. Our schools value diversity along a number of dimensions, including, *inter alia*, veteran status, geographical origin, undergraduate institution, work experience, political and cultural perspective, nationality, gender, race, and sexual orientation.[9] A diverse student body contributes to the quality of discussion, both inside and outside the classroom, on topics like interracial adoption; freedom of expression and hate speech; environmental justice; marriage regulation; and employment discrimination. Students from different backgrounds will bring different presumptions and aspirations to bear on these and innumerable other equally important and provocative topics. The clash of these perspectives will enrich the educational experience of all.

The educational environment of Harvard and Yale Law Schools is immeasurably enhanced because we select students so as to facilitate hard discussions of controversial topics. We structure our admissions processes to maximize the diversity of views and experiences that our students will encounter. It almost certainly would be mutually beneficial for students raised in Catholic schools and Yeshivas to encounter one another, because each will come away with an enlarged perspective on the law and on themselves. A national leader of the American bar ought to know what life looks like from the perspective of those who have grown up in the South, in South Dakota, in Harlem, or in Delhi.

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[9] This approach also comports with the accreditation requirements of the American Bar Association, which "[s]ince 1980 . . . has required all law schools to demonstrate 'a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms.'" Brief of Amici Curiae American Bar Association at 2, *Grutter* v. *Bollinger*, 539 U.S. 306 (2002) (No. 02-241).

The racial backgrounds and experiences of our students are without doubt relevant to this educational diversity. See *Seattle Sch. Dist. No. 1*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment) (discussing "the important work of bringing together students of different racial, ethnic, and economic backgrounds."). An important benefit of racial diversity is its capacity to illuminate varied or conflicting viewpoints within given racial groups. Such diversity helps overcome stereotypes and superficial assumptions about human behavior, perception, and social meaning. *See Grutter*, 539 U.S. at 330.

Imagine for example a discussion about the constitutionality of statutes prohibiting cross burning. The different opinions in *Virginia* v. *Black*, 538 U.S. 343 (2003), explicitly invoked the historically distinct perspectives of different groups. *See, e.g.*, *id.* at 388-95 (Thomas, J., dissenting) (explaining the cultural meaning of cross burning and why it is understood by African-Americans and other minority groups as "a threat and a precursor of worse things to come"). Discussion of this topic in a law school, whether in class or over coffee, would be impoverished were it not able to bring to bear the full spectrum of relevant perspectives. Analogously, debate over environmental waste disposal would be enlivened and enriched if those participating in the discussion included students with prior experience as environmental engineers; students with prior experience in municipal zoning; and students raised in poor communities situated near waste disposal sites.

2. Student Body Diversity Is Important In Preparing Students For The Practice Of Law.

A diverse student body also provides important practical benefits in legal training. As this Court recognized in 1950:

> [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. *Painter*, 339 U.S. 629, 634 (1950).[10]

The intellectual ferment fostered by a diverse student body is valuable not only in training students to become excellent advocates, but also in preparing future lawyers for the practical challenges that they will undoubtedly face in their careers. Alumni from Harvard and Yale Law Schools include not only federal and state judges and legislators, but also, *inter alia*, senior military officers, mayors, foreign heads of state, leaders of global law firms and corporate executives of Fortune 500 companies. We have concluded that it is necessary to expose students "to widely diverse people, cultures, ideas, and viewpoints," *Grutter*, 539 U.S. 330 (internal quotation marks and citations omitted), so that we can properly train them for these remarkable careers. We have also found that exposure to a diverse student body is highly advantageous for more traditional legal practice.

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[10] It is interesting to note, in light of the context of this case, that *Sweatt* also arose from the University of Texas system. At the time, an African-American student was denied admission to the law school because of his race.

The Court in *Grutter* cited evidence submitted by various educational and business *amici* showing that exposing students "to widely diverse people, cultures, ideas, and viewpoints" "better prepares students for an increasingly diverse workforce and society," and that it confers "skills needed in today's increasingly global marketplace." *Id.* (internal quotation marks omitted). The increasing globalization of legal practice demands that our alumni be able to work with clients and peoples who are themselves increasingly diverse. Even putting aside the demands of internationalization, the 2010 Census demonstrates that the U.S. population has itself become substantially more racially and ethnically diverse. *See* Karen R. Humes et al., 2010 Census Briefs, *Overview of Race and Hispanic Origin: 2010*, at 22 (Mar. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

One study prepared by the Boston Consulting Group found that "continued economic progress hinges on the ability to effectively integrate minority consumers into the mainstream of American business—both as employees as well as entrepreneurial partners." Bos. Consulting Grp., *The New Agenda for Minority Business Development* 7 (June 2005), *available at* http://www.kauffman.org/uploadedfiles/minority_entrep_62805_report.pdf. In another study conducted by the management consulting firm McKinsey & Company,

> The findings were startlingly consistent: for companies ranking in the top quartile of executive-board diversity, [returns on equity] were 53 percent higher, on average, than they were for those in the bottom quartile. . . . [and earnings before interest and taxes] margins at the most diverse companies were 14 percent higher, on average, than those of the least diverse companies . . . .

Thomas Barta et al., *Is there a payoff from top-team diversity*, McKinsey Quarterly (Apr. 2012), https://www.mckinseyquarterly.com/Is_there_a_payoff_from_top-team_diversity_2954.[11]

In our educational judgment, law students who pursue careers both within and outside the legal profession will inevitably interact with increasingly diverse clients, managers, and colleagues. Our commitment as educators is to create the educational environment best suited to prepare our students to succeed in this new world. In our view, diversity is associated with better educational outcomes.[12]

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[11] *See* Orlando C. Richard et al., *Cultural Diversity In Management, Firm Performance, and the Moderating Role of Entrepreneurial Orientation Dimensions*, 47 Acad. Mgmt. J. 255, 263 (2004). *See also* Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Soc. Rev. 208, 219 (2009) ("diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits"); Alison Kenney Paul et al., *Diversity As An Engine of Innovation*, 8 Deloitte Rev. 108, 111 (2011) ("Regardless of the group, it is hard to form a brand relationship unless you have people that come from those cultures and ethnicities that can connect.").

[12] Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Edu. Rev. 330 (2002). *See also* Samuel R. Sommers et al., *Cognitive effects of racial diversity: White individuals' information*

Diverse teams are better at solving a variety of problems when compared with homogeneous groups, even when rated higher on standard ability measures.[13]

II. AN EFFECTIVE, HOLISTIC, AND INDIVIDUALIZED EVALUATION CANNOT SUPPRESS THE RACE OF AN INDIVIDUAL.

As we have explained, our schools have concluded that holistic, individualized assessments are essential to assembling the best possible student body for the advancement of our educational missions. We have likewise concluded that it is neither feasible nor desirable to suppress the race of applicants while conducting such assessments.

The racial background of a person is not like a hat that can be taken on or off. It is frequently woven into the very fabric of identity and character. It matters to us to understand a candidate's journeys and strengths. To evaluate an applicant, we need to appreciate his or her unique experience of socio-

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processing in heterogeneous groups, 44 J. Experimental Soc. Psychol. 1129 (2008) (white individuals who expected to discuss a race-relevant topic with a racially diverse group exhibited better comprehension of topical background readings than whites assigned to all-white groups).

[13] *See generally* Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 319-28 (2007). *See also* Katherine W. Phillips et al., *Surface Level Diversity and Decision-Making in Groups: When Does Deep-Level Similarity Help*, 9 Group Processes & Intergroup Rel. 467, 469 (2006) (diversity "serves to legitimize the surfacing of unique information."); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 606 (2006) (heterogeneous mock juries "deliberated longer and considered a wider range of information" than racially homogenous groups).

economic disadvantage or advantage, early familial circumstances, or particular medical condition. It matters to us whether an applicant did not speak English until middle school or grew up in a neighborhood in which no one attended college. Race can be no less important a dimension of individual experience; it can be no less essential to a careful evaluation of an applicant's achievements and prospects.

Were we to be compelled to ignore race, we would be prevented from evaluating all that racial identity might mean to any individual person. To some applicants, race may not matter much at all. To others, however, it may be urgently salient. We do not prejudge this issue. We affirm only that enforced colorblindness will both undermine the capacity of our admissions processes fully to assess many applicants and severely injure our efforts to ensure that our classrooms and study groups will generate the robust debate that is surely essential to much legal and policy analysis.

As a practical matter, moreover, it is not clear to us how admissions officers and faculty reviewers can ignore race and yet still conduct holistic evaluations. Essays are a critical component of the application process at law schools such as Yale and Harvard, and it is not uncommon for the personal statement of minority applicants to explain the ways in which race has shaped their lives or perspectives. Applicants' references are an essential component of their admissions files, and reference letters frequently mention race in explaining how an applicant has demonstrated positive qualities and skills. We do not understand how such discussion could possibly be suppressed.

Consider the practical alternatives. We might instruct applicants not to mention their race in their personal essays; we might redact any explicit or implicit references to race that nevertheless appear in applicant essays; we might advise reviewers to ignore race in their letters of recommendation. We might direct faculty to ignore any inferences they might draw from an application file about the relevance of race.

These censorial approaches are deeply unattractive. They would not only deprive us of valuable and relevant information, but they would also stifle applicants, recommenders, and faculty. To take such steps would seem fundamentally at odds with our nation's traditions of freedom of expression and academic freedom.

III. THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT CONSIDERING RACE AS PART OF A HOLISTIC, INDIVIDUALIZED ASSESSMENT.

It has frequently been observed that at "'the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'" *J.E.B.* v. *Ala. ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) (quoting *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)). See also *Missouri* v. *Jenkins*, 515 U.S. 70, 120-121 (1995) (Thomas, J., concurring) ("At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."). "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000). See also *Seattle Sch. Dist. No 1*, 551 U.S. at 746 (opinion of Roberts, C.J.).

The holistic, individualized assessments that this Court endorsed in *Bakke* and *Grutter*—and that our law schools assiduously undertake—exemplify the treatment of applicants as individuals. A rule that forbids any consideration of race in the admissions process, by contrast, would demean the dignity of individual applicants by denying the relevance of their voices and their experiences.

A. Consideration Of Race As Part Of A Holistic, Individualized Evaluation Is Consistent With The Dignity Of Each Applicant.

This Court has recognized that race is "'one element in a range of factors that a university properly may consider in attaining the goal'" of a diverse student body "essential to its educational mission." *Grutter*, 539 U.S. at 324, 328 (quoting *Bakke*, 438 U.S. at 314). Such consideration of race is permissible if it is not used to "'insulat[e] the individual from comparison with all other candidates for the available seats,'" and is instead "used in a flexible, nonmechanical way" as part of a "truly individualized consideration." *Id.* at 334 (quoting *Bakke*, 438 U.S. at 317). An individualized admissions process does not use race as a quota or set-aside. In no way does it treat applicants as mere "components of a racial . . . class. " *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring) (internal quotation marks omitted). The whole point of an individualized application process is to use essays, references and test scores to understand fully each applicant in his or her own particularity. Such a process seeks to overcome stereotypes and classifications.

It does not "demean[] the dignity and worth of" an applicant, *Rice*, 528 U.S. at 517, to listen to what he has to say when he believes that race is an important aspect of his own personal experience. There is nothing intrinsically stigmatizing or demeaning about one's racial identity. See *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring). Race is relevant insofar as it enables us to hear each applicant's own story and to construct an entering class that is educationally optimal. Race is considered in the same way, and for the same purposes, as a multitude of other personal characteristics, such as prior work experience, civic service, athletic achievement, socioeconomic background, or geographic origin. In such a context, consideration of race does not offend the Equal Protection Clause.

B. An Individualized Admissions Process That Excluded Consideration Of Race Would Demean The Dignity Of Applicants.

The dignity of applicants would in fact be offended by a rule that prohibits consideration of race (and only race) from an otherwise fully individualized, holistic admissions process. Harvard and Yale Law Schools ask applicants to submit personal statements that discuss their circumstances and history. To refuse to recognize such discussions when, and only when, they pertain to an applicants' race disrespects the self-understandings of applicants.

We accord dignity to persons when we listen to what they have to say. It belittles applicants to invite their self-presentations and then deliberately ignore their personal accounts of their own lives. It demeans them to suppress what they believe is important in evaluating their records and their potential contributions to our law schools. It is incompatible with the respect we owe our applicants to demand that they comply with the preconception that race ought not matter to them.

Of course some applicants may consider race to be insignificant in their lives. But we know from experience that many other students understand race as a fundamental dimension of their identities. If Title VI were to prohibit our schools from listening to and considering such intimate and personal perspectives on their own lives, it would be in serious tension with the "personal dignity and autonomy" that lies at the heart of "the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 851 (1992). The Equal Protection Clause, no less than the Due Process Clause, celebrates an individual dignity that cannot be consistent with such an outcome.

If Title VI were to require Harvard and Yale Law Schools to purge all references to race in their admissions processes, the statute would in effect operate to censor the self-presentation of applicants. A statute effectively prohibiting applicants from discussing their own race would coerce silence in a manner that would potentially chill, if not infringe upon, the free speech rights of applicants.

The command of the Equal Protection Clause that government "must treat citizens as individuals, not as simply components of a racial . . . class," *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring) (internal quotation marks omitted), should not be understood to forbid law schools from considering aspects of applicants' history or personal identity that they wish to communicate.

IV. A RULING THAT RACE CANNOT BE CONSIDERED IN A HOLISTIC ASSESSMENT OF APPLICANTS WOULD UPSET SETTLED RELIANCE INTERESTS AND HAVE UNTOWARD CONSEQUENCES.

A ruling that race can no longer be part of a holistic, individualized assessment of applicants to law schools would upset decades of practice by Harvard and Yale Law Schools, as well as by countless other educational institutions, that have built their admissions processes in reliance on the effective holding of *Bakke*. Such a ruling, moreover, would likely cause significant harm to both institutions.

A. Principles Of *Stare Decisis* Weigh Heavily Against A Rule Of Absolute "Colorblindness" In Admissions Processes.

Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillery*, 474 U.S. 254, 265-66 (1986). While *stare decisis* is not "an inexorable command," courts adhere to it as "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827-28 (1991). "[E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotations omitted) (quoting *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996)).

"*Stare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard* v. *United States*, 514 U.S. 695, 714 (1995) (opinion of Stevens, J.) (quoting *Hilton* v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)).

This Court has long held that race can be a permissible criterion in schools' admissions decisions. Justice Powell's separate opinion in *Bakke*, issued more than three decades ago, set out the law regarding race-conscious admissions. See generally *Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'"). As the Court recognized in *Grutter*, "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." 539 U.S. at 323 (citations omitted).

For nearly 35 years, Harvard and Yale Law Schools have understood that they could, and believe that they should, employ admissions processes that "consider race or ethnicity . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." *Id.* at 334 (discussing scope of Justice Powell's controlling opinion in *Bakke*). As recipients of federal funds subject to this Court's constitutional interpretations under title VI of the Civil Rights Act,[14] Harvard and Yale Law Schools have relied on these principles in fashioning resource- and time-intensive processes designed both to identify students who possess the potential to become future leaders and to enrich their own institutional educational environments. Implementing these policies has required dozens of admissions officers and faculty reviewers, multiple rounds of evaluations, and significant expenditures of time and money. In undertaking such review processes, Harvard and Yale Law Schools have determined they cannot isolate race and exclude it from the otherwise comprehensive, individualized assessments necessary to fulfill their educational missions.

Thousands of other public and private educational institutions have similarly understood and relied upon *Bakke* and *Grutter*. Several other *amici* in this case demonstrate how the whole structure of our nation's higher education system has been built upon this Court's clear holdings about race-conscious admissions. See, *e.g.*, Brief of Brown University et al. (describing, on behalf of a coalition of 13 major universities, how undergraduate institutions have placed substantial reliance on *Bakke* and *Grutter* in shaping admissions policies). Indeed the modern legal profession itself rests on a foundation in schools and policies that depend, in no small part, upon decisions like *Bakke* and *Grutter*. See Brief of the American Bar Association (detailing the structural impacts of race-conscious admissions policy on the legal profession over several decades).

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[14] Title VI incorporates the standards that this Court has announced under the Equal Protection Clause.

> Although Title VI does not mention a private right of action, our prior decisions have found an implied right of action, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 703 (1979), and Congress has acknowledged this right in amendments to the statute, leaving it "beyond dispute that private individuals may sue to enforce" Title VI, *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001).

Barnes v. *Gorman*, 536 U.S. 181, 185 (2002). *See also Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 594 (1983) (plurality opinion) (citing *Cannon*).

Bakke and *Grutter* have invited, and received, a high degree of reliance. To overrule or even modify these precedents now "would dislodge settled rights and expectations," *Hubbard*, 514 U.S. at 714 (opinion of Stevens, J.), upon which law schools and universities have come to depend. Departing from these longstanding holdings would effectively require Harvard and Yale Law Schools to develop new admissions policies and procedures. The risk that these new procedures will select inferior students, and create a less robust educational environment, is quite high. The principles of *stare decisis* strongly counsel against imposing any such risk.

Nothing has changed in the intervening decade since *Grutter* was decided that would give rise to a """special justification,""" *Dickerson*, 530 U.S. at 443, for departing from traditional *stare decisis* requirements. To the contrary, the value of diversity has even stronger empirical support now than it did in *Grutter*. See *supra* at 16-18 (recent social science and business case studies). The growing complexity and interconnectedness of the world makes the case for diversity stronger even still. It would be especially unwarranted for the Court to revisit the holding of *Grutter* in a case where that issue is not even squarely posed.

B. Prohibiting Consideration Of Race Would Lead To Numerous Undesirable Consequences.

In addition to upsetting settled reliance interests, a ruling that the Equal Protection Clause bars considerations of race in admissions decisions would adversely affect the educational missions of institutions like the Harvard and Yale Law Schools.

As small, private institutions, neither school can employ the type of "top ten percent" plan that governs admissions at the University of Texas. As this Court recognized in *Grutter*, the use of "percentage plans" like the one used in Texas for undergraduate admissions can preclude professional schools "from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340. Law schools like Harvard and Yale would thus be put to a choice: either admit "by the numbers" alone or engage in a truncated individualized consideration that forbade applicants and recommenders from discussing, and our faculty and staff from considering, important aspects of applicants' lives, experiences, and goals that happen to relate to race.

The effort to purge admissions processes of all references to race, on the other hand, would have the ironic effect of rendering a truly individualized assessment impossible for many applicants. Requiring schools to ignore a factor that is often inextricable from an applicant's formative life experiences would have the perverse effect of penalizing some applicants in the name of equal protection. It would uniquely preclude them from relying on an aspect of their lives that may be essential to a full appreciation of their perspectives, personal accomplishments, and future potential.

For some students, being Caucasian may be an important part of their life story; as, for example, if a white applicant has chosen to focus on law because of the personal experience of participating in a school desegregation. A Cambodian student may submit a personal essay describing the difficulties of being typecast as a "model minority." The racial dimensions of personal identity might be especially salient for many African-American and Hispanic applicants who have experienced and overcome hurdles that others have not faced.

The ultimate effect of purging admissions processes of all reference to race will not be a colorblind Constitution; it will be a Constitution that disadvantages on the basis of race. The effort to cleanse admissions processes of all mention of race would also almost assuredly invite lawsuits from disappointed applicants who might claim that they had not been admitted because race had been inappropriately considered. Such suits will be difficult and costly to defend. They will thus create perverse incentives for schools to return to the legally safe harbor of admitting students entirely "on the numbers." It is hard to imagine a less attractive outcome for American higher education.

CONCLUSION

For the foregoing reasons, this Court should avoid any holding that would be inconsistent with the capacity of educational institutions to maintain admissions procedures that undertake individualized, holistic evaluation of applicants, including the race of applicants.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE PRESIDENT AND CHANCELLORS OF THE UNIVERSITY OF CALIFORNIA IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The President and Chancellors of the University of California ("UC Amici") respectfully submit this brief *amicus curiae* in support of the Respondent, the University of Texas at Austin ("UT").[1] UC Amici urge this Court to conclude that the UT's undergraduate admissions policy is narrowly tailored to achieving the important educational objective of student body diversity and is not precluded by this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The University of California ("UC") is the largest highly selective institution of higher education in the nation. It consists of ten campuses located throughout California with numerous undergraduate, graduate and professional schools and programs. In Fall 2011, UC had a total undergraduate and graduate enrollment of over 235,000 students. UC is governed by The Regents of the University of California and led by the President of the University, Mark G. Yudof, and the Chancellors of its campuses. The President and Chancellors join this brief as *amici curiae*.[2]

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs, in support of either party or of neither party, have been filed with the Clerk of the Court.

[2] The names of the Chancellors joining this brief are listed in the appendix.

UC has a longstanding commitment to the educational and societal benefits that flow from a diverse student body. "Mindful of its mission as a public institution, the University of California has an historic commitment to provide places within the University for all eligible applicants who are residents of California. UC seeks to enroll, on each of its campuses, a student body that, beyond meeting the University's eligibility requirements, demonstrates high academic achievement or exceptional personal talent, and that encompasses the broad diversity of cultural, racial, geographic, and socio-economic backgrounds characteristic of California."[3]

Since this Court's landmark decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the University of California's policies and practices have played a central role in the national debate concerning the admission of underrepresented minority students to public universities. In 1996, California became the first State in the nation to amend its state constitution to explicitly prohibit race-conscious measures in college admissions. This Court explicitly acknowledged the importance of such laws in *Grutter*, where it observed that "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches," and suggested that universities in other states "can and should draw on the most promising aspects of these race-neutral alternatives as they develop."

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[3] University of California Policy on Undergraduate Admissions (adopted May 25, 1988) ("*Undergraduate Admissions Policy*"), *http://www.universityofcalifornia.edu/news/compreview/12_16/Admission_UCpolicy.pdf.*

539 U.S. at 342; *cf. United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their roles as laboratories for experimentation to devise various solutions where the best solution is far from clear"). The University of California's experience over the last decade and a half under a constitutional prohibition against race-conscious admissions policies sheds important light on the practical, real-world obstacles faced by universities seeking to "obtain[] the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343.

SUMMARY OF ARGUMENT

In November 1996, California became the first state in the nation to explicitly prohibit affirmative action in college admissions.[4] In that year, the California voters enacted Article I, Section 31 of the state Constitution, widely known as Proposition 209, which provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(a).

Proposition 209, which took effect for undergraduate admissions in 1998, had an immediate and dramatic adverse effect on the admission and enrollment of underrepresented minority students at the University of California. In the ensuing years, the University of

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[4] Other states, including Washington and Michigan, later passed substantially similar laws that prohibit public universities from discriminating or granting preferences on the basis of race.

California has adopted a number of different strategies in an attempt to reverse that decline in underrepresented minority students, including expanding its outreach program to secondary schools, incorporating a broader and more comprehensive set of admissions criteria, adopting "holistic" review of applicants, decreasing the weight given to standardized tests, and admitting a specified percentage of the top graduates from each high school under an "Eligibility in the Local Context" program similar in certain respects to UT's "Top Ten Percent" Program. To date, however, those measures have enjoyed only limited success. They have not enabled the University of California fully to reverse the precipitous decline in minority admission and enrollment that followed the enactment of Proposition 209, nor to keep pace with the growing population of underrepresented minorities in the applicant pool of qualified high school graduates. These effects have been most severe and most difficult to reverse at the University's most highly-ranked and competitive campuses.

The University of California's experience establishes that in California, and likely elsewhere, at present the compelling government interest in student body diversity cannot be fully realized at selective institutions without taking race into account in undergraduate admissions decisions.

ARGUMENT

THE UNIVERSITY OF TEXAS AT AUSTIN'S UNDERGRADUATE ADMISSIONS POLICY SHOULD BE UPHELD UNDER THIS COURT'S EQUAL PROTECTION DECISIONS.

This Court properly recognized in *Grutter* that public universities have a compelling interest in achieving a diverse student body, a goal that furthers a number of significant educational and societal benefits. The University of California's longstanding policies are fully consistent with that recognition. However, UC has been significantly hampered from fully achieving that goal and realizing its benefits by Proposition 209, a state constitutional amendment that prohibits the use of race-conscious admission policies. UC's extensive experience with a wide range of race-neutral admissions measures since the implementation of Proposition 209 sheds important light on the extent to which race-neutral measures realistically can be expected to achieve such results.

A. Public Universities Have A Compelling Interest In Achieving The Numerous Educational And Societal Benefits Of A Diverse Student Body.

In *Grutter*, the Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." 539 U.S. at 325. The Court also recognized that an educational institution's judgment that such diversity is "essential to its educational mission" is one that warrants judicial deference. *Id.* at 328; *see also Parents Involved in Community Schools v. Seattle*

School Dist. No. 1, 551 U.S. 701, 797 (2007) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.") (Kennedy, J., concurring in part).

Grutter recognized that the interest in achieving diversity furthers a number of important educational and societal interests. First, the Court explained that the educational benefits that a diverse student body is designed to produce are both "substantial" and "real," and mandate that "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity" so as to further "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation." 539 U.S. at 331-32; *see also id.* at 332 ("All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training"). Second, the Court observed that universities and law schools "represent the training ground for a large number of our Nation's leaders," and opined that for leaders to have "legitimacy in the eyes of the citizenry," it is necessary that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332. Third, it found the University of Michigan Law School's conclusions regarding the educational value of diversity supported by a substantial body of evidence establishing "that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Id.* at 330 (citations omitted). In short, the Court observed, its conclusion that the Law School has a compelling interest in a diverse student body "is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission." *Id.* at 329.

In UC Amici's view, precisely the same conclusions obtain in the context of undergraduate institutions, particularly large, selective public universities such as UT-Austin and the campuses of the University of California. Indeed, closely similar considerations have long been officially recognized in formal policies of the Board of Regents, UC's governing body.[5]

The University of California consists of ten campuses located throughout California with numerous undergraduate, graduate and professional schools and programs.[6] In Fall 2011, UC had a total undergraduate and graduate enrollment of over 235,000 students. UC is broadly comparable in size and importance to the University of Texas System, another of the nation's largest systems of public higher education, which likewise has multiple campuses (nine universities, plus six health institutions) and a total enrollment of over 211,000 students.[7]

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[5] Under the California Constitution, UC is established as a public trust, to be administered by The Regents "with full powers of organization and government . . . ." CAL. CONST. art. IX, § 9. As such, the University enjoys a "unique constitutional status": "The authority granted the Regents includes 'full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowment of the University and the security of its funds.'" *Miklosy v. Regents of Univ. of Calif.*, 188 P.3d 629, 636-37 (Cal. 2008) (citations omitted).

[6] One UC campus, UCSF, is a graduate health sciences campus that enrolls no undergraduates. Although this brief focuses primarily on undergraduate admissions, the educational value of diversity is equally important at UCSF and for all of UC's graduate and professional schools.

As the premier public university in the State of California, UC has a longstanding commitment to the educational and societal benefits that flow from a diverse student body, which are at the heart of its institutional mission. That commitment is expressed in the University's Policy on Undergraduate Admissions, which dates to 1988:

> Mindful of its mission as a public institution, . . . UC seeks to enroll, on each of its campuses, a student body that, beyond meeting the University's eligibility requirements, demonstrates high academic achievement or exceptional personal talent, and that *encompasses the broad diversity of cultural, racial, geographic, and socio-economic backgrounds characteristic of California.*[8]

That commitment is integral to the University's commitment to academic excellence:

> Diversity can enhance the ability of the University to accomplish its academic mission. Diversity aims to broaden and deepen both the educational experience and the scholarly environment, as students and faculty learn to

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[7] The University of Texas System 2011: *Fast Facts, http://www.utsystem.edu/fastfacts.*

[8] *Undergraduate Admissions Policy* (emphasis added).

> interact effectively with each other, preparing them to participate in an increasingly complex and pluralistic society. . . . . Educational excellence that truly incorporates diversity thus can promote mutual respect and make possible the full, effective use of the talents and abilities of all to foster innovation and train future leadership.[9]

Even more broadly, UC's commitment to diversity is closely related to its duties as a public institution:

> Because the core mission of the University of California is to serve the interests of the State of California, it must seek to achieve diversity among its student bodies and among its employees. The State of California has a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible for talented students, staff, and faculty from all groups. The knowledge that the University of California is open to qualified students from all groups, and thus serves all parties of the community equitably, helps sustain the social fabric of the State.[10]

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[9] The Regents of the University of California, *Regents Policy 4400: Policy on University of California Diversity Statement* (adopted Sept. 20, 2007, as amended Sept. 15, 2010) ("*Diversity Statement*"), *http://www.ucop.edu/ucophome/coordrev/policy/PP063006DiversityStatement.pdf.*

[10] *Id.*

UC's policies are consistent with this Court's recognition in *Grutter* that institutions of higher education have genuine interests in student body diversity stemming from their educational mission and their role in society. These interests are far from mere abstractions. To the contrary, whether institutions succeed in attracting and enrolling diverse student bodies has concrete and measurable effects in the real world. In particular, whether a given institution is able to achieve a "critical mass" of underrepresented minority students has a direct relationship to whether the campus enjoys a healthy racial climate.[11]

UC campuses, like UT, administer a biennial survey to undergraduates in which they are asked, among other things, whether they feel that students of their race/ethnicity are respected on campus. The results are striking: among racial and ethnic groups, African Americans are least likely to feel that their race is respected on campus. In many cases, students' responses to the question correlate directly with whether the representation of underrepresented minority students on campus approaches critical mass.

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[11] Historically the University of California has classified as "underrepresented" students from groups that collectively achieved eligibility for the University at a rate below 12.5 percent. Underrepresented minorities refer to American Indian, African American, Chicano or Latino students. University of California, Office of the President, Student Academic Services, ***Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies*** (Mar. 2003) ("***Undergraduate Access to UC***") at 1 n.3, 4, ***http://www.ucop.edu/sas/publish/aa_final2.pdf.***

Thus, in 2010, across eight UC campuses that surveyed undergraduates, from 12.9% to as many as 68.5% of African American students reported feeling that students of their race are not respected on campus (the comparable range in 2008 was from 20% to 51.9%).[12] UC Riverside, the UC campus at which the greatest percentage of African Americans felt students of their race are respected (87.1%),[13] was also the UC campus with the greatest percentage of African American students (7.8% of the undergraduate student body).[14] Similar results obtained with respect to Chicano-Latino students: UC Berkeley and UC San Diego, the two campuses with the smallest percentage of Latino students, were also the two campuses at which Latinos were least likely to feel respected (26.3% and 37.9%, respectively).[15] Conversely, UC Riverside had the highest percentage of Latino students who felt that students of their ethnicity are respected (92.9%), and also had the highest proportion of Latinos in its student body

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[12] University of California, *2012 Accountability Report* at 80, *http://www.universityofcalifornia.edu/accountability/documents/accountabilityreport12.pdf* ("*2012 Accountability Report*"); *2012 Accountability Report Data Glossary and Technical Appendix*, tbl. 8.3.1, *http://www.universityofcalifornia.edu/accountability/documents/accountabilityreport12_glossary_technical.pdf* ("*2012 Accountability Report App.*"). Percentages above refer to those who strongly disagree, disagree, or somewhat disagree when asked if students of their race or ethnicity are respected on campus.

[13] *Id.*

[14] *UC 2011 Accountability Report*, tbl. 8.1.2 at 77, *http://www.universityofcalifornia.edu/accountability/documents/accountabilityreport11_tables.pdf.*

[15] *2012 Accountability Report* at 80; *id.*, App., tbl. 8.3.1.

(30.6%).[16] In short, where critical mass is not achieved, the campus racial climate is likely to be significantly less hospitable to minorities.

The concern about a welcoming climate for all racial and ethnic groups on campus is part of a broader commitment by UC and other public institutions to serve the full range of their citizenry, from all cultural, racial, ethnic, geographic, and socioeconomic backgrounds. UC Amici strongly disagree with Petitioner's contention that *any* consideration of state demographics in admissions amounts to "nothing more than 'racial balancing, which is patently unconstitutional.'" Pet. Br. at 19. That argument misconceives *Grutter*. The Court there condemned racial balancing, which it described as the practice of setting aside "some specified percentage of a particular group merely because of its race or ethnic origin." 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 307) (opinion of Powell, J.)). That hardly means that a public university must blind itself to the demographic realities of the state it serves. As discussed above, the Court has acknowledged the broader educational and societal interests served by a diverse student body, including the value of ensuring that public institutions of higher education are visibly open to all persons, regardless of background; the critical role of universities in preparing individuals for leadership in our political, business and legal communities; and the increased legitimacy that such leadership enjoys when it is truly representative of all of its constituencies.

All of these interests properly permit, and indeed compel, public universities to be conscious of the demographics of the states in which they are located and from which their applicants are largely drawn. Petitioner's cramped reading of *Grutter* as limited solely to narrow pedagogical interests is inconsistent with *Grutter* itself and with the larger realities faced by public universities such as the University of California and the University of Texas, which like public elementary and secondary schools have many compelling reasons to undertake "the important work of bringing together students of different racial, ethnic, and economic backgrounds." *Parents Involved in Community Schools*, 551 U.S. at 798 (Kennedy, J., concurring).[17]

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[16] *UC 2011 Accountability Rep.*, tbl. 8.1.2 at 77.

B. The University of California's Experience Establishes That Race-Neutral Admissions Policies Cannot Guarantee Fully Diverse Student Bodies.

Grutter held that the University of Michigan Law School's race-conscious admissions program was narrowly tailored to accomplish the compelling interest in a diverse student body. 539 U.S. at 333-43. That program did not use a quota system, but instead allowed flexible consideration of race or ethnicity only as a "plus" factor in the context of individualized consideration of each applicant. *Id.* at 335-36. The Law School satisfied this standard by its "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337. The Court emphasized that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.* at 349. Rather, the Court observed, narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.*

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[17] The importance of universities' admitting diverse student bodies recently was highlighted by the Census Bureau's announcement that for the first time in the country's history, births of minorities—including Hispanics, blacks, Asians, and those of mixed race—surpassed births of whites. Sabrina Tavernise, *Whites Account for Under Half of Births in U.S.*, THE NEW YORK TIMES (May 17, 2012). Like Texas, California is one of four "majority-minority" states (that is, states where whites no longer are the majority), a status it attained in 1999. Rebecca Trounson, *U.S. Reaches Historic Demographic Tipping Point*, LOS ANGELES TIMES (May 18, 2012).

Since 1998, when the state constitution prohibited any consideration of race or ethnicity in admissions decisions, the University of California has been actively engaged in precisely the sort of serious, good faith consideration and implementation of a variety of race-neutral alternatives that the Court contemplated in *Grutter*. As such, UC has extensive experience implementing race-neutral admissions policies while attempting to achieve diverse student bodies. That body of practical experience is directly germane to the Court's inquiry here, because it bears on whether it is realistic to expect that public universities can always rely exclusively on race-neutral admissions policies as a means of achieving sufficiently diverse student bodies. The University of California's experience thus provides this Court with an invaluable empirical test of the viability of such alternatives.

Despite numerous and varied efforts at increasing diversity on each of its campuses, UC has enjoyed only limited success. In particular, the admission and enrollment of underrepresented minority students at a number of UC campuses still have not regained the levels that prevailed before Proposition 209 was enacted. The race-neutral measures UC has implemented in an effort to increase diversity have not enabled it to achieve a "critical mass" of certain minority students, particularly African-American students, at its most selective campuses. Nor have they enabled it to assemble a student body that fully reflects the racial and ethnic diversity of the pool of state high school applicants from which those campuses draw.

1. The University of California's Admissions Standards And Policies.

Admission to the University of California is a two-step process: qualification for admission to the University as a whole and, once that is accomplished, admission to individual campuses. The Master Plan for Higher Education of the State of California provides that the University of California should educate freshmen from the "top one-eighth" (12.5 per cent) of all graduates of California public high schools.[18] To identify these students, the University of California promulgates minimum *eligibility* requirements that both specify a floor of preparation needed to pursue study at UC and also function as an entitlement: any high school graduate who meets these requirements is guaranteed a place at UC—although not necessarily at the campus nor in the major of his or her choice. At the same time, because demand for admission exceeds enrollment capacity at most UC campuses, the campuses over the years have developed selection criteria (such as consideration of high school grade point average, test scores, and other evidence of academic promise) to choose which UC-eligible applicants they will admit. These criteria function as a second, and generally more demanding, set of requirements that applicants to most of the campuses must meet.

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[18] *A Master Plan for Higher Education in California*, at 4, 73, *http://www.ucop.edu/acadinit/mastplan/MasterPlan1960.pdf.*

Students become *eligible* for admission to the University of California *system* by meeting established minimum requirements for coursework and grade point average (GPA) and submitting standardized test scores. Effective for the fall 2012 entering class, for example, minimum eligibility requirements for California residents included a GPA of 3.0 or better (weighted by honors/ Advanced Placement bonus points); completion of 15 yearlong college preparatory courses, including courses in history/social science, English, math, laboratory science, foreign language, visual and performing arts, and college preparatory electives; and submission of scores from the ACT with Writing or SAT Reasoning Test.[19]

The University's minimum eligibility criteria, which determine who is admitted to the University as a whole, have always been entirely race-neutral. From the 1960s through 1997, as part of the process of determining admission to a specific campus, individual campuses employed race-conscious criteria, the nature and degree of which varied. That changed beginning in the 1998-99 academic year, following the implementation of Proposition 209.

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[19] *Regents Policy 2103: Policy on Undergraduate Admissions Requirements* (June 18, 1982, as amended Feb. 5, 2009), *http://www.universityofcalifornia.edu/regents/policies/2103.html.*

2. The Adoption of Proposition 209 and Its Immediate Effects on Minority Admission and Enrollment Rates at the University of California.

In the November 1996 election, California voters approved Proposition 209, which added article I, Section 31 to the California Constitution.[20] Article I, section 31 declares that the state, including its political subdivisions, "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." (CAL. CONST., art. I, § 31, subd. (a).) The fall 1998 freshman class at the University of California was the first to reflect the ban on affirmative action established by Proposition 209. *See Coalition for Economic Equity v.*

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[20] Proposition 209 was enacted following The Regents' adoption, in July 1995, of Special Policy 1 ("SP-1"), a resolution disallowing the use of "race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study." The Regents of the University of California, *Policy Ensuring Equal Treatment: Admissions* § 2 *(SP-1)* (July 20, 1995), *http://www.universityofcalifornia.edu/news/compreview/sp1.pdf.* When that resolution was being considered, the academic leadership of the University unanimously urged the continuation of the University's 1988 admissions policy, observing that "significant numbers of potentially qualified California students are still underserved by the University." Statement of the President, Chancellors, and Vice Presidents of the University of California (July 10, 1995). The Regents later rescinded SP-1. The Regents of the University of California, *Future Admissions, Employment, and Contracting Policies, Resolution Rescinding SP-1 and SP-2* (May 16, 2001), *http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf.*

Wilson, 122 F.3d 692 (9th Cir. 1997) (vacating preliminary injunction against enforcement).[21]

In the immediate aftermath of Proposition 209 becoming effective, the rates at which underrepresented minority students applied to, were admitted to, and enrolled at the University of California fell, often by very significant percentages, at every UC campus. In 1998, the first year in which race-neutral admission policies were implemented at UC, admission rates (*i.e.*, the percentage of applicants admitted) for underrepresented minority students and the proportion that these students represented of the total admitted class fell for UC as a system and on every campus.

At the most selective campuses, these declines were steep. "The year after section 31 passed, the number of African American, Latino, and Native American freshmen at UCLA and U.C. Berkeley dropped by over 50%." *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133 (9th Cir. 2012).[22] At UC Berkeley, for example, the admit rate for underrepresented minority students fell from 54.6 percent in 1995 to only 20.2 percent in 1998; at UCLA, the corresponding figures were 52.4 percent in 1995 and 24.0 percent in 1998.[23] The net result was a dramatic drop in the number and proportion of underrepresented minority freshmen. Thus, while in 1995 UC Berkeley had enrolled 807 underrepresented minority freshmen, or 24.3 percent of the entering class, by 1998 it could count only 412, representing 11.2 percent of the class; at UCLA, the number of entering underrepresented minority freshmen dropped from 1,108 to 597 over the same period, from 30.1 percent to only 14.3 percent of the entering class.[24]

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[21] Proposition 209 also prohibits preferential treatment based on race or ethnicity in graduate admissions and in employment.

[22] The discussion in this brief focuses on these two campuses, which admit the lowest percentage of freshman applicants in the UC system. The interest recognized by this Court in ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity" (*Grutter*, 539 U.S. at 332) is particularly acute at these campuses, which are ranked among the top undergraduate institutions nationally. *See 2012 Best Colleges*, U.S. NEWS AND WORLD REPORT (UC Berkeley and UCLA ranked #1 and #2 among public colleges and universities and #21 and #25 among national universities), *http://colleges.usnews.rankingsandreviews.com/best-colleges*.

African American enrollments were especially hard hit. At UC Berkeley, African Americans fell from 6.7 percent of the entering class in 1995 to only 3.7 percent in 1998; at UCLA, similarly, African Americans were 7.4 percent of the entering class in 1995, and only 3.5 percent in 1998.[25] The enrollment of Chicano and Latino students at those campuses also dropped sharply: at Berkeley, from 16.9 percent in 1995 to 8 percent in 1998; at UCLA, from 22.4 percent to 11 percent over the same period.[26]

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[23] *Undergraduate Access to UC* at 15, 18-19 & Table 5.

[24] *Id.* at 18, 19, 22 & Tables 4 and 5.

[25] University of California, *Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2011* ("*1989-2011 Admissions*"), *http://www.ucop.edu/news/factsheets/flowfrc_11.pdf.*

[26] *Id.* The number of Native American students enrolling as freshmen at those campuses also fell sharply over the same period, from 56 to 13 at Berkeley and 42 to 14 at UCLA. *Id.*

3. The University Adopts Various Measures To Reverse The Decline In Minority Admission and Enrollment.

Beginning after the implementation of Proposition 209 and continuing to the present, the University of California has taken a variety of actions to strengthen K-12 education, enhance student preparation for higher education, and implement other race-neutral initiatives designed to enhance its ability to attract, admit, and enroll an undergraduate student body that is both academically well prepared and reflective of the broad diversity of California.

a. Outreach Task Force

When it first adopted SP-1 in 1996, the Board of Regents found that "it is in the best interest of the University to take relevant actions to develop and support programs which will have the effect of increasing the eligibility rate of groups which are 'underrepresented' in the University's pool of applicants as compared to their percentages in California's graduating high school classes." It directed the formation of a task force on academic outreach, the goal of which was to develop proposals for new directions and increased funding to increase the eligibility rate of economically disadvantaged and other applicants.[27]

In response to this mandate, the University formed an Outreach Task Force to develop a comprehensive approach to both low eligibility rates for students from underrepresented groups and the challenges those applicants faced in being admitted to the University's most selective campuses. The Outreach Task Force's report, issued in 1997, recommended a four-point strategy: enhancement and expansion of academic development programs for K-12 students; development of partnerships between UC campuses and selected regional schools to help improve opportunities for college preparation and to foster a school culture that promotes academic success and high educational standards; expansion of informational outreach to students, families, teachers, and counselors to improve planning and preparation for college; and University research and evaluation to identify the root causes of educational disparity within California's school system and to guide the University's outreach work.[28]

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[27] The Regents of the University of California, *Policy Ensuring Equal Treatment: Admissions (SP-1)* § 2 (July 20, 1995), *http://www.universityofcalifornia.edu/news/compreview/sp1.pdf.*

In response to these recommendations, the University dramatically expanded its outreach efforts beginning in 1998. In the years since completion of the report of the Outreach Task Force, UC has spent tens of millions of dollars to expand programs that improve college preparation levels for educationally disadvantaged students. Those efforts included an expansion of existing campus programs that work with individual students to increase academic preparation and motivate students to seek higher education; the establishment of the School/University Partnership Program, through which UC campuses partnered with K-12 schools; and the development of the California Professional Development Institutes, an initiative to train 70,000 teachers annually and to improve teacher quality in core areas of the State's standards-based curriculum.[29]

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[28] *New Directions for Outreach: Report of the University of California Outreach Taskforce* (July 1997), *http://www.ucop.edu/edpartners/documents/archived/outreachrpt.pdf.*

Consistent with Proposition 209, UC's outreach programs operate in a race-neutral fashion.[30] To be eligible for these programs, applicants must be from low-income families or those with little or no previous experience with higher education, or attend a school that is educationally disadvantaged.[31] These efforts are partially responsible for the University's very high enrollment of low-income students and those who will be the first in their families to graduate from college.[32]

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[29] *Undergraduate Access to UC* at 9-10.

[30] While Proposition 209 has been interpreted to prohibit certain mandatory outreach programs, not all forms of outreach are unlawful. The California Supreme Court has found that "the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification." *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1085 (Cal. 2000).

[31] *Undergraduate Access to UC* at 24.

[32] In 2009-10, 35% of UC undergraduates were recipients of federal Pell Grants, *i.e.*, they qualified as "low-income" students by the widely accepted federal definition (the figure increased to 39% in 2010-11). That is nearly double the rate at UC's peer institutions that are members of the Association of American Universities (20% at public universities and 16% at privates), and far higher than the rate at Ivy League colleges such as Harvard (10%) and Yale (13%). *2012 Accountability Report* at 28; *id.*, App., tbl. 3.5.1. As the minority enrollment figures discussed below make clear, policies that increase the enrollment of low-income students do not serve as an effective "proxy" for race and ethnicity.

b. Eligibility in the Local Context

Following the adoption of Proposition 209, elected officials as well as some University faculty called on the University to adopt a "percent plan" somewhat analogous to the Top Ten Percent Plan implemented in Texas following the *Hopwood* decision.[33] Accordingly, effective for students entering the University in 2001, the Board of Regents modified its existing eligibility policy to add a "top 4 percent" program, under which the top 4 percent of the eligible students in each California public high school were designated as Eligible in the Local Context ("ELC"). Effective for students entering UC as freshmen for fall 2012, the Board of Regents expanded the ELC program to the top 9 percent of eligible California high school graduates. Unlike the Texas Ten Percent Plan, ELC guarantees admission only to a campus with available space in the UC system, rather than to an applicant's campus of choice.[34]

ELC students are identified based on a review of the transcripts of the top students in California's high schools. (ELC is not available to out-of-state applicants.) To be eligible for consideration, such students are required to complete the entire course pattern mandated by UC, achieve a minimum GPA of 3.0, and take the full battery of UC-required admission tests.

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[33] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (invalidating University of Texas School of Law's use of racial preferences in admissions).

[34] *Policy on Undergraduate Admissions Requirements.*

The ELC program has been successful in increasing interest and applications from students at high schools that traditionally sent few students to the University. However, because the State of California has few if any high schools with student bodies composed entirely of minorities, it has not substantially increased the diversity of the pool of students considered eligible for UC.[35] Moreover, because ELC addresses only overall Systemwide eligibility and ELC students still must compete against tens of thousands of other well qualified students for admission to individual campuses, it has had limited effect on admissions at the system's most selective campuses, such as UC Berkeley and UCLA.[36]

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[35] Although the expansion of ELC to 9 percent in 2012 was designed to increase the diversity of the ELC pool, preliminary indications suggest this was not successful. For Fall 2012, the UC system received applications from more than 93,000 Californians, roughly one-third of whom qualified as ELC. Preliminary analyses indicate that approximately 35 percent of the ELC applicants were underrepresented minorities. This is slightly less diverse than the overall California resident applicant pool to UC, which included roughly 37 percent underrepresented minorities. University of California Office of Institutional Research, internal analysis, Fall 2012.

[36] For the Fall 2012 admissions cycle (the first in which ELC was extended to 9 percent of high school graduates), preliminary data indicate that UC Berkeley received applications from nearly 19,000 applicants who qualified for ELC—more than twice the number of California residents admitted (roughly 9,400). More than 80 percent of the total California students admitted to Berkeley qualified as ELC. But this left more than 11,000 ELC applicants who were denied. Numbers at UCLA were similar: more than 22,000 of UCLA's 52,000 California resident applicants qualified for ELC. Roughly 85 percent of UCLA's California admits were ELC, but this still left more than 14,000 who were

c. Comprehensive and Holistic Review

In the years following the implementation of Proposition 209, the Board of Regents and faculty also have made significant changes in the processes and criteria governing admission at the campus level. On November 15, 2001, effective for students entering UC in Fall 2002, the Board of Regents directed the campuses to institute a "comprehensive review process" by which all undergraduate students applying to UC campuses are evaluated for admission using "multiple measures of achievement and promise while considering the context in which each student has demonstrated academic achievement."[37]

Comprehensive review was intended to broaden the criteria for evaluating eligible applicants and to eliminate the historic practice of setting aside a particular proportion of the admitted class for students meeting a narrow range of academic criteria, thereby allowing all eligible applicants to be evaluated on an individualized basis in light of a broader set of criteria, including contextual information about students' educational and personal circumstances.[38] It is consistent with this Court's

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denied. *Id.* These figures demonstrate in part why a "10% plan" such as Texas's, which guarantees admission to a specific campus, would not work in California. The numbers are simply too large to accommodate at a campus such as Berkeley or UCLA.

[37] *Regents Policy 2104: Policy on Comprehensive Review in Undergraduate Admissions* (Nov. 15, 2001), *http://www.universityofcalifornia.edu/regents/policies/2104.html.*

[38] UC Board of Admissions and Relations with Schools, Systemwide Academic Senate, *Comprehensive Review in*

direction in *Grutter*, which approved the University of Michigan Law School's "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." 539 U.S. at 337.

The University adopted Guidelines setting forth eight guiding principles for comprehensive review and listing fourteen broad selection criteria for application by the campuses.[39] Among those principles were that "merit should be assessed in terms of the full range of an applicant's academic and personal achievements and likely contribution to the campus community, viewed in the context of the opportunities and challenges that the applicant has faced"; and that "[c]ampus policies should reflect continued commitment to the goal of enrolling classes that exhibit academic excellence as well as diversity of talents and abilities, personal experience, and backgrounds." The selection criteria, in addition to academic grade point average and standardized test scores, included qualification for the ELC program; the quality of academic performance relative to the educational opportunities available in the applicant's secondary school; academic accomplishments in light of the applicant's life experiences and special circumstances such as disabilities, low family income, first generation

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Freshman Admissions at the University of California 2003-2009 ("*BOARS Comprehensive Review Report*") at 3, 5 (May 2010), *http://www.universityofcalifornia.edu/senate/reports/HP_MGYreBOARS_CR_rpt.pdf.*

[39] *Guidelines for Implementation of University Policy on Undergraduate Admissions, http://www.ucop.edu/sas/adguides.html.*

to attend college, disadvantaged social or educational environment, difficult personal and family situations or circumstances, and refugee or veteran status.

The University has devoted substantial resources to creating tools that allow consideration of these factors even in a very large applicant pool, including the development of systemwide "read sheets" that display quantitative data such as grades, test scores, and numbers of courses taken as percentiles where an individual is rated against all applicants to UC, all applicants to the individual campus, and all applicants to UC and the campus from the student's individual high school. The read sheet also provides contextual information about each applicant's high school—for example, the number of applicants to UC, average test scores, socioeconomic data about the student body (*e.g.*, average family income, numbers of students who qualify for state and federal welfare programs), numbers of uncredentialed teachers, numbers of honors and Advanced Placement courses offered, etc. Read sheets are prepared electronically for every applicant and distributed to each campus to which the applicant has applied.

On January 20, 2011, the Board of Regents enacted a Resolution extending the concept of comprehensive review to encourage use of a single holistic score in evaluating applicants.[40] Holistic review, which had been pioneered at Berkeley beginning in 1999 and was later adopted by

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[40] *Regents Policy 2108: Policy Regarding Individualized Review and Holistic Evaluation in Undergraduate Admissions* (Jan. 20, 2011), *http://www.universityofcalifornia.edu/regents/policies/2108.html.*

UCLA,[41] eliminates the use of fixed weights for specific criteria and allows admissions readers greater use of judgment in evaluating the totality of an applicant's achievements and potential. Individual applications are read and scored by multiple independent readers and significant score disparities are referred to additional more senior readers for adjudication.

d. Use of Standardized Tests

Another initiative taken by the University of California in an attempt to increase the diversity of its entering classes on a race-neutral basis was to reduce its reliance on standardized tests. Since the late 1960s, the University's eligibility requirements included the submission of scores from four standardized admissions tests: the Scholastic Aptitude Test (SAT) I or ACT, and three SAT II achievement tests in specific subject areas. Over time, however, the University's use of standardized admissions tests and the tests themselves evolved away from a preference for "aptitude" testing, based in part on evidence that scores on aptitude-type tests were highly influenced by family education and income levels.[42]

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[41] *See BOARS Comprehensive Review Report* at 27-28 (describing use of single-score holistic review processes at UC Berkeley and UCLA).

[42] *Undergraduate Access to UC* at 13; BOARS, *Admissions Tests and UC Principles for Admissions Testing* (Dec. 2009) at 3-4, 10-11 & n.6, 12, 18 (discussing evidence that lower test scores are associated with socio-economic disadvantage and estimating that a disproportionately low percentage of Chicano/Latino and African American students who complete UC's course requirements take the SAT-II Subject tests), *http://www.universityofcalifornia.edu/senate/reports/hp2mgy_boars-testing_010609.pdf.*

In February 2001, then-UC President Richard Atkinson called for the elimination of the SAT Reasoning Test requirement to increase inclusiveness and fairness and to avoid controversial notions of aptitude. In response, the College Board revised the SAT-Reasoning Test (SAT-R) to eliminate objectionable question types and to incorporate the writing component previously administered in the SAT-II Subject tests, while ACT Inc. similarly developed the ACT-with-Writing. The University maintained the SAT/ACT requirement, but reduced the number of required subject tests from three to two.[43] Out of concern that requiring any additional tests beyond the SAT or ACT might discourage students from educationally disadvantaged families, the University eventually dropped the subject test requirement entirely. Beginning with applicants for Fall 2012, the University no longer requires applicants to submit SAT Subject test scores for eligibility.

C. The Limited And Disappointing Results of The University's Race-Neutral Admissions Initiatives.

While these and other measures have enjoyed some limited success, particularly at UC's less selective campuses, the unfortunate reality is that the University's experience continues to support the conclusion it reached a number of years ago: "in a highly selective institution, implementing race-neutral policies leads to a substantial decline in the proportion of entering students who are African American, American Indian, and Latino."[44] Similarly, a recent assessment by the Board of Admissions and Relations with Schools ("BOARS") of the Academic

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[43] *Undergraduate Access to UC* at 13-14.

[44] *Id.* at 1, 28.

Senate concluded that while comprehensive review in freshman admissions is "capturing talent and diversity and helping UC continue to serve as an engine of social mobility for students with promise from modest backgrounds," the University continues to fall short in its admission of underrepresented minority students, particularly African American and Chicano/Latino students. In particular, that report identified a "disturbing persistence of low African American admit rates across UC campuses, which now is affecting the educational climate."[45]

The shortfall is most apparent when one considers the admission rates for African American students at UC Berkeley and UCLA, the University's most selective campuses. Between 1995 and 2009, African Americans consistently represented between 7 and 8 percent of new high school graduates in California.[46] In 1995, African

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[45] *BOARS Comprehensive Review Report* at 3, 5, 7. A similar conclusion was reached by the Study Group on University Diversity, which was established in 2006 to "undertake a holistic study of the long-term impact of Proposition 209 on the University's ability to serve the State and fulfill its mission as the leading public university in one of the nation's most diverse states." Study Group on University Diversity, *Overview Report to The Regents* at 2 (Sept. 2007), *http://diversity.universityofcalifornia.edu/documents/diversityreport0907.pdf.* It concluded: "Relative to the increasing diversity of California's students, we are losing ground. Furthermore, gains in undergraduate diversity have been concentrated at a few campuses and underrepresented students have significantly lower admission rates on virtually all of our campuses." *Id.* at 5.

[46] CAL. POSTSECONDARY EDUC. COMM'N, ETHNICITY SNAPSHOTS TABLE: BLACKS AS A PERCENT OF TOTAL, 1995-2009, *http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp?Eth=2&Rpt=Grad_HS*. The figure was 6.9 percent in 2008 and 6.8 percent in 2009. *Id.*

American students represented 7.3 percent of admitted freshmen at UC Berkeley, but by 1998, following the implementation of Proposition 209, that figure had dropped to only 3.2 percent. In 2010 and 2011, it was only 3.9 percent—still barely half the pre-Proposition 209 figure—and preliminary data for Fall 2012 place the percentage at 3.5 percent.[47] Similar results obtain at UCLA, where African American students represented 6.7 percent of admits in 1995, but only 3.0 percent in 1998, 3.8 percent in 2010, 3.6 percent in 2011, and 3.8 percent in 2012 (preliminary).[48] Thus, admission rates for African American students at these campuses have not recovered from their post-Proposition 209 decline, but instead have stagnated at lower levels. Systemwide, the faculty BOARS committee recently found that admission rates for African Americans remain "far below" those for the groups with the highest admit rates on each campus, and concluded that "[t]he Comprehensive Review process alone is not sufficient to overcome the disadvantages that African Americans face in their educational opportunity."[49]

Although the results for Latino/Chicano students have been appreciably better, they have been driven largely by the growth of Latinos in the state's high school graduating classes, the racial and ethnic diversity of which continue to increase rapidly. Thus, in 1995, Chicano and Latino students represented 18.5 percent of admits at

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[47] *1989-2011 Admissions*; UC, Office of the President, *California freshman admissions for fall 2012*, Table 3, *http://www.ucop.edu/news/factsheets/2012/fall_2012_admissions_table3.pdf* ("*Fall 2012 Admissions*"). Enrollment rates are closely similar to these admissions figures.

[48] *Id.*

[49] *BOARS Comprehensive Review Report* at 25.

UC Berkeley, a figure that dropped to only 8.5 percent in 1998. In 2010, Latino/Chicano students at UC Berkeley had increased to 14.8 percent of the admitted pool, a figure that grew to 17.2 percent in 2011 and 17.8 percent in 2012.[50] Between 1995 and 2009, however, Latino/Chicano students went from 30 percent to fully 41 percent of California's high school graduates.[51] That is, Latino/Chicano admissions at UC Berkeley have not yet fully recovered to their levels of more than 15 years ago, during a period when the population of Latino high school graduates has increased by more than 25 percent. Thus, the increase in both the percentages and absolute numbers of admitted Latino students at UC campuses masks a growing gap between those numbers and their numbers in the available statewide pool of eligible, qualified applicants.

These figures are troubling, because they call into serious question whether it is currently feasible without the careful and limited application of race-conscious measures to achieve the level of diversity of underrepresented minority students that this Court has recognized as a legitimate objective in the context of higher education. Certainly, most UC campuses have found themselves unable to cross that threshold with respect to African American students, despite the extensive history summarized above of race-neutral measures intended to achieve that objective. In 2011, there were only 130 African American students in an entering freshman class of 4,443 at UC Berkeley, and 224 of 5,825 at UCLA.[52] Thus, there is a high likelihood that each of those students would find himself or herself the only African American student in nearly all of his or her classes, and subject to the isolation that diversity is intended in part to avoid. *See Grutter*, 539 U.S. at 318 (describing testimony that admitting a "critical mass" of minorities requires a "meaningful number" that "encourages underrepresented minority students to participate in the classroom and not feel isolated").[53] With African American students numbering only about four out of every hundred entering freshmen, that scenario is inescapable except perhaps in the very largest introductory lecture courses.[54]

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[50] *1989-2011 Admissions*; *Fall 2012 Admissions*, Table 3.

[51] CAL. POSTSECONDARY EDUC. COMM'N, ETHNICITY SNAPSHOTS TABLE, HIGH SCHOOL GRADUATES: LATINO AS A PERCENT OF TOTAL, 1995-2009, *http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp?Eth=4&Rpt=Grad_HS.*

These limited numbers of underrepresented minority students in UC's undergraduate population are evident at the professional school level as well. In particular, business schools, which play an influential role in shaping tomorrow's business leaders, have very low proportions of underrepresented minorities, and UC's business schools compare poorly in that respect to similar programs nationally. Systemwide, UC enrolled fewer minority students in business (4.5 percent) than did comparable programs nationally (12.8 percent).[55] In California, where an estimated 46.4 percent of the 2011 population is Latino/Hispanic, African American and American Indian,[56] recent entering classes of MBA students at UC campuses have averaged only one to two percent African American and three to four percent Latino students.[57] Indeed, during ten of the last eleven academic years, two or more of UC's six business schools enrolled *zero* African Americans.[58] While law school enrollment figures are somewhat more encouraging, and vary from school to school and year to year, UC law schools face similar challenges. Entering law school classes in recent years have averaged only three to four percent African American, with one UC law school in 2009-10 reporting only ten African American students in a student body of over 600, considerably below the numbers in the years immediately before Proposition 209.[59]

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[52] *2012 Accountability Report*, App., tbl. 8.2.1.

[53] Given these figures, UC Amici do not believe that critical mass has been achieved, whether that threshold is measured on a campus-wide, department or program-wide, or classroom-by-classroom basis.

[54] In 2011-12, more than 90 percent of all undergraduate class sections at UC Berkeley numbered less than 100 students. UC Berkeley, Office of Planning & Analysis, *Common Data Set 2011-12, http://opa.berkeley.edu/statistics/cds/2011-2012.pdf.*

These results threaten seriously to undermine the University of California's ability to discharge its role as "the training ground for a large number of our Nation's leaders." *Grutter*, 539 U.S. at 332.[60] As a University report recently concluded, "the enrollment percentage of underrepresented minorities . . . has exhibited little or no progress at UC's business schools. This clearly limits the University's ability to contribute to a diverse leadership cadre for California."[61]

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[55] *2012 Accountability Report* at 90; *id.*, App., tbl. 8.7.1.

[56] U.S. CENSUS, STATE & COUNTY QUICK FACTS, CALIFORNIA (2011), *http://quickfacts.census.gov/qfd/states/06000.html.*

[57] *2011 Accountability Report*, tbl. 8.7.1, at 102.

[58] *Id.* at 104-05.

[59] *Id.* at 103, 107-08.

[60] Over the years, scores of the State's and the Nation's political, legal, and business leaders have graduated from UC Berkeley and UCLA, including Chief Justice Earl Warren, current and former governors, Congressmen, judges, and a host of others.

Notable among them are many prominent minorities, including Los Angeles Mayor Antonio Villaraigosa, former Los Angeles mayor Tom Bradley, D.C. Circuit judge (and former California Supreme Court Justice) Janice Rogers Brown, and diplomat and Nobel laureate Ralph J. Bunche, among others.

[61] *Study Group on University Diversity* at 5.

CONCLUSION

The University of California's experience over a decade and one-half suggests that the limited and judicious application of race-conscious admissions measures remains necessary, at least under current circumstances, if the compelling interest in a diverse student body is to be fully realized. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — UC *AMICI CURIAE*

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

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Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF DR. ROBERT D. PUTNAM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Dr. Robert D. Putnam is the Peter and Isabel Malkin Professor of Public Policy at the Kennedy School of Government at Harvard University.[1] A recipient of the Johan Skytte Prize, one of the world's highest accolades for a political scientist, Dr. Putnam has conducted extensive research on ethnic and racial diversity, and education. Dr. Putnam has consulted widely with national leaders, including the last three American presidents and the last three British prime ministers, on issues relating to the social sciences, and has authored 14 books and 96 articles on these issues.[2] He is the former president of the American Political Science Association, a member of the National Academy of Sciences, and a Fellow of the British Academy.

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[1] In letters lodged with the Clerk of the Court, Counsel for the Petitioners and Respondents have granted blanket consent for the filing of *amicus* briefs in this case in accordance with this Court's Rule 37.3(a). *Amicus* submitting this brief hereby represents that no counsel for any party authored this brief in whole or in part. Additionally, no party or counsel for a party – or any person other than *amicus* and his counsel – made a monetary contribution intending to fund the preparation or submission of this brief.

[2] Dr. Putnam is the author of *E Pluribus Unum: Diversity and Community in the Twenty-first Century, the 2006 Johan Skytte Prize Lecture; Education, Diversity, Social Cohesion and "Social Capital"*; and *Education and Social Capital.* His books include *Bowling Alone: The Collapse and Revival of American Community*; *Better Together: Restoring the American Community*; and *American Grace: How Religion Divides and Unites Us.*

Dr. Putnam has conducted a nationwide study on the effects of a more diverse and multicultural society, finding that on balance, diversity is an important social asset. This conclusion reaffirms Dr. Putnam's views, based upon his experience as a professor of social sciences for over 40 years, that diversity in higher education not only has substantial benefits for all students but also facilitates greater learning.

Dr. Putnam did not seek to become involved in this case, but because his findings on diversity were inaccurately and selectively described in the *amicus curiae* brief submitted by Abigail Thernstrom, Stephan Thernstrom, Althea K. Nagai, and Russell Nieli (collectively the "Thernstrom *amici*"), he respectfully submits this brief to clarify the record. Indeed, contrary to suggestions in the Thernstrom *amici* brief, Dr. Putnam's research supports the compelling interest of seeking to attain diversity in our Nation's institutions of higher education.

SUMMARY OF ARGUMENT

The academic work at the center of this brief is Dr. Putnam's essay, *E Pluribus Unum: Diversity and Community in the Twenty-first Century, the 2006 Johan Skytte Prize Lecture*, 30 Scandinavian Political Studies 137 (2007) ("*E Pluribus Unum*"), the very title of which reflects our Nation's objective "to create a novel 'one' out of a diverse 'many.'" The Thernstrom *amici* have twisted Dr. Putnam's essay and used it to argue against the University of Texas at Austin's ("UT") use of race-conscious admissions policies to achieve diversity in its student body, and to capture the benefits flowing to all students from such diversity. Dr. Putnam's essay does not support their conclusion.

Quite to the contrary, Dr. Putnam's extensive research and experience confirm the substantial benefits of diversity, including racial and ethnic diversity, to our society. In his essay, Dr. Putnam concluded that, while increased diversity may present challenges in the short to medium term, greater diversity can lead to significant benefits to society in the medium to long term. These benefits are manifest in higher education, as Dr. Putnam's more than 40 years of experience as a professor at Harvard University and the University of Michigan demonstrate.

The Thernstrom *amici* selectively cite Dr. Putnam's research and focus on only one of the three findings that Dr. Putnam makes in his essay. In so doing, the Thernstrom *amici* present a distorted view of Dr. Putnam's work. They fail to acknowledge his other points: most importantly, that diversity has considerable benefits and that the most effective method to reduce any short term disadvantages of diversity is to create a wider sense of "we." The tools for doing so include programs like the race-conscious admissions policy that UT has implemented.

ARGUMENT

I. Dr. Putnam's research and experience support the holding in *Grutter v. Bollinger* that the attainment of a diverse student body is a compelling state interest.

Dr. Putnam's study examines the important challenges and significant opportunities facing all advanced countries in the transition to a more diverse and multicultural society. *See E Pluribus Unum* at 144. The evidence that Dr. Putnam reviewed in his essay demonstrated that increased diversity in the United States and other advanced nations is inevitable and that, while this fact may present challenges in the short to medium term, increased diversity can benefit society in the medium to long term by including a broader range of groups within what it means to be, for example, an American. *See id.* at 138-39.

This reality is reflected in Dr. Putnam's long experience as a professor. A diverse student body is essential to effective learning and in-class discussion of the social issues, such as race relations and urban poverty, which are addressed in Dr. Putnam's courses. A realistic discussion of these issues would be far less valuable without students from a wide array of backgrounds, including diverse racial and ethnic origins. Moreover, the value of diversity extends to learning in other academic fields, such as mathematics and science. Research has shown that broad diversity can produce improved problem-solving. This diversity is critical in higher education and, as this Court stated in *Grutter*, provides great benefit to students entering "today's increasingly global marketplace." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Accordingly, Dr. Putnam's research and experience support this Court's holding in *Grutter* – and the Respondents' position in this case – that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325.

A. Dr. Putnam's essay made three major points about diversity.

E Pluribus Unum discusses three broad points, which are clearly laid out in the introduction. *See E Pluribus Unum* at 138-39. First, "[i]ncreased immigration and diversity are not only inevitable, but over the long run they are also desirable. Ethnic diversity is, on balance, an important social asset, as the history of [the United States] demonstrates." *Id.* at 138. Second, "[i]n the short to medium run, however, immigration and ethnic diversity challenge social solidarity and inhibit social capital." *Id.* Third, "[i]n the medium to long run, on the other hand, successful immigrant societies create new forms of social solidarity and dampen the negative effects of diversity by constructing new, more encompassing identities." *Id.* at 138-39. Accordingly, "the central challenge for modern, diversifying societies is to create a new, broader sense of 'we.'" *Id.* at 139.

The first point, that increased diversity is both inevitable and desirable, is based on analysis of immigration trends in the United States and five European countries – Ireland, Germany, Sweden, France and the United Kingdom. *Id.* An increase in diversity brings several benefits to society. For example, increased diversity tends to enhance creativity, as reflected in the large percentages of immigrants who have won Nobel Prizes, become members of the National Academy of Sciences, and won artistic honors such as Academy Awards and Kennedy Center awards. *Id.* at 140. Other research has shown that diversity contributes to greater collective creativity in work groups. *Id.* (citing

Sheila S. Webber & Lisa M. Donahue, *Impact of Highly and Less Job-related Diversity on Work Group Cohesion and Performance: A Meta-Analysis*, 27(2) J. Mgmt. 141 (2001); C. O'Reilly, et al., *Group Demography and Innovation: Does Diversity Help?*, *in* 1 Research in the Mgmt. of Groups and Teams (Elizabeth Mannix & Margaret Neale eds., 1997); K.Y. Williams & C.A. O'Reilly, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, *in* 20 Research in Org. Behavior (Barry M. Staw & Larry L. Cummings, eds., 1998)).

The second part of *E Pluribus Unum* focuses on the challenges resulting from diversity in the short to medium term. *Id.* at 138. In examining these challenges, Dr. Putnam analyzed the "Social Capital Community Benchmark Survey" of 2000, which contained a sample size of 30,000 people. *Id.* at 144. The sample included a "representative national sample of 3,000" and smaller samples in 41 different communities nationwide. *Id.* The study found that, at the time, increased diversity triggered both lower inter-racial trust and trust in people of the respondent's own race. *See id.* at 147-48. Dr. Putnam stated that "[d]iversity seems to trigger *not* in-group/out-group division, but anomie or social isolation." *Id.* at 149.

The third finding of *E Pluribus Unum* shows that in the medium to long term, diversity leads to many positive results. *Id.* at 138-39. Because notions of "diversity" are based on "socially constructed identities," the adaptation to diversity over time requires Americans to develop a more encompassing sense of "we." Race-conscious admissions policies, such as those used at UT, help to facilitate this adaptation in the area of higher education by fostering in its students a broader sense of what it means to be a UT student, and ultimately, a UT alumnus.

These results also have been observed in other American institutions. The integration of the United States Army has progressed over the last 30 years, to the point where studies in the 1990s found that "the average American soldier has many closer interracial friendships than the average American civilian of the same age and social class." *Id.* at 161 (citations omitted). Similar experiences arise in the context of religion. While religion has become less important as a line of social division in America, religion remains personally important to individuals. *See id.* at 160 ("[T]hough most Americans know their own religious affiliation, for younger Americans that affiliation is less salient socially.").

In short, far from finding only that diversity in the short term can produce "overwhelmingly negative" effects, Thernstrom Br. at 13, the point advanced in *E Pluribus Unum* is that "in the short run there is a tradeoff between diversity and community, but that over time wise policies (public and private) can ameliorate that tradeoff." *E Pluribus Unum* at 164. As Dr. Putnam concluded, "[t]he task of becoming comfortable with diversity will not be easy or quick, but it will be speeded by our collective efforts and in the end well worth the effort." *Id.* at 165.

B. Dr. Putnam's more than 40 years of experience as a university professor reaffirm his views on the benefits of diversity in higher education.

The university campus setting precisely illustrates Dr. Putnam's point about the medium to long term effects of diversity. As this Court stated in *Grutter*, a diverse student body promotes "'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" 539 U.S. at 330 (citation omitted). Dr. Putnam's teaching experience demonstrates the importance of diversity in higher education.

Dr. Putnam has taught at Harvard University, and before that at the University of Michigan, for more than 40 years. His teaching focuses on contemporary social issues in America, including race relations, urban poverty, and religious diversity. The presence of students from diverse backgrounds fosters realistic exchanges during in-class discussion, and leads to more effective learning. *Id.* (holding the educational benefits of diversity "are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"); *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 219 (5th Cir. 2011) (citation omitted).

The type of classroom discussion Dr. Putnam relies on would be significantly impaired in the absence of students from a wide range of backgrounds, including diverse racial and ethnic origins. Indeed, the lack of a diverse student body would reduce the educational benefits for students of all races. A less diverse student body would diminish exposure to a broader range of perspectives and make all students less prepared to adapt to an increasingly diverse workplace.

The need for broad diversity, including racial and ethnic diversity, in higher education is equally strong in other disciplines, including mathematics and science. For example, research has demonstrated that better, faster problem-solving is produced by increased diversity, especially intellectual diversity. *See, e.g.*, Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (2007).

As this Court stated in *Grutter*, "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" 539 U.S. at 330 (citations omitted). This premise has long been accepted by the Court. Indeed, quoting Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, the Court of Appeals stated below that student body diversity

> often brings not just excitement, but valuable knowledge as well. "[A] student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a [university] experiences, outlooks, and ideas that enrich the training of its student body

> and better equip its graduates to render with understanding their vital service to humanity."

Fisher, 631 F.3d at 219 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J.)).

A successful adaptation to the reality that the United States is inevitably becoming more diverse will require society as a whole to create "a new, broader sense of 'we.'" *E Pluribus Unum* at 139. Such a strengthening of shared identities depends upon the existence of "more opportunities for meaningful interaction across ethnic lines where Americans (new and old) work, *learn*, recreate, and live." *Id.* at 164 (emphasis added). Accordingly, Dr. Putnam's research and teaching experience confirm that UT has a compelling interest in a diverse student body and attaining the educational benefits that flow from diversity.

II. The Thernstrom *amici* brief misuses Dr. Putnam's research.

The Thernstrom *amici* brief argues that racial and ethnic diversity in higher education is not a compelling state interest, contending that the increased contact between racial groups on campuses that results from race-conscious admissions policies, even under the parameters of *Grutter*, undermines race relations. The Thernstrom *amici* cite to one of Dr. Putnam's findings to support its argument, while omitting his conclusions that the medium to long term gains of diversity are achieved through increased racial integration and interaction, and that diversity provides many benefits to society.

A. The Thernstrom *amici* brief omits that ultimate gains from diversity are achieved through increased interracial interaction.

The Thernstrom *amici* attempt to use Dr. Putnam's research to emphasize that more diverse settings are characterized by lower social solidarity. Thernstrom Br. at 11 ("[The more contact [people] have with [members of other ethno-racial] groups . . . the more suspicious they are of them."). Dr. Putnam's study was a "comparative static" analysis, that is, a comparison of communities in the United States *at a single point in time*. *See E Pluribus Unum* at 158. As Dr. Putnam notes in his essay, the research survey did not offer statistical evidence on the "dynamic" effects of diversity "over long periods of time within a single place." *Id.* at 158-59. Such a statistical analysis to measure long term effects has not been available, and is one that social scientists have only begun to undertake. *Id.* at 159. Instead, Dr. Putnam relied on historical analysis to measure the long term effects of diversity.

The Thernstrom *amici* mischaracterize Dr. Putnam's research studies by emphasizing only the short term effects of diversity, while ignoring the long term effects. *See* Thernstrom Br. at 13. Ignoring the long term effects is not only intellectually dishonest, it also disserves this Court whose decisions operate in a long-term world. Based upon historical research, Dr. Putnam found that over time, policies designed to encourage shared identity across ethnic groups *reduce* intra-group "social distance" and *increase* social solidarity. *E Pluribus Unum* at 159; *see supra* Part I.A.

For example, another research survey examined whether making friends with a person of another religion leads to a more positive assessment of various religious groups. *See* Robert D. Putnam & David E. Campbell, *American Grace: How Religion Divides and Unites Us* 526-34 (Simon & Schuster, 2010). Dr. Putnam found that "as people build more religious bridges," by making friends with people of another religion, "they become warmer toward people of many different religions," not just those religions to which their friends belong. *Id.* at 533. In the long term, "an increase in interpersonal religious bridging will continue to have a similar effect, smoothing tensions among people of different religions." *Id.*

The same concept applies to race. In the medium to long term, as people have more contact with members of other ethno-racial groups, they will trust people of all ethnicities and races more, and increase social solidarity. *See E Pluribus Unum* at 138-39. People will "adapt[ ] over time, dynamically, to . . . diversity, [which] requires the reconstruction of social identities . . . of the newly more diverse society as a whole." *Id.* at 159-60. They will construct a new, more encompassing identity. *Id.* at 139.

Since increased diversity in this country is inevitable, the social effects of diversity in the medium to long term are significant. "[R]etaining social cohesion in the context of increased diversity is one of the pressing issues of our time." Robert D. Putnam, *Diversity, Social Capital, and Immigrant Integration: Introductory Remarks*, 98 Nat'l Civic Rev. 3, 3 (2009). If the United States does not take affirmative steps to adapt to the reality of a more diverse society, "the reweaving of our communities may take half a century, judging from our past experience." *Id.*

B. The Thernstrom *amici* brief ignores the many social benefits of diversity outside of the "contact" hypothesis.

The Thernstrom *amici* also fail to acknowledge the many social benefits of diversity existing apart from the challenged "contact" hypothesis. That hypothesis posits that "[a]s we have more contact with people who are unlike us, we overcome our initial hesitation and ignorance and come to trust them more." *E Pluribus Unum* at 141. As the Court recognized in *Grutter*, an admissions policy such as the one used by the University of Michigan Law School "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" *Grutter*, 539 U.S. at 330. The Thernstrom *amici* seek to minimize these benefits by linking them with the contact hypothesis. *See* Thernstrom Br. at 9-10.

Dr. Putnam's study demonstrates that these educational benefits may occur outside of the contact hypothesis. When "social distance is small," and "there is a feeling of common identity, closeness, and shared experiences," such as in a classroom, students of different races and ethnicities will cultivate relationships with each other. *E Pluribus Unum* at 159. As a result, these students not only will come to trust those individual students more, but also will trust students of all other races and ethnicities more. Over time, they will construct a new, more encompassing understanding of the embodiment of a UT student, for example. *See id.* Hence, through shared experiences, not solely contact, individuals from diverse backgrounds obtain greater trust and relationships, benefitting themselves and the larger society.

In addition, broad diversity, including racial and ethnic diversity, in higher education creates other powerful benefits, such as fostering collective creativity in workgroups, and "produc[ing] much better, faster problem-solving." *Id.* at 140. The Thernstrom *amici* ignore these benefits of diversity that were part of Dr. Putnam's work.

C. Race-conscious admissions policies such as the ones at UT are effective in increasing interpersonal contact and reducing social distance.

UT's policies foster the small social distance necessary to encourage a shared identity across ethnic groups. Policies that promote interpersonal contacts among members of diverse ethnic groups are among the most effective at reducing social distance. Such policies have led to a decrease in the United States Army's inter-ethnic tensions, the increase of interfaith American relationships, and a renewed historical identity as a nation of immigrants.[3] *See id.*

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[3] As these examples demonstrate, a broad view of diversity is beneficial. Another such area that can lead to a broader sense of community is diversity of economic (*i.e.*, class) backgrounds. Although recent research by Dr. Putnam and others has sought to draw more attention to class divisions and

(Continued ...)

The United States Army's affirmative action and anti-discrimination policies provide a clear example of how affirmative action policies foster a new shared identity. *See id.* at 161. Over thirty years ago, race relations in the military were tense. Deadly attacks of fragmentation hand grenades among soldiers of different races were frequent enough that a term was developed for it: "fragging." *See id.* Recent studies now show that the "average American soldier has many closer inter-racial friendships than the average American civilian of the same age and social class." *Id.* An emphasis on shared identities across racial lines among the officer corps played a key role in the now relatively color-blind institution. *See id.*; *see also Grutter*, 539 U.S. at 331 ("[H]igh-ranking retired officers and civilian leaders of the United States military assert that, 'based on [their] decades of experience,' a 'highly-qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.'") (citation omitted).

The benefits of diversity have also been realized in America's religious community. The common wisdom among sociologists of American religion was that "11:00 am Sunday is the most segregated hour in the week." *E Pluribus Unum* at 161 (internal quotation marks omitted). Over the last 50 years,

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economic inequality, this does not lessen the compelling state interest in achieving diversity, including racial and ethnic diversity. *See* Robert D. Putnam, Requiem for the American Dream? Unequal Opportunity in America, Address at the Aspen Ideas Festival (June 29, 2012).

however, many churches, especially evangelical megachurches and Catholic parishes, have become substantially more racially integrated. *See id.* This racial integration is, at least in part, due to "the construction of religiously based identities that cut across (while not effacing) conventional racial identities." *Id.*

A century ago, immigrants of different "races" entered the country, including Italians, Polish Catholics, Russians, and others who did not identify as Anglo Saxons. *Id.* at 162. These immigrants' cultures "permeated the broader American cultural framework, with the Americanization of St. Patrick's Day, pizza, and 'Jewish' humour." *Id.* "In some ways 'they' became like 'us', and in some ways our new 'us' incorporated 'them.'" *Id.* This new identity was due, at least in part, to policies aimed at incorporating new immigrants, such as community centers, athletic fields, playgrounds and schools. *Id.*

In short, policies that seek a broad diversity, including racial and ethnic diversity, in educational institutions, such as those in use at UT, hold great promise in overcoming any potential short-run negative effects of diversity identified in the Thernstrom *amici* brief. A nation that is inevitably and increasingly diverse benefits from policies that promote social solidarity and trust through shared experiences and creation of a more inclusive social identity. This is the important lesson from Dr. Putnam's work, "namely to create a novel 'one' out of a diverse 'many.'" *Id.* at 165.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECOR
AND
BRIEFS

No. 11-345

In The
Supreme Court of the United States

◆

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

BRIEF OF *AMICI CURIAE* RELIGIOUS ORGANIZATIONS AND CAMPUS MINISTRIES INCLUDING THE GENERAL BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH, REV. GRADYE PARSONS, STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), AMERICAN BAPTIST CHURCHES IN THE U.S.A., THE AFRICAN METHODIST EPISCOPAL ZION CHURCH (U.S.A.), THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, THE PROGRESSIVE NATIONAL BAPTIST CONVENTION, THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., ESPERANZA, THE CHRISTIAN LIFE COMMISSION AND THE AFRICAN AMERICAN FELLOWSHIP OF THE BAPTIST GENERAL CONVENTION OF TEXAS, THE AMERICAN BAPTIST HOME MISSION SOCIETY, CATHOLICS IN ALLIANCE FOR THE COMMON GOOD, NETWORK, DISCIPLES JUSTICE ACTION NETWORK (CHRISTIAN CHURCH (DISCIPLES OF CHRIST)), SOJOURNERS, AND THE AFRICAN AMERICAN MINISTERS LEADERSHIP COUNCIL IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether The University of Texas at Austin's use of race as one factor among many considered in the admissions process is permissible to secure the benefits of diversity in higher education.

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INTEREST OF *AMICI CURIAE*[1]

Amici are major religious denominations and other religious organizations with a strong interest in securing the benefits of diversity for all students. Several of the *amici* sponsor campus ministries at campuses across the Nation, including The University of Texas at Austin. In particular, *amici* are committed to helping members of *amici*'s faith communities flourish in their own faith while engaging and interacting with others from diverse backgrounds. *Amici* seek to nurture young people and give them the tools they need to reach their full potential, including being equipped for the pluralistic and multicultural society in which *amici* minister and serve.

The General Board of Church and Society of The United Methodist Church ("UMC") is responsible for seeking to implement the UMC's Social Principles and providing forthright witness as provided in THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH ¶ 1004 (United Methodist Publishing House 2008) ("UMC BOOK OF DISCIPLINE" or

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[1] Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amici* file this brief in accord with the blanket written consent of all parties to the filing of *amicus curiae* briefs in support of either party or of neither party, copies of which are on file in the Clerk's Office.

"the Discipline"). The UMC is the third largest denomination in the United States, with campus ministries at over 500 colleges and universities throughout the country. The UMC's Discipline affirms all persons as equally valuable in the sight of God and works toward societies in which each person's value is recognized, maintained, and strengthened—living out the call to mission and ministry by engaging in ministry with the poor, combating diseases of poverty by improving health globally, creating new places for new people and renewing existing congregations, and developing principled Christian leaders. Campus ministries under the auspices of the UMC, including the Wesley Fellowship, which operates at The University of Texas at Austin, seek to be open and welcoming communities engaging in vital Christian ministry to students, faculty, and staff, while placing students at the heart of their missions, and providing the tools students need to help discern their call, develop their skills, and discover a community of other young Christian leaders. The General Board of Church and Society of The United Methodist Church files in this case out of the belief that diversity in higher education provides all students with a richer, more vibrant educational experience and prepares individuals for a leadership role in our pluralistic democracy.

Rev. Gradye Parsons, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) ("PC (U.S.A.)"). Rev. Gradye Parsons, as Stated Clerk of the General Assembly, is the senior ecclesiastical officer of the Presbyterian Church

(U.S.A.). The PC (U.S.A) is a national Christian denomination with nearly 2,016,000 members in more than 10,560 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the policies of the General Assembly of the PC (U.S.A.) regarding the elimination of racism in access to higher education, employment and public education. The General Assembly of the PC (U.S.A.) has historically recognized that in order to eliminate systemic racism, measures to increase diversity are often necessary. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

American Baptist Churches in the U.S.A. ("American Baptists") is one of the most diverse Christian denominations today, with 5,500 local congregations comprised of 1.3 million members across the United States and Puerto Rico. American Baptists are a Christ-centered, biblically grounded, ethnically diverse people called to radical personal discipleship in Christ Jesus. American Baptists nurture authentic relationships with one another; build healthy churches; transform communities, engaging every member in hands-on ministry; and speak the prophetic word in love. As a people of prayer, purpose, and passion, American Baptists are in the forefront of creating a community of faith where people of every race, nationality, and culture gather as one in worship, service and work. American Baptists heed the call to evangelism and mission, seeking to energize the world in discipleship; to serve as witnesses for justice and wholeness; to provide healing and education to all; to promote peacemaking and holistic change; to fight poverty; and to develop leadership in our members. As members of an inclusive religion, American Baptists are gifted by a variety of backgrounds and find unity in diversity, diversity in unity, and embrace a pluralism of race, ethnicity, and gender. American Baptists file in this case out of the belief that diversity in higher education provides all students with a more vibrant educational experience, teaches all members of our society to value its diversity and to find unity in that diversity, develops leaders capable of embracing all members of our pluralistic democracy, and legitimizes our public institutions by ensuring that they are open to all members of society.

The African Methodist Episcopal Zion Church (U.S.A.) ("AMEZ") is a Christian denomination with over 1.4 million members in the United States, with member churches on five continents with the mission to increase love for God and to help meet the needs of humankind by "Loving God with all our heart, with all our soul, and with our entire mind, and to love our neighbor as ourselves." The AMEZ realizes its mission through spirituality, worship, prayer, obedience, evangelization, ministry, and charity, focusing on each individual as a whole person. To that end, the AMEZ promotes and implements ministries that transform people's lives spiritually, socially, and economically; promotes fellowship with God, believers, and nonbelievers; and affirms the grace inherent in every person. In particular, the AMEZ seeks to empower its members for ministry, so that each individual may attain the spiritual potential God has for him or her. The AMEZ files in this case out of the belief that diversity in higher education provides all students with a more vibrant educational experience, allowing each student to reach his or her potential; prepares individuals for leadership roles in our democracy; and promotes justice by ensuring that our public institutions are open to all members of society.

The General Synod of the United Church of Christ is the representative body of the national United Church of Christ ("UCC") and is composed of delegates chosen by its Conferences, from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by General Synod as described in the Bylaws of the UCC, and of *ex officio* delegates. The UCC was formed in 1957 by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has approximately 5,600 Local Churches in the United States, with a membership of approximately 1.2 million. The General Synod of the UCC, various settings of the UCC, and its predecessor denominations, have a rich heritage of supporting diversity. In 1981 at its thirteenth gathering, the General Synod passed a foundational resolution entitled "Affirmative Action in Church and Society" and in 1995 at its twentieth gathering the General Synod passed a resolution entitled "Recommitment to Affirmative Action in Light of Recent Supreme Court Decisions." The General Synod of the United Church of Christ files in this case out of the belief that diversity in higher education teaches all members of our society to value its diversity, helps heal societal divisions and unify our society, prepares leaders for their roles in our pluralistic democracy, and legitimizes our public institutions by ensuring that they are open to all members of society.

The Progressive National Baptist Convention is an association of Baptist churches with 1.5 million members in the United States, committed to the mandate of making disciples of Christ. The Convention is founded on the precepts of fellowship, progress, service, and peace and seeks to affirm the "priesthood of all believers." The centerpiece of the Convention's witness is social justice and human liberation as a mandate of the Gospel. As part of its mission, the Convention promotes the training of church leaders and lay members to equip them for a lifetime of ministry to humanity. The Convention is dedicated to the development of leaders in a global, diverse environment, and exposes its leaders to ministry opportunities and experiences in cultures other than their own to increase the effectiveness of their ministry and leadership. The Convention recognizes that the elimination of systematic racism often requires measures to increase diversity. The Convention files in this case out of the belief that diversity in higher education teaches all members of our society to value its diversity; helps to heal societal divisions and unify our society; prepares leaders for their roles in our pluralistic democracy; and legitimizes public institutions of higher education by ensuring that they are accessible to all members of society.

The National Council of the Churches of Christ in the USA ("NCCCUSA") is the leading force for ecumenical cooperation among Christians in the United States. The NCCCUSA's member faith groups—from a wide spectrum of Protestant, Anglican, Orthodox, Evangelical, historic African American and Living Peace churches—include 45 million persons in more than 100,000 local congregations in communities across the nation. Each participating denomination brings distinctive faith traditions to the Council's common table. Protestant and evangelical traditions are represented by churches of British, German, Scandinavian and other European origin, historic African American churches, and immigrant churches from Korea and India. Orthodox member communions have roots in Greece, Syria, Russia, the Ukraine, Egypt, India, and other places where Eastern and Oriental Orthodoxy have long histories. And each member communion has a unique heritage, including teachings and practices that differ from those of other members. As they gather in the Council, the member communions grow in understanding of each other's traditions. They work to identify and fully claim those areas of belief they hold in common; they celebrate the diverse and unique gifts that each church brings to ecumenical life; and together they study those issues that divide the churches. They cooperate in many joint programs of education, advocacy and service that address critically important needs and that witness to our common faith. NCCCUSA files in this case out of the belief that genuine unity demands inclusivity and a respect for diversity, and the belief that diversity in higher education teaches all members of society to value diversity, promotes justice, and creates models of shared leadership vital to our democracy.

Esperanza is the premiere Hispanic faith-based network in the country, led by visionary activists and thought leaders who understand the issues impacting Hispanic communities and act from a faith-based perspective. Esperanza delivers programs and services in its local Philadelphia community, and works with a network of over 12,000 clergy, churches, and community leaders across the country to strengthen Hispanic communities. Esperanza is driven by the biblical mandate to serve and advocate for "the least of these," and in doing so to strengthen Hispanic communities. Esperanza files in this case based on the belief that diversity in higher education provides all students with a richer, more vibrant educational experience; prepares individuals to be active, empowered members of their communities; and is necessary to ensure that all members of our democracy have access to opportunities for self advancement.

The Christian Life Commission and the African American Fellowship of the Baptist General Convention of Texas. The Christian Life Commission is the ethics agency of the Baptist General Convention of Texas, a fellowship of churches joined together to transform our communities and the world. The African American Fellowship is the fellowship of African American Churches affiliated with the Baptist General Convention of Texas. The Baptist General Convention of Texas seeks to continue Jesus' ministry of teaching, evangelizing, and ministering to human needs; accomplishes our work through individuals with diverse backgrounds; values the inclusion of all persons; and embraces the mosaic of God's family, grateful for the richness of gifts, backgrounds, and experiences. The Christian Life Commission, which is a diverse body made up of both pastors and lay members of Texas Baptist churches throughout the State, works with churches, communities, and government leaders to help give voice to those often overlooked or ignored by society. Central to the Christian Life Commission is the call to recognize every individual's unique gifts, talents, and spiritual formation. The Christian Life Commission and the African American Fellowship reach out to all through compassion and ministry, and promote racial reconciliation through ministry and public engagement. The Christian Life Commission and the African American Fellowship file in this case out of the firm commitment that the future and well-being of Texas is determined by the success of public education and lifelong learning; that the availability of education is vital for developing God's gifts, understanding, and wisdom; and that The University of Texas at Austin's admission policy furthers quality schooling for all Texas students.

American Baptist Home Mission Society ("ABHMS") answers God's call to live out Christian faith and transform individuals, congregations and communities by developing Christ-centered leaders, networks and programs committed to witness and evangelism, social justice, discipleship and mission work across the United States and Puerto Rico. Missionaries of all types—pastors and lay leaders; chaplains and pastoral counselors; refugee sponsors; directors of neighborhood action program Christian centers; volunteers; Sunday school teachers; and new church planters—partner with ABHMS daily to minister to those in need emotionally, physically, financially, and spiritually. A central part of ABHMS's mission is a commitment to sharing and learning across cultures, and the common understanding that the church is enriched when the contributions of all are engaged in its witness and mission. Through cultural awareness and sensitivity skill development, racial reconciliation training and dialogue, intercultural development tools and coaching, and coordination of activities that promote cross-cultural learning opportunities, ABHMS helps congregations and individuals develop cultural awareness and sensitivity for building a just and inclusive church. ABHMS is also committed to providing and supporting educational opportunities that enable and empower students and ministerial leaders to grow both personally and professionally. ABHMS files in this case out of the belief that diversity in higher education provides all students with a more vibrant educational experience, teaches all members of our society to value its diversity and to find unity in that diversity, develops leaders capable of embracing all members of our pluralistic democracy, and legitimizes our public institutions by ensuring that they are open to all members of society.

Catholics in Alliance for the Common Good ("CACG") is a civic organization that promotes Roman Catholic social teachings in public life. The organization advances an analysis of contemporary issues of public policy that is informed by these Catholic teachings; as Catholics we are called to participate actively in public life in the service of human dignity, social justice, and the common good. Central to CACG's mission is the promotion of policies and programs that enhance the inherent dignity of all, and support the health, welfare, and advancement of all people, regardless of race, gender, religion, or economic class. CACG files in this case out of the belief that participation from all members of society is necessary for the common good, and that diversity in higher education helps to ensure every person's right to participate in the economic, political, and cultural life of our society.

NETWORK has educated, organized and lobbied for economic and social transformation at the national level for over forty years. In that capacity, NETWORK has worked vigorously against racism in our nation as well as the growing wealth and income gaps that especially stigmatize communities of color. NETWORK grounds its work in Catholic Social Teaching, which emphasizes the dignity of each individual and the need to ensure that all individuals have access to the opportunities our nation has to offer. NETWORK files in this case out of the conviction that without access to higher education, at both the undergraduate and graduate levels, communities of color will continue to experience reduced earning capacity and further marginalization.

Disciples Justice Action Network ("DJAN") is a multi-racial, multi-ethnic grassroots network of individuals, congregations, and organizations within the Christian Church (Disciples of Christ). The Disciples of Christ was founded on the ideal of unity in Christ with openness and diversity in practice and belief, and is dedicated to wholeness in a fragmented world. The Disciples Justice Action Network seeks to live out this mission by working together and advocating greater justice, peace and diversity in churches, communities, nations, and the world. The Disciples Justice Action Network files in this case out of the belief that diversity in higher education facilitates the creation of true communities, educates individuals in service and reconciliation, and promotes justice and wholeness in a fragmented world.

Sojourners is a national Christian organization committed to faith in action for social justice. Our mission is to articulate the biblical call to social justice, inspiring hope and building a movement to transform individuals, communities, the church and the world. With a 40-year history, Sojourners is a nonpartisan leader that convenes, builds alliances among, and mobilizes people of faith, focusing on racial and social justice, life and peace, and environmental stewardship. Our formal diversity statement affirms our belief that unity in diversity is not only desirable, but *essential* to fulfilling God's ultimate desire for God's people, and commits us to publicly advocate for civil rights and legal non-discrimination to protect the safety and dignity of all people. Sojourners files in this case out of that commitment to a society—including our educational system—that works to achieve diversity.

African American Ministers Leadership Council ("AAMLC") is a network comprised of 1,100 African American ministers, who believe churches are called to be centers of caring and action, and that religious leaders are called to lead by example. The AAMLC celebrates the historical role of the Black Church as a place of refuge and a source of strength in the midst of oppression. The AAMLC builds on a strong association of pastors, clergy, theologians, seminarians, and ministry lay leaders to promote civic engagement, social justice programs, access to public education, health care, and economic justice for all. In particular, the AAMLC realizes its call and mission by giving pastors and lay leaders tools and access to support for strengthening congregations and communities. The AAMLC files in this case out of the belief that diversity in higher education provides all students with a more vibrant educational experience, teaches individuals to reach out to others with caring, prepares individuals for leadership roles in our society, and promotes the accessibility of institutions of public education to all comers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Colleges and universities are traditionally places of debate and discussion, which require effective participation by members of all groups to further the goals of providing students with the tools to live in a pluralistic society, cultivating future leaders, and giving individuals the tools to mature in faith, compassion, and mutual understanding. A diverse campus promotes these goals, as interactions across socioeconomic, racial, ethnic, and religious lines give all individuals the opportunity to explore new and varied points of view, to develop their unique talents and gifts, and to reach out to others with kindness, respect, and compassion. The presence of only a few members of different groups, however, impedes these goals and undermines the vital principles of open access and equality.

Reaping the benefits of diversity in higher education requires a critical mass of minorities so that members of each group can bring their individualized experiences to bear, rather than be perceived as simply a representative of any one specific group. *Amici* religious organizations and denominations, some of which sponsor thriving campus ministries at The University of Texas at Austin and other colleges and universities throughout the Nation, are committed to enhancing and strengthening the independence, inclusion, individuality, and diversity of all people—affirming "all persons as equally valuable in the sight of God" and working toward "societies in which each person's value is recognized, maintained, and strengthened." UMC BOOK OF DISCIPLINE ¶ 162. *Amici* further believe it is important for "racial minorities to have their special circumstances considered in order to improve their educational opportunities * * * * " *Grutter* v. *Bollinger*, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting).

Amici therefore support policies that promote diversity in higher education in a holistic fashion so that individuals have the opportunity to develop their full potential. Such policies provide flexibility to consider each individual's unique experiences and background and to admit students of all backgrounds, who bring an array of talents and leadership skills that are essential to realizing the benefits of a student body that is not just racially diverse, but diverse along all lines. This broad diversity is fundamental to the university, which serves as a vital training ground for future political, civic, and business leaders of the Nation. It is also fundamental to *amici*, which similarly value the rich diversity of the college communities in which their members are educated, and in which *amici* minister and serve.

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ARGUMENT

I. The Benefits Of Diverse College Campuses Are Vital To *Amici*'s Missions

Amici religious denominations and organizations strive to provide their members, including college students, with faith communities in which to grow and develop. See, e.g., THE GENERAL BOARD OF HIGHER EDUCATION & MINISTRY, *United Methodist Campus Ministry: College and University Students* ("We long to provide the tools students need to help discern their call, develop their skills, and discover a community of other young Christian leaders.");[2] AMERICAN

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[2] At http://www.gbhem.org/site/c.lsKSL3POLvF/b.3594249/k.46E/Welcome_to_United_Methodist_Campus_Ministry.htm (last visited Aug. 8, 2012). The campus ministries of the United Methodist Church are known as "Wesley Foundations." Wesley Foundations trace their beginnings to the origins of Methodism itself—specifically, to the founding "Holy Club" of the Methodist

(Continued on following page)

BAPTIST CHURCHES (USA), *Vision* ("As a people of prayer, purpose, and passion, we are in the forefront of creating a community of faith where people of every race, nationality and culture gather as one in worship, service and work").[3] Likewise, *amici* seek to promote a society that recognizes the worth and dignity of every human being. NETWORK, *Issues* (affirming that "each person has an inherent and unalienable dignity");[4] UNIVERSITY PRESBYTERIAN CHURCH, *Multicultural Affirmation* (affirming commitment to the "recognition of the importance of all individuals in the makeup of God's Kingdom" and the "opportunity to learn more about one another and how we can live and work in unity");[5] NATIONAL COUNCIL OF CHURCHES, *Member Communions* ("NCC

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movement, which comprised a group of students at Oxford University led by John Wesley in "methodical" study, prayer, and self-discipline. The first Wesley Foundation in the United States was established in 1913 at the University of Illinois. The name "Wesley Foundation" was chosen to emphasize two spheres of outreach: "Wesley" refers to John Wesley, the founder of the Methodist Church and the first campus minister at Oxford University; "Foundation" refers to an "open movement," that is, an ecumenical movement available to all students.

[3] At http://www.abc-usa.org/WhoWeAre/Vision/tabid/56/Default.aspx (last visited Aug. 8, 2012).

[4] At http://www.networklobby.org/issues/economic-justice (last visited Aug. 8, 2012).

[5] At http://upcaustin.org/wp-content/uploads/2010/09/Multicultural Affirmation.pdf (last visited Aug. 8, 2012).

believes that genuine unity demands inclusivity and a respect for diversity.").[6]

As part of these efforts, *amici* focus on individuals—encouraging them to explore and nurture their unique gifts and talents. See, e.g., UMC BOOK OF DISCIPLINE ¶ 162 (affirming all persons as "equally valuable in the sight of God" and "work[ing] towards societies in which each person's value is recognized, maintained, and strengthened"); SOJOURNERS, *Diversity Statement* ("We affirm the biblical truth of every human being's inherent dignity and worth, as all people are created in the image of God.");[7] CATHOLICS IN ALLIANCE FOR THE COMMON GOOD, *Our Vision* (CACG "is committed to creating the necessary conditions for a culture of life that reverences the life and dignity of the human person at all stages");[8] AMERICAN BAPTIST CHURCHES (USA), *Leadership Development* ("The vitality of any local congregation is dependent not only on inspiring preaching, but also on Christian education, visitation, prayer ministries, youth work, stewardship programs and many other components that draw upon the varied skills of the entire church family.").[9] *Amici* celebrate the uniqueness of each individual, and thus seek to encourage—and challenge—members in developing their own potential, particularly during the critical college years. See, e.g., BRASKAMP, ET AL., PUTTING STUDENTS FIRST: HOW COLLEGES DEVELOP STUDENTS PURPOSEFULLY 191 (2006) ("Students are learning and developing in college for a purpose: that is, to be of service to the world." (citation omitted)).

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[6] At http://www.ncccusa.org/about/about_ncc.html (last visited Aug. 8, 2012).

[7] At http://sojo.net/about-us/diversity-statement (last visited Aug. 8, 2012).

[8] At http://www.catholicsinalliance.org/aboutus.html (last visited Aug. 8, 2012).

At the same time, *amici* focus on outreach to and engagement with wider communities—teaching and fostering respect for those of different faiths, opinions, and beliefs. See, e.g., *Our People: The People of The Methodist Church* (explaining that Methodists "accept you for who you are * * * [s]how respect for other religions * * * [and] [w]elcome diverse opinions and beliefs");[10] Paul Massingill, *Keys To Creating A Diverse Campus Ministry* (explaining the "core commitment that following Jesus and being in Christian community requires us to be in relationship with those who are 'different' than we are.").[11] In doing so, *amici* seek to promote authentic relationships, which are the foundation of the true community that *amici* seek to foster. See, e.g., TEXAS WESLEY UNITED METHODIST CAMPUS MINISTRY, *Who We Are* (emphasizing a "welcoming community that focuses on small group interaction");[12] AMERICAN BAPTIST CHURCHES (USA), *Mission Statement* ("Our commitment to Jesus propels us to nurture authentic relationships with one another");[13] Alec Hill, *Committed to Community* (seeking "true community" marked by "authenticity" and noting the importance of "building a community to reach a community").[14]

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[9] At http://www.abc-usa.org/WhoWeAre/Identity/Mission/Leadership Development/tabid/65/Default.aspx (last visited Aug. 8, 2012).

[10] THE UNITED METHODIST CHURCH, http://www.umc.org/site/c.lwL4KnN1LtH/b.1355351/k.2E2B/Our_People.htm (last visited Aug. 8, 2012).

[11] THE GENERAL BOARD OF HIGHER EDUCATION & MINISTRY (July 30, 2011), http://www.gbhem.org/site/apps/nlnet/content3.aspx?c=lsKSL3POLvF&b=5521401&ct=11450361.

Diverse college campuses are exceptionally important to these efforts by *amici* because they provide critical settings in contemporary society where individuals "learn from one another and challenge one another." CAMPUS HOUSE OF PRAYER, *Missional Community Movement Vision*.[15] Such peer learning and growth is particularly apparent when students have the opportunity to interact with those who are different, as this allows students "to break out of the stereotypes so that [they] can be free to be exactly who [they] are." UNIVERSITY BAPTIST CHURCH, *College*

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[12] At http://www.texaswesley.com/who-we-are/ (last visited Aug. 8, 2012).

[13] At http://www.abc-usa.org/WhoWeAre/Vision/tabid/56/Default.aspx (last visited Aug. 8, 2012).

[14] INTERVARSITY CHRISTIAN FELLOWSHIP (Feb. 11, 2003), http://www.intervarsity.org/news/committed-to-community.

[15] At http://texasunited.org/mission/vision/ (last visited Aug. 8, 2012).

Ministry, Labyrinth.[16] Experiencing the diversity of humanity further gives students the opportunity to "learn the fullness of God's creation." *A Resolution To Affirm University Presbyterian Church As A Multicultural Church.*[17] A diverse campus environment is necessary for students to realize *amici*'s goals; grow in their faith; and develop into whole persons.

Amici, through sponsorship of campus ministries and many other activities, focus not only on building authentic, meaningful relationships and teaching individuals to develop into whole persons, but also on sharing their faith with and ministering to diverse people. AMERICAN BAPTIST CHURCHES (USA), *Vision* ("[W]e work together in mutual submission, humility, love, and giving that the gospel might be preached and lived in all the world.");[18] EVERY NATION CAMPUS MINISTRIES, *Core Values* ("Because we are called to make disciples, our primary focus is ministering to people");[19] UNIVERSITY PRESBYTERIAN CHURCH, *Diversity* ("We are prayerfully and intentionally seeking to welcome and befriend an ever widening circle of God's people.").[20] To do this requires that *amici* "encourage and participate in the education of young people, in order that they might be better equipped to live in a multicultural society." EVANGELICAL LUTHERAN CHURCH IN AMERICA, *Freed in Christ: Race, Ethnicity and Culture.*[21]

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[16] At http://ubcaustin.org/labyrinth/?page_id=10 (last visited Aug. 8, 2012).

[17] UNIVERSITY PRESBYTERIAN CHURCH 1 (2010), http://upcaustin.org/wp-content/uploads/2010/09/MulticulturalAffirmation.pdf (citation and internal quotation marks omitted).

[18] At http://www.abc-usa.org/WhoWeAre/Vision/tabid/56/Default.aspx (last visited Aug. 8, 2012).

[19] At http://www.encmtexas.com/ENCM/Core_Values.html (last visited Aug. 8, 2012).

Moreover, *amici* recognize that "[m]any needs are best met by joining forces with others." The UNITED METHODIST CHURCH, *Mission and Ministry* ("We take part in community groups that are trying to serve human need or trying to change social forces that cause suffering");[22] NETWORK, *History* (explaining that success is due to "continued involvement of hundreds of congregations of women religious and thousands of individual Sisters, as well as that of parishes, small faith communities, religious congregations of brothers and priests, and thousands of individual activists").[23] As a result, *amici* frequently partner with other faith-based groups to advance their mutual goals and missions. See, e.g., UNIVERSITY INTERFAITH COUNCIL, *Welcome* (discussing goal "to provide mutual support, to discuss issues and values relevant to our ministries at U.T., and to facilitate common programs with each other");[24] DISCIPLES JUSTICE ACTION NETWORK, *Links and Allies* (listing groups with which it partners);[25] SOJOURNERS, *History* (explaining goal of "uniting churches and faith-based organizations across the theological and political spectrum");[26] CATHOLICS IN ALLIANCE FOR THE COMMON GOOD, *Our Vision* (discussing "network of more than 20 national Catholic and interfaith organizations that include laypeople, theologians, priests, and women religious").[27] This collaboration and partnership is critical to achieving *amici*'s shared mission of change and growth in their communities and the world. And such collaboration and partnership requires the ability to reach out to diverse individuals and organizations.

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[20] At http://upcaustin.org/about/diversity (last visited Aug. 8, 2012).

[21] Adopted Aug. 31, 1993, http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/Race-Ethnicity-Culture.aspx.

[22] At http://www.umc.org/site/c.lwL4KnN1LtH/b.2295473/k.7034/Mission_and_Ministry.htm (last visited Aug. 8, 2012).

[23] At http://www.networklobby.org/about-us/history (last visited Aug. 8, 2012).

Amici thus endeavor to prepare their members to live out their faith in a world that is increasingly diverse. The population of the United States is today approximately 308 million, consisting of approximately 50.5 million Latinos or Hispanics (16.3 percent); 42 million Black and African Americans (13.6 percent), 17.3 million Asian Americans (5.6 percent), and 5.2 million Native Americans (1.7 percent). *Profile of General Population and Housing*

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[24] At http://www.uicut.org/ (last visited Aug. 8, 2012).

[25] At http://www.djan.net/links.htm (last visited Aug. 8, 2012).

[26] At http://sojo.net/about-us/history (last visited Aug. 8, 2012).

[27] At http://www.catholicsinalliance.org/aboutus.html (last visited Aug. 8, 2012).

Characteristics: 2010.[28] By 2050, it is expected that the population will consist of approximately 128 million Latinos or Hispanics (29 percent); 59 million Black and African Americans (13 percent), and 41 million Asian Americans (9 percent). Jeffrey S. Passel & D. Vera Cohn, *U.S. Population Projections 2005-2050* 9-10.[29] Thus by 2050, it is likely that no single racial group will account for over 50 percent of the population. *Id.* at 10.

For *amici* to properly equip their members to minister to, serve, and partner with diverse communities, now and in the future, it is vital that members be exposed to diversity in ways that allow students of faith to explore new points of view, develop interests and talents, and "'reexamine their most deeply held assumptions about themselves and their world.'" *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2999 (2010) (Kennedy, J. concurring) (quoting *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 312, 313, n.48 (1978)). It is vital that these members encounter and engage individuals of different economic, racial, ethnic, and religious backgrounds. This is not merely a compelling educational interest; it is an imperative for the development both of *amici*'s members and of an active and involved citizenry. See *Grutter*, 539

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[28] United States Census Bureau, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&prodType=table (last visited Aug. 8, 2012).

[29] The Pew Research Center (Feb. 11, 2008), http://pewsocialtrends.org/files/2010/10/85.pdf.

U.S. at 332 ("Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible is to be realized."); see also SOJOURNERS, *Diversity Statement* ("We believe that unity in diversity is not only desirable, but *essential* to fulfilling God's ultimate desire for God's people, as expressed in scripture (Acts 2, Revelation 7:9), and thus an essential element of seeking God's will on earth as it is in heaven." (emphasis in original));[30] AMERICAN BAPTIST CHURCHES (USA), *10 Facts You Should Know About American Baptists* ("American Baptist Churches USA today is the most racially inclusive Protestant body. Represented in our churches are equally diverse worship styles, cultural mores and approaches to Scriptural interpretation. The resulting challenges and opportunities have made us stronger—through fellowship, respect, mutual support and dialog, all based on a belief that unity in Christ involves growth and understanding.").[31]

To fulfill their own missions of helping their members grow in their faith, understanding and compassion; providing the tools their members will need to reach their full potential as individuals in our ever-changing pluralistic society; and cultivating leaders for the next generation, *amici* rely on the existence of rich diversity along all lines at our Nation's colleges and universities.

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[30] At http://sojo.net/about-us/diversity-statement (last visited Aug. 8, 2012).

[31] At http://www.abc-usa.org/portals/0/ABC10FactsBrochure.pdf (last visited Aug. 8, 2012).

II. Diversity Is Particularly Important At Flagship Schools Like The University Of Texas At Austin

Amici share both a conviction that the tradition of pluralism is enhanced when people of faith bring their concerns and convictions into public life, and a moral obligation to work towards a more just society in which access to opportunity is visibly open to all. That obligation extends to ensuring that each individual's worth is recognized and that all have equal access to higher education—including flagship schools like The University of Texas at Austin—regardless of economic status, race, ethnicity, religion, or creed. See, e.g., UMC BOOK OF DISCIPLINE ¶ 162-A (asserting "the right of members of racial and ethnic groups to equal opportunities in employment and promotion [and to] education and training of the highest quality").

Given these principles, it is exceptionally important that flagship schools—like The University of Texas at Austin—ensure their campuses are diverse along all lines. The realization of each individual's potential is brought to fruition when elite universities are clearly open to all comers. This openness reinforces our pluralistic tradition, helping to ensure essential and "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation." *Grutter*, 539 U.S. at 332.

Flagship schools disproportionately develop the leaders who shape civic and political life. *Ibid.* In a world where civic, political, religious, and community life is ever more diverse, it is essential to the growth of future leaders that they be exposed to and reflect the wealth of diversity that exists, and experience the diverse communities they will lead. This helps to guarantee their legitimacy, by making "the path to leadership [ ] visibly open to talented and qualified individuals of every race and ethnicity." *Ibid.*

Additionally, flagship schools educate *amici*'s members, who go on to serve important roles in charitable and community life, and as role models. *Amici*'s members are better equipped to act as role models, living and teaching their faith in a diverse world, when they have been educated in an environment that is diverse in all ways. Access to and experience of a richly diverse education assists all individuals in realizing their unique potential, thus enabling them to better serve and minister to their diverse communities. But students are not the only beneficiaries of diverse flagship institutions. The Nation, too, benefits as its "'future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 313 (quoting *Keyishian* v. *Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

A diverse student body is therefore essential to provide students with the tools to live in a pluralistic society, the cultivation of future leaders, and to make sure that individuals mature in faith and compassion to become active, engaged members of our communities. But the presence of only a few members of different groups impedes these goals and undermines the central tenets of accessibility and equality.

Achieving the benefits of diversity requires that there be enough individuals of all types on a campus, so that no one individual feels isolated as a result of his or her unique characteristics, and so that no single individual is made to feel like a "spokesperson" for his or her group. In essence, the goal of critical mass is to make sure that an individual is not seen in a binary context, but rather as a whole person—unique and deserving of respect. Reaching a critical mass thus enables members of all groups to share their *individualized* experiences, rather than being viewed simply as representative of a specific group. *Grutter*, 539 U.S. at 333. In this regard, "'some attention to numbers'" is inevitable. See *id*. at 336 (quoting *Bakke*, 438 U.S. at 323). For individuals to realize their shared humanity, to accept one another as individuals, to experience meaningful communication, and to grow into their true potential, it is vital to experience diversity of all forms, to understand that every individual has a unique context, and to value that context.

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CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS, ET AL.

Respondents.

**On Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit**

BRIEF AMICI CURIAE FOR RICHARD SANDER AND STUART TAYLOR, JR. IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*[1]

The past decade has witnessed a profusion of careful research on the subject of racial preferences, much of it stimulated by this Court's decisions in *Grutter v. Bollinger*, 549 U.S. 306 (2003), and *Gratz v. Bollinger*, 549 U.S. 244 (2003). *Amici curiae* have written this brief to bring to the Court's attention the portions of this research that seem most relevant to the issues under consideration in *Fisher v. University of Texas, et al.*

Richard Sander is an economist and law professor at UCLA, and a leading scholar in the field of affirmative action. Stuart Taylor, Jr. is a lawyer and journalist who has written many articles and a book on various civil rights issues and episodes. They have been collaborating on a book about the social science research on, and policy dilemmas involving, racial preferences in higher education admissions.

Amici suggest a rule sought by neither party: narrow tailoring should require each state school that seeks to use racial preferences to make them no larger than its socioeconomic preferences and to disclose their size, operation and a timetable for phasing them out by 2028.

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[1] No counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Many of the issues involved in judicial oversight of racial affirmative action in university admissions turn on empirical questions that can be better understood through social science research. This brief identifies important findings in recent research that suggest that the Court's decision in *Grutter*, and indeed affirmative action practices in general, are not having their intended effects.

ARGUMENT

I. Social Science Research Has Undermined The Central Assumption Underlying All Racial Preference Programs In Higher Education Admissions: That They Are Good For The Intended Beneficiaries

Affirmative action is an intensely controversial policy, and the social science work done in this field is far from immune to politics. But a growing volume of very careful research, some of it completely unrebutted by dissenting work, suggests that racial preferences in higher education often undermine minority achievement.

This Court's decisions make clear that racial preferences in higher education are tolerated under constitutional law — to the extent that they are tolerated — only on the assumption that they are benefits conferred upon relatively powerless minorities.[2] If preferences turn out to have mostly harmful effects — or even if the effects are often harmful and on balance ambiguous — then the fundamental legal premise for permitting this type of racial classification is gone.

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[2] This has always been implicit and often explicit in the Court's opinions. *E.g., Grutter* 539 U.S. 306, 313-14, 316, 341 (2003); *id.* at 332-33 (admissions policy helps preferred groups achieve "[e]ffective participation . . . in the civic life of our Nation" and

Admissions preferences are often described by universities as essentially tie-breaking exercises or as efforts to create a "level playing field." If this were true it would be hard to imagine any harmful effect on the intended beneficiaries. But in fact the racial preferences used by the University of Texas, and those used by most flagship state universities, elite colleges, and graduate professional schools are very large indeed.[3] Those African-Americans (hereinafter "blacks") and Hispanics who are admitted due to preferences typically enter with markedly less academic preparation (as measured by test scores and high school/college records) than nearly all of their Caucasian (hereinafter "white") and Asian classmates.

For example, among freshmen entering the University of Texas at Austin in 2009 who were admitted outside the top-ten-percent system, the mean SAT score (on a scale of 2400) of Asians was a staggering 467 points above (and the mean score of whites was 390 points above) the mean black score. In percentile terms, these Asians scored at the 93rd percentile of 2009 SAT takers nationwide, whites at

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acquire "the training and education necessary to succeed in America"); *Regents of University of California v. Bakke*, 438 U.S. 265, 325 (1978) (joint opinion of Brennan, White, Marshall and Blackmun, JJ).

[3] T.J. Espenshade, C.Y. Chung, and J.L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 SOCIAL SCIENCE QUARTERLY 1422 (2004); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV.367 (2004).

the 89th percentile, Hispanics at the 80th percentile, and blacks at the 52nd percentile.[4]

For decades, it was unclear whether very large preferences generally benefited the preferred students (through the positive peer effects of very able classmates and influential networks) or, on balance, harmed them by subjecting them to academic "mismatch" (because teachers would aim instruction at the median student, and those with weaker preparation would fall behind and learn less).[5] A growing array of evidence suggests that mismatch effects predominate.

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[4] The mean SAT scores were 1991 for Asians, 1914 for whites, 1794 for Hispanics, 1524 for blacks. The mean GPA's were 3.07, 3.04, 2.83, and 2.57. Univ. of Tex. Off. of Admissions, Implement. and Results of Tex. Aut. Admissions Law, (HB 588) at Univ. of Texas, Sec. 1: Demographic Analysis of Entering Freshmen, Fall 2010, at 14 (hereafter "Demographic Analysis") http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf. Data on distribution of 2009 SAT takers is from College Board, SAT Percentile Ranks for Males, Females, and Total Group http://professionals.collegeboard.com/profdownload/sat_percentile_ranks_composite_cr_m_w.pdf

[5] See Esther Duflo, Pascaline Dupas, and Michael Kremer, *Peer Effects, Teaching Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya*, 101 AMERICAN ECONOMIC REVIEW 1739 (2011) for an outstanding overview of the learning tradeoffs between separating -- and placing in a single classroom -- students with very different levels of academic preparation.

A. Studies Of Preferred Minorities' Low Grades, Abandonment Of Initial Aspirations By Shunning Hard Courses, Low Graduation Rates, And Bar Exam Failure Rates Show Academic "Mismatch" To Be A Costly Side-Effect Of Racial Preferences

1. It is now generally conceded that large admissions preferences — regardless of whether these are based on race, "legacy" considerations, or other factors — cause students to receive lower grades. The median black receiving a large admissions preference to an elite law school, for example, ends up with grades that put her at the 6th percentile of the white grade distribution — an effect that is almost entirely due to the preference itself.[6] (Data made available to researchers *after* the *Grutter* decision revealed that 60% of blacks admitted to the University of Michigan Law School had GPAs in the bottom tenth of their class.)[7] Low grades interconnect with other preference-related problems, as discussed below.

2. Dartmouth psychologist Rogers Elliott and several colleagues published a study in 1996 that found very high attrition rates from the sciences in

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[6] Sander, *supra* note 3, 57 Stan. L. Rev. at 425-36.

[7] See Richard Sander, *Do Elite Schools Avoid the Mismatch Effect?* http://www.elsblog.org/the_empirical_legal_studi/2006/09/do_elite_school.html (September 2006) ("In the 5-year [Michigan] Alumni dataset, the mean final (standardized) GPA of black respondents is -1.48; in the 15-year [Michigan] Alumni dataset, it's the same. Interestingly, in the PDS dataset [another survey of Michigan graduates], the mean final GPA of black respondents is even lower, -1.75. These are very low figures – translated, they imply that over 60% of Michigan's black students are in the bottom tenth of their classes.")

four Ivy League schools for students admitted with large preferences.[8] Students who had weaker academic preparation than their peers were particularly vulnerable in science and engineering classes, where grading is on a rigid curve, professors often teach at a challenging pace and material builds sequentially from one course to the next. Students with significantly weaker preparation than the median student can become overwhelmed, and consequently transfer to less rigorous majors at a high rate. This phenomenon came to be known as "science mismatch," because similar students attending less elite colleges appeared to have higher persistence rates in science. The cumulative effect is that even though black entering freshmen have levels of interest and aspiration in science comparable to (or higher than) whites, they make up only a small proportion of those with degrees in science and engineering.[9]

This tendency for students admitted based on large preferences to transfer out of difficult majors at high rates was recently confirmed by a study at Duke University.[10] A direct test of the "science mismatch" hypothesis, using data from the University of California, also found strong evidence of the effect.[11] In 2008, the United States Commission on

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[8] Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier and Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RESEARCH IN HIGHER EDUCATION 681 (1996).

[9] *Id.* at 681-82, 699-702.

[10] Peter Arcidiacono, Esteban M. Acejo, and Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice* (2011 working paper, available at http://www.seaphe.org/working-papers/)

[11] See Richard Sander and Roger Bolus, *Do Credential Gaps in College Reduce the Number of Minority Science Graduates?* (2009 working paper, available at http://www.seaphe.org/working-papers/).

Civil Rights held hearings on the problem, and issued a report that expressed great concern about the role of racial preferences in undermining minority graduation from science and engineering programs.[12] So far as we are aware, no scholar has shown any of these findings to be in error.[13]

3. In 2003, sociologists Stephen Cole and Elinor Barber (by then deceased) published *Increasing Faculty Diversity,*[14] a study of the minority "pipeline" problem in academia. Drawing on questionnaires and other detailed data from 7,612 graduating seniors at 34 colleges, Cole and Barber found significant evidence that large racial preferences were hurting the minority pipeline to academia. Such students tended to get significantly lower grades and struggle academically, hurting their self-confidence. The idea of pursuing a doctorate to enter academia became less appealing, even among those who had started college with that ambition.[15] Similar students at colleges with smaller or no racial preferences were far more likely to do well, develop self-confidence, and pursue their original goals.[16]

The Cole and Barber finding was striking in part because it was emphatically contrary to the assumptions of the authors' funders and sponsors — Ivy League presidents and foundations that passionately supported racial preferences in admissions. Yet we are unaware of any comparable research that contradicts their conclusion.[17]

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[12] United States Commission on Civil Rights, *Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers*, Briefing Report, October 2010.

[13] As we discuss below, the Duke study and its authors were subjected to intense criticism, including by Duke's president, but, remarkably, none of the critics took issue with any of the study's substantive findings. See, e.g., KC Johnson, Durham in Wonderland, March 23, 2012, http://durhamwonderland.blogspot.com/search?q-arcidiacono

[14] Stephen Cole and Elinor Barber, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS (Harvard University Press 2003).

[15] *Id.* at 116-21.

[16] *Id.* at 208.

4. In 2005, one of the authors of this brief (Sander) published in the *Stanford Law Review* an analysis suggesting that large racial preferences seriously damaged the academic performance of black law students, contributing to lower graduation rates and much lower success rates on bar exams.[18] The law school setting is uniquely appropriate for studying the mismatch effect, because – unlike in college and many graduate programs – there are more or less uniform tests taken by graduates to measure their legal learning. There are also huge racial disparities in outcomes: blacks entering law school are only half as likely as their white peers ever to become lawyers.[19]

Unlike the "science mismatch" and "academic mismatch" research discussed above, Sander's "law school mismatch" research generated extensive public discussion, and many critiques have been published.[20] Although Sander's data and calculations have been confirmed by replication,[21] several of the critics have advanced alternate empirical models to test whether the mismatch effect is large enough to actually reduce the number of black lawyers produced each year. As economist Doug Williams has pointed out, almost none of these social science critiques have disputed the central contention of the law school mismatch hypothesis: that large preferences undermine learning in law school.[22] Indeed, using some of the same models employed by critics, Williams has demonstrated that the basic finding – that large preferences substantially reduce the rate at which a given student will graduate and pass the bar on his first attempt, compared to his chances had he attended a less selective school — holds up robustly under a wide variety of tests.[23]

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[17] See *id.* at xi-xii; Robin Wilson, *The Unintended Consequences of Affirmative Action*, CHRONICLE OF HIGHER EDUCATION, Jan. 31, 2003 at 10.

[18] Sander, *supra* note 3, 57 STAN. L. REV. at 440-48.

[19] For a discussion of recent trends in black bar passage, see Richard Sander, *Are Black/White Disparities in Graduation and Passing the Bar Getting Worse, or Better?* http://www.elsblog.org/the_empirical_legal_studi/2006/09/sander_2_black_.html

[20] http://www2.law.ucla.edu/sander/Systemic/Critics.htm catalogs a number of the critiques.

[21] See, e.g., Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?* 57 STAN. L. REV.

Some of the critics have not themselves withstood scrutiny. For example, in 2007 law professor Katherine Barnes published a widely-discussed critique of Sander that turned out to be based on erroneous calculations. In her recently-pubished correction, Barnes found that, if eliminating racial preferences in law schools reduced the number of black matriculants by 21%, the number of blacks to graduate and pass the bar exam (including those passing after multiple attempts) would nonetheless remain the same.[24] This implies that the success rate

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1807, 1808 n. 4 (2005); Richard Sander, *A Reply to Critics*, 57 STAN. L. REV..1963, 1984-86 (2005).

[22] Doug Williams, *Does Affirmative Action Create Educational Mismatches in Law Schools?* (2009 working paper, available at http://www.seaphe.org/working-papers/).

[23] Doug Williams, *Do Racial Preferences Reduce Minority Learning in Law Schools?* (2011 working paper, available at http://www.seaphe.org/working-papers/). See also the extensive review of the law school mismatch debate in Sander, *Listening to the Debate on Reforming Law School Admissions Preferences, 88* DENV. U.L. REV *889, 933-952.*

[24] Katherine Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?: A*

of black law students would rise sharply, with the number who never become lawyers falling by more than half.[25]

5. The social science literature arguing that racial preferences do not hurt the intended beneficiaries has overwhelmingly focused on graduation rates from college. Some studies find that graduation rates are undermined by large preferences, and some find that they are not.[26] But the controversy may be more apparent than real. Graduation rates are under the control of college administrators, who can adjust policies or inflate grades to minimize academic "failures." This is common at elite private colleges.[27] But a student can graduate and still be harmed by science mismatch, academic mismatch, lower grades, lower aspirations, less academic self-confidence and less promising career prospects.

Correction, A Lesson, and an Update, 105 NORTHWESTERN L. REV. 791 (2011).

[25] Doug Williams, Richard Sander, Marc Luppino, and Roger Bolus, *Revisiting Law School Mismatch: A Comment on Barnes (2007, 2011)*, 105 NORTHWESTERN L. REV. 813 (2011).

[26] *Compare* William G. Bowen and Derek Bok, *The Shape of the River* (Princeton University Press 1998) 59-70 *with* Linda Loury and David Garman, *College Selectivity and Earnings*, 13 JOURNAL OF LABOR ECONOMICS 289 (1995) *and* Audrey Light and Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?* 35 JOURNAL OF HUMAN RESOURCES 299 (2000).

[27] Stuart Rojstaczer and Christopher Healy, *Grading in American Colleges and Universities*, TEACHERS COLLEGE RECORD (March 2010).

B. Experience At The University Of California Provides A Uniquely Valuable Perspective On The Effects Of Racial Preferences

1. In 1996, California voters passed Proposition 209, which banned the use of racial preferences in state programs, including in university admissions. The University of California implemented this ban starting with freshmen matriculating in the fall of 1998. The aftermath is a uniquely valuable but understudied "real-world" experiment in what happens when racial preferences are eliminated.

The University in 1998 had eight undergraduate campuses (a ninth was added in 2005); all are considered excellent colleges, but they span a wide range of academic competitiveness. For example, the median SAT at UC Berkeley is a couple hundred points higher than the median SAT at the least "elite" of the eight campuses.[28] Proposition 209, by eliminating racial preferences, reduced the number of blacks and Hispanics admitted to UC's most elite campuses. But most of those "displaced" students ended up at other UC campuses.[29]

2. In the immediate aftermath of 209's implementation, black enrollment fell by about half at the UC's most elite campuses, rose at several less elite campuses, and fell systemwide (for all eight campuses) by almost 20%.[30] Strikingly, with the elite campuses not able to achieve their usual levels of minority enrollment through simple racial prefer-

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[28] Kate Antonovics and Richard Sander, *Affirmative Action Bans and the Chilling Effect*, Table 4 (2011 working paper, available at http://www.seaphe.org/working-papers/).

[29] *See UC Application, Admissions, and Enrollment of California Resident Freshmen for Fall 1989 through 2010, at http://www.ucop.edu/news/factsheets/flowfrc_10.pdf.*

[30] Id.

ences, both Berkeley and UCLA launched significant efforts to improve K-12 education in their communities and to increase the number of strong minority candidates.[31] Most UC schools also introduced socioeconomic preferences. Although much smaller than the racial preferences had been, these made Berkeley and UCLA by far the most socioeconomically diverse elite college campuses in the nation. They also added some racial diversity.[32]

At present, by a wide range of metrics — including relative to state population share and changes in total UC enrollment — black and Hispanic enrollments at UC are higher than before Proposition 209.[33] UC black enrollment had returned to pre-209 levels by 2002 and averaged some 40% above pre-209 levels by 2007-1010.[34] The various post-209 changes in campus policies had even more positive effects on Hispanic enrollments. By 2000, Hispanic enrollment UC-wide had reached a new record, and by 2008 Hispanic enrollment UC-wide was double its pre-209 levels.[35]

3. After Proposition 209 took effect, the academic performance and graduation rates of blacks and Hispanics rose -- just as mismatch theory would have predicted at any school where racial preferences became smaller. Because of the use of various surrogates for race, mismatch by no means disappeared within the University. But it declined, and

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[31] *New Directions for Outreach: Report of the University of California Outreach Task Force* (July 1997); Karl Pister, *UC Outreach: Systemwide Perspective and Strategic Plan* (September 1998).

[32] Sander, Class in American Legal Education, 88 DENVER U.L. REV.631, 663-64 (2011).

[33] UC Applications, *supra* note 29.

[34] *Id.*

[35] *Id.*

209 thereby brought sharp improvements in black and Hispanic academic performance.

From 1992-94 to 1998-2005, black four-year graduation rates UC-wide improved by more than half and black six-year graduation rates improved by a fifth. Similar improvements occurred for Hispanics. Black and Hispanic GPAs also increased post-209, even though more minority students were sticking with less-generously-graded science and engineering studies.[36] Transfers of minority students who had started at community colleges and excelled there also increased sharply — once again, as predicted by mismatch theory.

All of this helps explain why by the time the early post-209 cohorts had worked their way through the UC system, the University of California was graduating dramatically more blacks and Hispanics than at any time in its history.[37]

4. A common argument for engineering diversity through racial preferences is the perceived need for a "critical mass" of members of each minority group at each school — or even in every classroom. This notion helped spur complaints that Proposition 209 had "resegregated" the UC system. The ironic truth is that blacks were significantly more integrated across UC campuses after 209 than before.[38] Pre-209, Berkeley and UCLA had used very large racial preferences to compete aggressively with the less elite campuses for black freshmen; as a result, about half of all blacks enrolling at UC in the early 1990s went to the two elite campuses. After Proposi-

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[36] Richard Sander, *An Analysis of the Effects of Proposition 209 Upon the University of California* (2011 working paper, available at http://www.seaphe.org/working-papers/).

[37] *Id.*

[38] *Id.*

tion 209, blacks became more evenly distributed across all eight campuses.[39]

Research suggests a similar pattern nationally: Scholars have found that the use of large racial preferences by elite colleges has the effect of reducing diversity at second-tier schools.[40]

5. Another important question about racial preferences is whether they help motivate minority high school students or, to the contrary, make it easier for them to coast into selective colleges. Careful research on 209's effect upon minority high school students is still underway, but one central fact supports the second hypothesis: The proportion of black California high school students whose academic performance put them in the top tenth of all students jumped by more a third in the first cohort affected by Proposition 209, and continued to rise in subsequent years.[41] This suggests that strong black high school students may have increased their efforts to excel as UC preferences disappeared.

II. Research Suggests That *Grutter* And *Gratz* Were Empirically Flawed And Universities Have If Anything Increased Racial Balancing And Ignored This Court's Mandate To Phase Out Preferences by 2028

Gratz and *Grutter* expressed strong misgivings about racial preferences in admissions. The Court sought to ban particularly heavy-handed uses of race and to set higher education on a course toward phasing out such preferences altogether. The available quantitative evidence suggests that these decisions have had the opposite of their intended effects.

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[39] Id. The "index of dissimilarity" for blacks and non-blacks across UC campuses was 0.21 in 1996 and 0.18 in 2001. *Id.*

[40] Peter Arcidiacono, Shakeeb Khan, and Jacob Vigdor, ***Representation versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?*** 95 J. OF PUB. EC 1 2011).

[41] Sander, *supra* note 36.

A. *Grutter* Has Led to Larger and More Mechanical Preferences Because It Made An Empirical Error In Assuming That More 'Holistic' Preferences Would Do the Opposite

1. In determining that the University of Michigan Law School's racial preferences were constitutional and the undergraduate College's were not, the Court placed great importance on the fact that the Law School used a "highly individualized, holistic review of . . . all the ways an applicant might contribute to a diverse educational environment." *Grutter,* 539 U.S at 337. The Court said that the College's "point" system, on the other hand, gave far more weight to the "mechanical, predetermined diversity 'bonuses' based on race or ethnicity," *id.*, than to "the differing backgrounds, experiences, and characteristics" of students from non-preferred groups, *Gratz*, 539 U.S. at 273 (2003). The Court inferred that the Law School gave less weight to race and more to multiple other "diversity" factors.

2. Two major analyses after *Grutter* and *Gratz* by legal empiricists of diverse views and methodologies reached the same definitive conclusion: Contrary to the Court's inference, the racial preferences used by the University of Michigan Law School before *Grutter* and *Gratz* were larger and more mechanical than those used by the College.[42] Race was more

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[42] Ian Ayres and Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX L. REV. 517 (2007); Sander, *supra* note 3, 57 STAN. L. REV. at 400-410. Ayres strongly supports racial preferences; Sander is a skeptic.

often the deciding factor in an application at the Law School than at the College. And the Law School gave less weight to other diversity factors. "Holistic" admissions did not produce the outcomes that the Court said it desired; they simply made it harder for students, parents, and other non-experts to deduce how the Law School's admissions system actually worked.[43]

3. The data on practices since *Grutter* and *Gratz* confirms this point. For example, the University of Michigan undergraduate College had fully shifted, by the 2005-06 admissions year, to the kind of "holistic" system mandated by the Court. Analysis of the College's admissions data shows that, in 2005-06, it gave substantially greater weight to race, more often making it the decisive factor in individual admissions decisions, than it had under the pre-*Gratz* point system.[44]

The new system also pursued proportionate racial prepresentation — the essence of racial balancing — by systematically preferring blacks over better-prepared Hispanics. The same is true at the University of Texas, whose data for enrolled freshmen admitted outside the Top-Ten-Percent system show very large preferences for blacks not only over whites and Asians but also over Hispanics. The mean Hispanic SAT score and high school GPA were 1794 and 2.83; the corresponding numbers for blacks were 1524 and 2.57. The data also show substantial preferences for whites as well as Hispanics and blacks over Asians, who could be seen as objects of systematic discrimination.[45]

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[43] See also *Gratz*, 349 U.S. at 305 (Ginsburg, J., dissenting), 297-98 (Souter, J., dissenting).

[44] Richard Sander, ***Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter***, in Kevin McGuire, ed., NEW DIRECTIONS IN JUDICIAL POLITICS (2012).

[45] See Demographic Analysis, *supra* note 4.

4. Admissions data from a sample of six state law schools (including the University of Michigan Law School) from 2002-03 and 2005-07 shows that, on average, their racial preferences became both larger and more mechanical after *Grutter* and *Gratz*.[46] There is no evidence that these schools give substantial weight to any other diversity factor than race -- and, as we discuss below, students admitted from all racial groups at such schools are overwhelmingly from relatively privileged backgrounds.[47] Analysis of a much larger sample of public law schools (over forty) shows that the patterns at the six law schools in the smaller sample are representative of national patterns.[48]

B. Contrary To The Court's Expectation In *Grutter* That Racial Preferences Would Be Phased Out Over 25 Years, There Is Little Evidence After Nine Years That Respondent Or Any Other University Has Any Such Intent

In *Grutter*, Justice O'Connor held that "race-conscious admissions policies must be limited in time [and] must have a logical end-point," and specified that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary." 539 U.S. at 343. Over one-third of that period has elapsed. We are aware of no organized effort by higher education leadership to phase out preferences, or even to formulate a plan for doing so. To the contrary, the evidence cited above is illustrative of the actual patterns since *Grutter*: Preferences have become larger and more pervasive.

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[46] Sander, *supra* note 44.

[47] Sander, *supra* note 32.

[48] Sander, *supra* note 44.

The *Fisher* case illustrates a similar trend: In states that had developed successful efforts to shift to race-neutral admissions, post-*Grutter* initiatives in Texas have reintroduced preferences under rationales[49] at war with *Grutter*'s assertion that the Constitution forbids "[e]nshrining a permanent justification for racial preferences," 539 U.S. at 342. Powerful interest groups in states that have banned racial preferences in admissions, notably California, are constantly seeking to overturn or evade the bans.[50]

The drift of policy is unmistakably toward using large racial preferences for many decades, or even centuries, in pursuit of proportional representation of every racial and ethnic group at every higher education institution. UT, for example, invoked state demographics in its proposal to restore racial preferences and deemed Asians "overrepresented" even though there are now fewer of them than Hispanics at UT. The University's apparent agenda is to use preferences to move toward racially proportionate representation of all four major racial groups – in other words, racial balancing. Pet. Brief 7. Universities will push to perpetuate large preferences until the racial gaps in test scores shrink dramatically --

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[49] As Judge Garza pointed out in his special concurrence, "the University's reliance on race at the departmental and classroom levels will, in practice, allow for race-based preferences in seeming perpetuity." App. 87.

[50] See, e.g., Editorial, "We're sorry Californians voted for Prop 209. But the Legislature's attempt to undo it is wrong," *Los Angeles Times* (Oct. 6, 2011) at 18; Peter Wood, *A Veto for Racial Preferences*, Chronicle of Higher Education, Oct. 12, 2011, http://chronicle.com/blogs/innovations/.

and they have hardly shrunk at all since 1990.[51] The racial gaps at the top of the SAT-score range, where elite colleges find most of their students, are especially dramatic.[52] Numerous studies show that on average blacks do not catch up with their white classmates during college or graduate school. They tend to fall farther behind.[53]

C. *Grutter's* Confidence That Higher Education Institutions Are Entitled To A Uniquely High Level Of Deference In Their Use Of Race Is Misplaced

1. This Court's opinions in *Bakke* and *Grutter* have extended a unique level of deference to universities, reflecting a belief that each of them deserves some latitude to determine its own need to balance racial diversity with other factors in shaping its

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[51] The most authoritative assessment of national trends in academic preparation is the Congressionally authorized National Assessment of Educational Progress ("NAEP"). The most recent NAEP report, on levels of academic preparation for a variety of demographic groups, analyzes data through 2008. The report shows that although black-white performance gaps narrowed substantially from 1971 until the late 1980s, the gaps widened in the years around 1990, and have been essentially unchanged since then. The same is true of the Hispanic-white gaps. NAEP 2008 TRENDS IN ACADEMIC PROGRESS, National Center for Education Statistics (2009).

[52] "In 1999, . . . [w]hite students were 9.8 times as likely as their black peers to score 750 or better on the verbals, and 13.1 times as likely to do that well in math." Abigail and Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education,* CONSTITUTIONAL COMMENTARY 209, 227.

[53] E.g., Thernstrom, *id.*, at 227-32; Sander, *supra* note 3, at 435-36; Bowen & Bok, *supra* note 26, at 77.

academic mission. Several facts, however, suggest that universities are severely constrained in their ability to weigh the costs and benefits of racial preferences in an independent and candid way.

2. Accreditation agencies have become very aggressive in imposing national racial diversity standards upon individual institutions. The most well-known example, by no means unique,[54] is the George Mason Law School, which was forced to reinstitute large racial preferences to avoid losing accreditation from the ABA.[55] (In the wake of *Grutter*, the ABA adopted even more aggressive racial diversity standards that apply even to law schools in states that have banned the use of race in admissions.)[56]

3. For schools that operate in "national" markets for their students, the "cascade effect" of racial preferences severely constrains the individual autonomy of schools. This is because, in these markets, the competition for minority students with preferences and financial aid packages tends to "bid up" the size of racial preferences. Thus, even moderately elite schools that, in a race-blind world, would enroll substantial numbers of blacks and Hispanics, find that the minorities they could admit on a race-blind basis are being lured by large preferences and race-

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[54] The University of Colorado Medical School has in recent years tripled minority enrollment, to 33% of its student body, in response to pressure from its accrediting agency. See Margaret Jackson, "University of Colorado Medical School Heals Diversity Gap," DENVER POST, April 21, 2012.

[55] Robert Zelnick, Accreditation and Affirmative Action, at http://www.seaphe.org/working-papers/

[56] See Standard 212, 2011-2 Standards and Rules of Procedures for Approval of Law Schools, American Bar Association.

based financial aid packages to more elite schools. The moderately-elite schools thus feel constrained to maintain large racial preferences of their own no matter the resulting harms. This pattern then exerts the same pressure on institutions further down the selectivity hierarchy. By unintentionally fostering this state of affairs, this Court's decisions have ironically helped put enormous pressure on selective schools to engage in the very racial balancing that the Court has declared unconstitutional whether the schools would freely choose to do so or not.[57]

4. The political climate on many university campuses makes careful deliberation on and candor in discussing these subjects a very rare thing. Consider: (a) The University of Texas promised, with reflexive alacrity, to restore race as an admissions factor within hours after *Grutter* was issued, Pet. Brief 5. (b) Despite the issuance of two thoughtful reports from the United States Commission on Civil Rights Commission about the problem of academic mismatch (in 2008 and 2010), there has been ***no*** response from the university community to either report. (b) As noted earlier, no university or academic association has, so far as we are aware, undertaken any efforts to plan for a phaseout of racial preferences by 2028. (c) The recent ostracism by Duke's President and many others of a group of Duke's own social scientists -- for their sensitively

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[57] Stanley Rothman, Seymour Martin Lipset, and Neil Nevitte, "Does Enrollment Diversity Improve University Education?" INT'L J.OF PUB.OPINION RESEARCH, Vol. 15, No. 1 (2003) report that the level of diversity at a university has a strong negative correlation with administrators' assessments of student academic preparation and their satisfaction with educational quality.

presented and completely unrefuted analyses of the science mismatch problem at Duke -- illustrates a pervasive hostility among university officials nationwide toward careful or candid discussion of evidence concerning the effects of large racial preferences on academic performance.[58]

5. The pervasive secrecy in which universites cloak their preferential admissions programs[59] makes it impossible for courts to monitor compliance with this Court's commands that universities eschew racial balancing and seriously pursue race-neutral alternatives.

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[58] On the events at Duke, see K.C. Johnson, *supra* note 13. In his annual address to Duke faculty, President Broadhead attacked three eminent social scientists on the faculty simply for documenting, in a careful and thoughtful analysis, the problem of science mismatch at Duke. Broadhead said the professors "appeared to disparage the choice of majors by Duke undergraduates . . . *A further insult was that the paper had been included in an amicus brief submitted by opponents of affirmative action urging the Supreme Court to hear* [*Fisher*]" (emphasis added). On the general problem of honest discussion of affirmative action in higher education, see Bill Moyers, transcript of interview of psychologist Jonathan Haight, Feb. 3, 2012, http://billmoyers.com/segment/jonathan-haidt-explains-our-contentious-culture/ (Haight says: "I think the New Left, the commitment that was made in the '60s, was toward victim groups. So it was civil rights, women's rights, gay rights. . . . [T]he sacralization of victim groups had to happen to bring the Left together to fight what was a truly altruistic and heroic battle. And they won, . . . But . . . [o]nce you've sacralized something, you become blind to evidence.")

[59] To the best of our knowledge, no university in the United States has ever voluntarily made public the size of its racial preferences or how they are administered.

D. The Court's Acceptance Of Diversity As A Compelling Interest In Educational Settings Puts Universities Under Great Pressure To Disregard The Costs Of Racial Preferences

1. Past Court decisions on affirmative action at universities have relied heavily on the belief that racial diversity confers enough educational benefit to constitute a compelling interest justifying the use of race in admissions. With this blessing, a veritable industry of "diversity advocates" has arisen, generating an enormous volume of "research" that purports to demonstrate a wide variety of educational, performance, and institutional benefits flowing from diversity. In fact, the conclusions one can reasonably draw about diversity benefits are both limited and nuanced.[60]

For example, a good deal of research focuses on the very plausible idea that increased student racial diversity on a campus fosters more interracial contact and a better understanding of how race affects one's viewpoints. However, very little of this work considers how the size of racial preferences used in achieving schools' desired racial head counts affects these interactions. One very careful study that does consider this issue finds, in comparing cross-racial interactions on many different college campuses, that the very large racial preferences used by many elite schools *reduce* cross-racial social interaction; that is, whites and blacks are less likely to become friends when they arrive on campus with dramatically different levels of academic preparation.[61] Indeed, science mismatch, discussed above, has been shown to cause a decline in social interaction among blacks and whites between their freshman and senior years.[62] In other words, the educational benefits of diversity are undermined when diversity is achieved through large preferences.

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[60] Although this Court will undoubtedly receive many amicus briefs citing research on educational benefits of diversity, many of the scholars involved in this research have been candid in acknowledging its limitations. See, e.g., the commentary by the distinguished *Chronicle of Higher Education* reporter Peter Schmidt, *America's Universities are Living A Diversity Lie*, WALL STREET JOURNAL, June 28, 2008.

2. An overpowering inference from this research is the inherently inescapable idea that large racial preferences -- and the resulting large disparities in academic performance -- feed negative stereotypes about academic ability among whites and minorities alike. An environment that produces gross performance disparities that closely correlate with race will foster negative racial stereotypes. Perhaps the most striking failing of the "diversity school" of scholars is its studious avoidance of this issue in examining the effects of affirmative action.

3. A few researchers have examined the effects of large preferences on the *self*-perception of recipients. These scholars have found that once on campus, such students tend to develop negative perceptions about their own academic competence, which in turn affect academic performance.[63]

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[61] Arcidiacono et al, *supra* note 40.

[62] Research in progress by Arcidiacono and his colleagues has found that freshman white students at Duke have similar rates of friendship with black and Asian students, but that by senior year, white-black friendships have declined and white-Asian friendships have increased. The academic distance between blacks and whites (and the absence of such a distance between Asians and whites), and the attrition of blacks from the sciences and economics, all contribute to this shift.

[63] See Brown, Charnsangavej et al, *Putting the "Affirm" Into Affirmative Action: Preferential Selection and Academic Performance*, 79 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 736 (2000); Cole and Barber, supra note 14, at 116-21; Fischer and

4. These findings fit well with the often-misunderstood phenomenon of "stereotype threat." In a famous but usually misreported experiment conducted in the mid-1990s, Claude Steele and Joshua Aronson found that black Stanford students performed worse on a difficult cognitive test when they were "primed" with some reminder of a racial stereotype – in particular, that blacks tend to perform worse than whites on such tests.[64] When the stereotype priming (or "threat") was absent, blacks performed the same on Steele's cognitive tests as whites with the same SAT scores. The implication of this finding is not (as is often claimed) that the racial test-score gap on the SAT is due to stereotype threat. Indeed, it refutes that claim. Steele's finding of no racial gaps in the more natural test setting (without artificially "priming" test-takers) strongly suggests that stereotype threat is essentially absent from standardized test administrations like the SAT I. A second logical inference from Steele's experiment is that environments which reinforce in minority minds the idea that their race is an academic handicap will tend to undermine the academic performance of those students.

5. This understanding of stereotype-threat research helps explain why real-world tests (as opposed to experiments) usually do not show much evidence of stereotype threat.[65] To the extent this phenomenon does occur, however, it argues strongly

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Massey, *The Effects of Affirmative Action in Higher Education*, 36 SOCIAL SCIENCE RESEARCH 531 (2007).

[64] Steele and Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 797 (1995).

[65] See, for example, Cullen, Hardison, and Sackett, Using SAT-Grade and Ability-Job Performance Relationships to Test Predictions Derived from Stereotype Threat Theory, 89 J. APPLIED PSYCHOLOGY 220 (2004).

against the use of large racial preferences. At a school with such preferences, black students will tend to have low grades and, importantly, will be aware that academic performance at the school strongly correlates with race. (This will of course not be true at a school that does not use racial preferences.) Every testing situation will tend to prime negative stereotypes about test performance. Thus, while stereotype threat does not explain the test score gap or other measured racial differences in academic preparation in elementary and secondary school, it may well help to explain why blacks (and, to a lesser extent, Hispanics) often underperform their academic credentials at colleges and universities that use large racial preferences.[66]

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[66] The many studies showing that blacks "underperform" their SAT and LSAT scores by getting substantially *lower* grades in college and law school than whites with the same scores, *see, e.g.*, Thomas J. Espenshade and Alexandria Walton Radford, NO LONGER SEPARATE, NOT YET EQUAL 238-39, 249 (Princeton University Press 2009), are sometimes cited as conclusive disproof of stereotype threat theory. We suggest that these tend to show that stereotype threat is absent at most high schools and settings where students take college entrance exams, but may well be activated on college campuses that rely on large racial preferences.

III. Key Assumptions Accepted By The Court Below Are Doubtful: Evidence Suggests That Large Racial Preferences Add Little Classroom Diversity And Do Not Make the University More Attractive To Minority Candidates

A. Self-Segregation Into "Soft" Courses Limits Classroom Diversity

1. As noted above, a pervasive characteristic of large admissions preferences is that the recipients are at a competitive disadvantage in courses. Many of them consequently seek out courses and majors where they will suffer least — academically and personally — from their relatively weaker preparation. Over time, this means that students admitted with large preferences tend to concentrate in the "softest" majors and courses.[67]

This process of self-segregation directly undercuts a central premise of UT's reintroduction of racial preferences in 2004. Officials justified the new preferences primarily on the ground that too many courses at the University lacked meaningful "diversity," meaning a significant presence of blacks and Hispanics. App. 23a, 156a-157a.[68] But admitting students with large racial preferences is not an effective strategy for diversifying classrooms. The larger the preference, the more ill-prepared students will self-segregate into soft majors and courses. UT's policy will at best produce a high ratio of racial engineering to classroom diversity — the opposite of "narrow tailoring."

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[67] Arcidiacono *et al.*, *supra* note 10.

[68] "App." references the Fifth Circuit opinion reported at 631 F.3d 213, reproduced in the appendix to the Petition for Certiorari.

2. Such self-segregation into soft courses will result from any system of admissions preferences that create large disparities in academic preparation within the student body. Most relevant here, the Texas Top Ten Percent plan, whatever its merits in advancing diversity, created a student body with very wide disparities in academic preparation, largely (though not entirely) along racial lines. This may well explain the fact that, according to the University of Texas, classroom diversity decreased between 1996 and 2002 even though minority enrollment increased. App. 86a.

B. Experience After Racial Preferences Were Banned At The University Of California Shows A "Warm ing" Effect On Minority Applications And Enrollments

1. Respondents have advanced the familiar argument that racial preferences are vital to persuade racial minorities that they are "welcome" on a college campus, and that reducing preferences would have what some call a "chilling effect" on minorities' interest. And the court below suggested that minorities were discouraged from attending UT after it implemented *Hopwood*. But the best available evidence suggests that this is a myth, and that, on the contrary, bans on racial preferences seem to produce a "warming effect," making the affected institutions more desirable — not less — to prospective black and Hispanic students.

2. An authoritative analysis by two leading labor economists, David Card and Alan Krueger, found that the propensity of highly-qualified blacks to apply to Berkeley, UCLA, and the University of Texas at Austin did not meaningfully change after

those schools implemented bans on racial preferences.[69]

3. Strikingly, labor economist Kate Antonovics and Richard Sander (a coauthor of this brief) found that black and Hispanic students admitted to the UC system after the race-preference ban were substantially more likely to accept the offer and enroll, compared to similarly qualified students before Prop 209.[70] This "warming effect" for blacks and Hispanics at UC Berkeley was approximately 15%. Although we do not know why this happened, the available evidence is consistent with the hypothesis that these students believed their diplomas would be more valuable without the taint of being presumed an "affirmative action admit."

4. This reinforces all of the findings discussed in Part I of this brief. While race-based advocacy groups overwhelmingly express support for racial preferences, the warming effect evidence suggests that individually, many blacks and Hispanics strongly prefer to avoid settings where they may be stigmatized by a racial preference. Indeed, a careful survey of a national random sample of sixteen hundred students at 140 American colleges and universities found that 71% of minority students (and 85% of all students) specifically rejected the use of racial or ethnic "preferences" in admissions; 62% of minority

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[69] David Card and Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 INDUSTRIAL & LABOR RELATIONS REVIEW 416 (2005). Card & Krueger examined "highly-qualified" blacks because their admission chances would be minimally affected by the ban, which reduced the chances of most other blacks; students are less likely to apply when their admission chances are low.

[70] Kate Antonovics and Richard Sander, *Affirmative Action Bans and the Chilling Effect* (2011 working paper, available at http://www.seaphe.org/working-papers/).

students (and three-fourths of all students, and a majority of faculty members) opposed "relaxing academic standards" to increase minority representation.[71]

IV. The Lack Of Socioeconomic Diversity At Elite Schools Refutes The Notion That Large Racial Preferences Can Qualify As Narrowly Tailored

1. An outpouring of research since *Grutter* and *Gratz* has documented the shocking lack of socioeconomic diversity in the upper reaches of higher education. Whether we measure "socioeconomic status" (hereafter "SES") by the incomes, education, or occupations of a student's parents (or some combination), highly selective colleges draw three-quarters of their students from the top quartile of the SES spectrum, and half from the top tenth.[72] A young person from the bottom quartile of the SES distribution is less than one-hundredth as likely to attend a "top ten" law school as a young person from the top tenth of the SES distribution.[73] As these numbers imply, racial preferences contribute little socioeconomic diversity to most schools that use them, because most of those receiving these preferences are from elite backgrounds.[74]

2. This intense underrepresentation is partly due to the lower average academic achievement of low-SES students. But when one controls for aca-

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[71] Rothman *et al.*, *supra* note 57.

[72] Anthony Carnevale and Stephen Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in Richard Kahlenberg, editor, AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION (2004).

[73] Sander, *supra* note 32.

[74] Id.

demic preparation, low-SES students are *80% less likely* than high-SES students to attend college after high school. Using the same controls, blacks are *30% more likely* than whites to attend college (at elite colleges, of course, these imbalances are much greater).[75] This captures in a telling way the imbalance in current preference policies. To put the same point differently, universities could significantly increase socioeconomic diversity with much less use of preferences than are currently used in pursuit of a predominantly racial diversity.

3. Low-and-moderate-SES students can confer as much or more intellectual and viewpoint "diversity" benefit upon universities, the available research and real-world observation suggest, as the mostly high-SES racial minorities currently favored by preferential admissions. By recruiting and giving admissions preferences to such low-and-moderate-SES students, universities could also increase social mobility in, and the legitimacy of, American institutions at least as much (given current imbalances noted above) as current racial preference programs.[76] Such a policy could also increase racial diversity (if not as much as racial preferences) because disproportionate numbers of low-and-moderate-SES students are black and Hispanic. So socioeconomic preferences could confer net diversity benefits equal to or greater than racial preferences without the costs of feeding stereotypes, spurring resentment,

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[75] Richard Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 89 DENV. L. REV. 881 (2011).

[76] *Id.* We submit that the following from *Grutter*, 539 U.S. at 332, is equally true of low-and-moderate SES students: "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training [for future leaders]."

and straining fundamental equal protection principles.

4. The principle that racial classifications must be a last resort[77] and the availability of a rich, untapped supply of low-and-moderate-SES students who could enhance diversity while also raising academic standards, point to the same conclusions, as stated below.

V. The Court Should Require Each State School That Seeks To Use Racial Preferences To Make Them No Larger Than Its Socioeconomic Preferences And To Disclose Their Size, Operation, And Effects And A Timetable For Phasing Them Out By 2028

1. Our purpose in this brief has been to bring to the Court's attention important bodies of research on the actual operation and effects of racial preference programs in higher education. The overall picture this research paints is a grim one:

--A widespread academic culture that, despite internal misgivings, feels constrained to embrace very large racial preferences;

--"Diversity" strategies that do not use race as part of an individualized consideration of individual circumstances, but rather rely almost exclusively on race at the expense of other forms of diversity – especially socioeconomic diversity;

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[77] *E.g.*, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No.* 1, 551 U.S. 701, 735 (2007); *id.*, at 789-90 (Kennedy, J., concurring in part and concurring in the judgment) ("individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest"); *Grutter*, 539 U.S. at 339; *Id.*, at 387-95 (Kennedy, J., dissenting).

--A determination among university administrators to minimize public awareness of the actual workings of large racial preferences, which in turn leads them to ignore or deny the large academic harms produced by those preferences.

2. This Court's prior opinions have in many ways made a bad situation worse. Nominally, *Bakke*, *Gratz* and *Grutter* all sought to tightly constrain the use of race in admissions, but did so in ways that aggravated underlying problems. *Bakke* banned quotas, but by allowing universities to place an indeterminate "weight" on race in the pursuit of diversity, simply changed the name of practices that continued on essentially as before. By upholding the larger, more race-focused preferences used by the University of Michigan Law School, while striking down the smaller, measurable preferences used by Michigan's undergraduate program, *Grutter* and *Gratz* signaled (whether intentionally or not) that enormous racial preferences were permissible so long as they were draped in an opaque cloak of "holistic" consideration. *Grutter* failed so thoroughly to ground critical ideas such as "strict scrutiny," "racial balancing," and "narrow tailoring," that Judge Garza gave up trying to set limits on what struck him as clearly improper practices by the University of Texas.

3. Perhaps the single most important step forward the Court can take is to mandate that any state university which wishes to take the race of students into account must do so in a way that makes both the university's current and planned use of racial preferences in admissions and the academic consequences thereof transparent both to applicants and (with careful privacy protections) to the public.

First, each school that wants to use racial preferences should provide each admitted student with information on the academic records of past enrollees with comparable entering credentials. For example, a student admitted to the University of Texas with a given SAT score and high school GPA should receive the University's best estimate of the past graduation rates of comparable students, their college GPAs, and their rates of attrition from intended majors. Graduate programs, such as those in law and medicine, should also provide the best available estimate based on entering credentials of each applicant's chances of passing requisite licensing exams. Schools should be encouraged but not required to provide data on post-graduate employment as well.

Second, these data should be made publicly available in a form aggregated enough to protect individual privacy, but detailed enough so that interested observers can discern and report on the weight given in admissions to the various criteria on which decisions are based and estimate the likely success rates of students with particular credentials.

Third, experience suggests strongly that only mandatory public disclosure of each school's timetable for phasing out racial preferences by 2028 will lead schools to take that *Grutter* deadline seriously.

4. This type of transparency is very similar to that recommended by the United States Commission on Civil Rights when it issued a detailed report on the problem of "law school mismatch" in 2007.[78] Without transparency, strict scrutiny becomes a contradiction in terms and preferences a trap for the unwary.

5. Narrow tailoring would also be advanced by requiring universities that wish to take race into

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[78] United States Commission on Civil Rights, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, Briefing Report, April 2007.

account to demonstrate (through disclosure) that the weight assigned to race in admissions decisions does not exceed the weight given to socioeconomic factors. As discussed in Part IV, socioeconomic imbalances in college access and on elite campuses far exceed racial imbalances, and greater SES diversity can be achieved with much smaller preferences, and thus less risk to students, than is the norm with current racial preferences. Thus constraining the use of race in admissions makes it far more likely that racial preferences are not mechanically manipulated to achieve balancing goals, but instead really are part of a multi-faceted process of assessing an individual's contribution to a diverse campus community.

6. In short, the Court can make "narrow tailoring" meaningful, and foster a far healthier diversity on university campuses, by mandating transparency and barring the use of racial preferences that exceed a school's socioeconomic preferences.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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IN THE

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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF SCHOLARS OF ECONOMICS AND STATISTICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the University of Texas at Austin's use of race in undergraduate admissions decisions is lawful under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are twenty-two scholarly experts in economics and/or statistics, each holding a relevant advanced degree and either currently or formerly teaching this subject matter at the university level or employing these methods as professional analysts of public policy.

This case is important to *Amici* Scholars of Economics and Statistics because as academics and analysts each has a scholarly interest in seeing valid social science incorporated in law, and seeing scientifically invalid or doubtful propositions removed as a basis for legal judgments. *Amici* serve the interests here of assisting the Court in understanding empirical data that are relevant as an evidentiary matter as this Court assesses the critical-mass theory adopted by this Court in 2003 and applied by the lower court in this case.

The twenty-two scholars that have joined this brief as *amici curiae* are:

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[1] No counsel for any party authored this brief in whole or in part, and no one apart from *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

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SUMMARY OF ARGUMENT

In holding the Equal Protection Clause permits racial preferences in the University of Texas' undergraduate admissions policy, the Fifth Circuit followed the "critical mass" theory narrowly adopted by five Justices in *Grutter v. Bollinger*, 539 U.S. 306 (2003). Under this theory, enrolling a critical mass of minority students achieves a compelling public interest benefiting those minority students and their classmates.

Subsequent evidence has come to light showing this adoption was error. State actions discriminating by race are subject to strict scrutiny, under which the University may only employ means that are narrowly tailored to achieve compelling public interests. The University bears the burden of proving strict scrutiny is satisfied, including proving the means precisely fit the need to achieve the compelling interest.

Strict scrutiny "smokes out" illegitimate uses of race by requiring the University to show that a "strong basis in evidence" supports its critical-mass theory. When discriminating on race, the University is constrained to employ only means that the evidence clearly shows achieves substantial educational benefits for minority students through diversity. Yet as Judge Garza found, the University's challenged policy results in no discernable educational benefits.

The Court extends no deference to the University when determining whether the critical-mass theory is narrowly tailored, as Justice Kennedy explained such deference is antithetical to strict scrutiny. Nonetheless, the Court of Appeals deferred to the

University's judgment and findings regarding its racially-discriminatory policy.

This denial of deference stems from the rule that government's reasons for discriminating due to race must be unquestionably legitimate. Yet as Judge Garza observed, the Fifth Circuit applied a "hopelessly deferential standard" in this case, which Chief Judge Jones noted the judiciary cannot countenance.

As Justice Kennedy said in *Grutter*, the Court's precedents require that empirical evidence supports the University's critical-mass theory. Yet the available empirical data instead go against the University's theory, data not available to the *Grutter* Court.

Students benefit from studying with peers. Research shows minority students often self-segregate when enrolled in sufficient numbers, which when affirmative action is employed results in less-prepared students sometimes foregoing benefits that would result from studying with better-prepared peers.

Although the University commissioned two studies on minority enrollment and performance, neither offers direct evidence supporting the critical-mass theory. Neither provides a "strong basis in evidence" to support a policy entailing a suspect class. The first study shows the University's classrooms have significant minority populations, so racially-diverse viewpoints are already present, and adding more minorities would provide decreasing marginal returns on diversity. The second is deficient as it is overly subjective, asking students regarding their feelings and perceptions rather than examining empirical data verified through objective metrics.

The University thus presents no scientifically-valid literature supporting the critical-mass theory it invokes to justify its racial-preference system. *Amici* knows of only one published peer-reviewed paper directly testing this hypothesis, coauthored by John R. Lott Jr., J. Mark Ramseyer, and Jeffrey Standen ["LRS"]. In this study, the authors had access to every transcript for every student from two university law schools, as well as data from the applicant pool for one of those schools.

Neither the University of Michigan Law School nor the *Grutter* Court stated a verifiable test for critical mass. Justice O'Connor's opinion for the Court's narrow majority might suggest minority enrollment approximating minority applications in the applicant pool may be relevant to "critical mass," but still fails to give provide a usable test.

Yet not only did *Grutter* not provide data to support its hypothesis, the Court never considered the possibility of self-segregation, to say nothing of examining empirical evidence regarding minority student performance.

The empirical data analyzed by LRS show no positive correlation between minority enrollment levels and the grades of minority students. The data instead suggest the opposite. Isolated preferred-minority students will more frequently study with non-preferred students, who as a matter of statistical averages are better-prepared, resulting in greater educational benefits. Although this analysis does not control for all factors, it is fatal to strict scrutiny's requirement that the critical-mass theory have a "strong basis in evidence."

The lack of evidentiary support for the critical-mass concept is only exacerbated by two additional items. The foregoing material concerned the number of minority students and the fraction of the student body they comprise. Comparing the proportion of minorities admitted to their proportion in the applicant pool failed to show any positive correlation to student performance. Additionally, "stereotype threat"—a student's concern that they will perform poorly that can negatively impact their performance unless they have additional minority classmates—likewise fails to provide any supporting data.

Narrow tailoring requires that the means employed actually achieve the compelling interest required by strict scrutiny. *Amici* know of no empirical evidence supporting the critical-mass theory, and LRS provide data contradicting this theory. The University of Texas thus failed to carry its burden of proving that having a critical mass of minority students in classrooms actually benefits those students. Therefore the University's policy fails to satisfy strict scrutiny.

ARGUMENT

I. THE UNIVERSITY FAILS TO CARRY ITS BURDEN OF PROVING BY A STRONG BASIS IN EVIDENCE THAT THE CRITICAL-MASS THEORY ACHIEVES A COMPELLING PUBLIC INTEREST.

Central to the Fifth Circuit's judgment in this case was that the University of Texas' admissions policy is permissible under the Equal Protection Clause because it seeks a "critical mass" of minority students to optimize the benefits of racial diversity. *See* Pet. Cert. App. 62a–70a. Such a critical mass is one that "realize[s] the educational benefits of a diverse student body," meaning "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003).

The *Grutter* majority reasoned that achieving such a critical mass was so beneficial that it justified the use of racially-discriminatory action. *Id.* at 330, 340. In adopting this theory, a bare majority of the Court found that the benefits of having a critical mass of minority students are "substantial." *Id.* at 330. Justice O'Connor added that Michigan Law School and its *amici* "show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workplace and society, and better prepares them as professionals." *Id.* (citation and internal quotation marks omitted).

This adoption was error. The touchstone of equal-protection analysis is that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (footnote and citation omitted). As a result, state actions segregating persons based upon race are subject to strict scrutiny. *Johnson v. California*, 543 U.S. 499, 505–06 (2005). Under this demanding standard of review, government actions involving race will only be upheld if narrowly tailored to advance a compelling public interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224, 227 (1995).

This Court must pursue the "most searching examination" in scrutinizing the University's purported rationale for this policy, *id.* at 223 (citation omitted), because such racial-preference schemes are "too pernicious" to be permitted unless the University can prove "the most exact connection between justification and classification," *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

It is not enough that the government is pursuing a truly compelling public interest through its policies. "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Grutter*, 539 U.S. at 327. The social science presented in this brief shows that the University's policy fails the narrow-tailoring prong of the constitutional analysis required in this case, as the challenged policy evidently works to the detriment of the very students it supposedly aids.

When strict scrutiny applies, it is the government actor that bears the burden of proving that the challenged action satisfies the ends-means requirements of compelling interests and narrow tailoring. *See Gratz*, 539 at 270; *Adarand*, 515 U.S. at 224. Thus Respondent University bears the burden of proving its racial-preference policy satisfies strict scrutiny, rather than Petition Fisher proving it does not. And the evidence discussed in Part II shows that the University failed to carry this burden.

A. Narrow tailoring requires a strong basis in evidence that the challenged state action actually accomplishes a compelling interest.

"[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands." *Grutter*, 539 U.S. at 342. More than just narrowness of scope, the narrow-tailoring prong of strict scrutiny also requires that the means employed by the government actually achieves the compelling public purpose asserted by the government. Strict scrutiny does not permit the University to employ any means it chooses to pursue its objectives, including a program premised upon a theory demonstrated to be scientifically unsound or unsupported by empirical evidence. The Court has never "signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by [] strict scrutiny." *Gratz*, 539 U.S. at 275.

The impetus driving the critical-mass theory here must be that it ameliorates or eliminates the disabling effects of racial discrimination. *See Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). This racial-preference program's primary purpose is to aid the preferred racial groups, and secondarily to aid the student body as a whole. To the extent the empirical evidence suggests it actually harms the principal population it is intended to benefit, the only theory the University offers in support of this program instead calls for its abolition. Part of the Court's invalidation of the racial-preference program at the public university in *Bakke* was that the empirical data did not show that the program aided its intended beneficiaries. *See id.* at 311 & n.47.

"[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . . ." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.). This close judicial search for illegitimate uses extends not only to determining whether the government's objectives are sufficiently compelling; this "smoking out" of illegitimate uses also ensures that the means employed advance the asserted interest with exacting precision. *See id.*

Therefore specifically in the context of university admissions, racial-preference policies must be effective in achieving a compelling interest to survive strict scrutiny. "Even in the limited circumstance when drawing racial distinctions is permissible to furthering a compelling state interest, government is still constrained in how it may pursue that end: The means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to *accomplish* that purpose." *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)) (brackets and internal quotation marks omitted) (emphasis added).

Assuming *arguendo* that the purported interest is compelling and that the challenged measure is sufficiently narrow in scope, there must be a "strong basis in evidence" supporting the facts justifying the theory. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion). However, as shown in Part II of this brief, *infra*, there is significant contrary evidence casting into serious doubt the factual predicate underlying the critical-mass theory.

Narrow tailoring requires exactness between the means employed and the ends pursued—that the former begets the latter. The Court should not "find that [the University's] use of race is narrowly tailored where the University's highly suspect use of race provides no discernable educational impact." Pet. Cert. App. 108a (Garza, J., specially concurring).

"[W]hen it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that." *Grutter*, 539 U.S. at 387 (Rehnquist, C.J., dissenting). Here, the University's critical-mass theory is counterfactual, as the evidence discussed in Part II indicates that far from advancing the government's purported interest, the University's policy actually works against the interests of the very students it claims to benefit. Petitioner Fisher correctly argues that this critical-mass theory is not tethered to the educational benefits it purported to convey. Pet. Br. 28 (quoting *Grutter*, 539 U.S. at 333). It may be unprecedented to hold the University's program satisfies strict scrutiny in the face of this contrary evidence. This racial-preference policy is "completely ineffectual in accomplishing its claimed compelling interest." Pet. Cert. App. 106a (Garza, J., specially concurring).

B. No deference is owed to the government when applying strict scrutiny.

"The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment). Thus "any racial preference must face the most rigorous scrutiny by the courts." *Id.* at 519. There is "obvious tension between the pursuit of critical mass" and the guarantees of the Equal Protection Clause. *Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting). In the face of such tension, a court engaged in judicial review owes no deference to the governmental unit whose actions are being scrutinized.

While the fact-finding processes of policymaking bodies are generally entitled to a presumption of regularity, *see Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488–89 (1955), such general presumptions and deference are inappropriate when applying strict scrutiny, *see Croson*, 488 U.S. at 500 (citing *McLaughlin v. Florida*, 379 U.S. 184, 190–92 (1964)). "Deference is antithetical to strict scrutiny, not consistent with it." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). Consequently, a "government actor cannot render race a legitimate proxy for a particular condition merely by declaring the condition exists. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501 (citations omitted). Yet the Fifth Circuit erred by deferring to the University's judgment regarding its racial-preference policy. *See* Pet. Cert. App. 36a–37a.

It is "because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and *unquestionably* legitimate." *Croson*, 488 U.S. at 505 (quoting *Fullilove*, 448 U.S. at 534–35 (Stevens, J., dissenting)) (emphasis added). Deferring to the University's policy judgments necessarily leaves unresolved questions regarding the effectiveness of those reasons. Thus while such deference is appropriate under rational-basis review, it is inconsistent with requiring a "strong basis in evidence" under strict scrutiny. *See Wygant*, 476 U.S. at 277.

The Court's precedents consistently deny deference when strict scrutiny is the standard of review. "*Grutter* does not countenance 'deference' to the university throughout the constitutional analysis." Pet. Cert. App. 178a (Jones, C.J., dissenting from denial of reh'g en banc). Yet the Fifth Circuit nonetheless extended deference to the University of Texas. Indeed, so much so that Judge Garza characterized the panel as employing a "hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades." Pet. Cert. App. 109a (Garza, J., specially concurring). Petitioner Fisher correctly applies this Court's precedents in arguing that, contrary to the Court of Appeals' approach in this case, "demanding a strong factual basis before allowing race-based governmental action ensures that '[s]trict scrutiny remains . . . strict.'" Pet. Br. 33 (quoting *Bush v. Vera*, 517 U.S. 952, 978 (1996)) (brackets in the original).

II. EMPIRICAL EVIDENCE DOES NOT SUPPORT THE CRITICAL-MASS THEORY ADOPTED BY *GRUTTER* AS APPLIED BY THE FIFTH CIRCUIT.

This Court's "precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, *when supported by* *empirical evidence.*" *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting) (emphasis added). But the empirical evidence available does not support the critical-mass theory of racial diversity at universities.

Governmental use of affirmative action in universities raises questions about peer effects on student performance. By definition, under affirmative action minority students often enter post-secondary schools less prepared than their peers who did not receive preferential treatment. Minorities may also tend to self-segregate,[2] a possibility contemplated neither by the Court in *Grutter* nor by the Fifth Circuit below. Universities employing affirmative action must correlate peer effects and prospective self-segregation with academic performance.

As to peer effects, the University of Texas presumes that minority students in classrooms with fewer students from their ethnic group feel marginalized in ways that discourage them from succeeding, hence the University's argument that it is pursuing the "educational benefits" of achieving critical mass. *See* Pet. Cert. App. 33a–34a, 41a. According to this theory, the fewer minority students in a classroom, the lower those students' performance.

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[2] J. W. Schofield, *Maximizing the benefits of student diversity: Lessons from school desegregation research*, *in* DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION 103, 105 (G. Orfield & M. Kurlaender eds., 2001). This may occur by the actions of the students, Art McFarland, *Self Segregation in School Cafeterias?*, WABC-N.Y., Mar. 27, 2006, http://abclocal.go.com/wabc/story?section=our_schools&id=4029353&ft=print (last visited May 25, 2012), or by parents when they decide where to send their children to school, *see* Suhrid S. Gajendragadkar, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 153–55 (2006); *cf. also* Eric A. Hanushek, *Will Quality of Peers Doom Those Left in the Public Schools?*, *in* CHOICE WITH EQUITY 121–40 (Paul T. Hill ed., 2002).

On the other hand, self-segregation can have the opposite effect. In a classroom with a large number of minority students, those minority students might tend to study primarily with their less well-prepared peers of the same preferred population. If so, a classroom with fewer minority students might result in minority students performing at higher levels by inducing them to study (by necessity) with better-prepared non-affirmative action peers. Affirmative action might particularly impact the better-qualified minority students who could switch from studying with better-performing classmates to worse-performing classmates.

Ensuring that a class "better prepares [students] as professionals" not only involves the interactions between minority and non-minority students, *see* Pet. Cert. App. 9a (citation omitted), it also necessitates creating an environment where students—including minority students—can best learn the material. The better students learn and retain the material taught in their classes, the better they will succeed after graduation.

A. Neither the study nor the survey commissioned by the University of Texas demonstrates that minority students are benefited by a "critical mass" of minorities in the classroom.

In the case at bar, the University of Texas commissioned two studies to determine whether the university was enrolling a "critical mass" of "underrepresented" minorities in undergraduate classes. However, neither study provides direct evidence that the number of "underrepresented" minorities in a classroom needs a "critical mass" to improve the performance of such minorities.

1. The first University study does not show minority enrollment that could constitute a "critical mass."

One report raises concerns that the University of Texas was not "enrolling a critical mass of underrepresented minorities." Examining small class sizes from between five and twenty-four students during the Fall of 2002, 88.6% of these smaller classes enrolled at most one black student, 51.6% had at most one Asian-American student, and 43% had at most one Hispanic student.[3]

But the University of Texas data also show that these small classes usually—over 80% of the time—have two or more students from at least one of these three minority groups.[4] For example, in a class with fifteen students, the probability that none of the students will be a minority is only 3%. The probability that only one of the students will be a minority is 8.27% and the probability that two of the students will be a minority is approximately 19%. Otherwise stated, 70% of the classes with fifteen students will have three or more minority students.[5]

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[3] Off. of Admissions, Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996–2002 (2003), App. 3, Fig. 1, [hereinafter "Diversity Rep."], SJA 66a, 96a.

[4] *See id. Amici* arrive at 80% probability by calculating 1-(.886*.5162*.4302)= .803. Similarly, the odds of a class having either two or more black students or two or more Hispanic students are 62%. If you include the possibility of both one black and one Hispanic student being in the same class, the odds rise to over 68%.

It is thus unlikely that white students will be able to attend many of these smaller classes and not have minority students comprise a significant percentage of the class. Across all classes, over 91% will have at least two students from any one underrepresented group.

This is not to suggest that exposure to varying viewpoints is unimportant. However, *amici* posit there should be diminishing returns to additional exposure. For example, if seven of the ten smaller classes enroll at least two minority students, the additional knowledge obtained by non-minorities from an eighth class with at least two minority students is at least questionable. But this principle of diminishing marginal returns was never examined by the University. Under the second prong of strict scrutiny, the burden is on the government to prove how its use of race serves the compelling interest it asserts. *See Gratz*, 539 U.S. at 270. The University has not done so, as it has failed to account for diminishing returns, assuming *arguendo* that any benefits inure to the students in the first place. The Court is not obligated to make factual inferences in the University's favor when applying such a demanding judicial standard of review.[6]

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[5] *Amici* premise this discussion on several assumptions: (1) The probabilities of a particular minority being in the class is independent of other minorities being in the class, (2) The probability of minorities being in a particular class is the same across all classes, and (3) classes with fifteen students in them have the same probability of minorities being in that class as shown for classes with five to twenty-four students in Diversity Rep., *supra* note 3. A class size of fifteen students was picked because it is the exact middle of the small class range used by the University of Texas.

The probability for zero minorities in the class is given by: $.6352^{*}.2651^{*}.1782 = .0300$. The probability for exactly one minority in the class is given by: $.2508(.2651)(.1782) + .2511(.6352)(.1782)+.252(.6352)(.2651) = .0827$ The probably for exactly three minorities in the class is calculated using a method of moments type argument.

$.03 + .0827 = (1 - P_{estimate})^{15} + 15\ P_{estimate}(1 - P_{estimate})^{14}$

$(1 - P_{estimate})^{14}(1 - 14\ P_{estimate}) - .1127 = 0$

$P_{estimate} = .2276$

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[6] It is also appropriate when applying strict scrutiny to note it is unclear why the University is only pursuing racial diversity, when the purported compelling interest flows from creating a diverse classroom experience. By contrast, students are much less likely to be exposed to a diversity of political viewpoints from their professors, a fact that most universities apparently do not consider sufficiently important to remedy. A 2003 survey of eleven California universities ranging from small, private, religiously-affiliated schools to large public, elite schools found that faculty members were 8.1 times more likely to be registered as Democrats than Republicans. Chris Cardiff & Daniel Klein, *Faculty Partisan Affiliations in all Disciplines: A Voter-Registration Study*, 17 CRITICAL REV. 237, 248 (2005). Ratios varied between academic disciplines, ranging from Democratic professors being 21 times more common than Republicans in Anthropology and Sociology, to 8.5 times more in History to 2.9 times more common in Economics. Daniel B. Klein & Charlotta Stern, *Professors and Their Politics: The Policy Views of Social Scientists*, 17 CRITICAL REV. 257, 264 (2005). A 2002 study in *The American Enterprise* magazine showed that at Cornell registered liberals (Democrat or Green Party) outpaced conservatives (Republican or Libertarian) by 166 to 6. Jeff Jacoby, *A Left-wing Monopoly on Campuses*, BOSTON GLOBE, Dec. 2, 2004, *available at* http://www.highbeam.com/doc/1P2-7873393.html (last visited May 26, 2012). At Stanford, the ratio was 151 to 17; University of Colorado at Boulder, 116 to 5; University of California Los

2. The University survey is fatally flawed due to its subjectivity.

The Fifth Circuit describes how the University "surveyed undergraduates on their impressions of diversity on campus and in the classroom. Minority students *reported* feeling isolated, and a majority of all students *felt* there was insufficient minority representation in classrooms for the full benefits of diversity to occur." Pet. Cert. App. 22a (footnote and internal quotation marks omitted) (emphases added); *see also Grutter*, 539 U.S. at 318.

However, the relevant aspect of this survey is not science. The entire relevant discussion in the report involved merely two sentences: "The University also relied on anecdotal information from students—those who have the most direct interaction in the classroom. Their observations backed up what the study data revealed—that there was insufficient minority representation for the full benefits of diversity to occur." Walker Aff. ¶ 12, JA 432a. But the University of Texas study on the percentage of classes with at least two minorities of the same race does not provide any evidence that there was "insufficient minority representation." This study thus provides merely subjective opinion, not empirical evidence.

Thus the University did not provide *any* direct evidence, much less the requisite "strong basis in

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Angeles, 141 to 9; and San Diego State University, 80 to 11. *Id.* Such political and ideological differences are not beset by the profound Fourteenth Amendment concerns present in this case by entailing a suspect class, and so these imbalances only highlight the constitutional concerns regarding the racial-preference policy.

evidence" to satisfy strict scrutiny, ***Wygant***, 476 U.S. at 277 (plurality opinion), that minority representation was "insufficient." It was only unsubstantiated "anecdotal information" from which the University inferred that minority and nonminority students alike would better succeed if the number of minority students increased.

Even if an appropriately-designed survey had been conducted, the data would still be of limited usefulness. The primary limiting factor is that responses to such survey questions involve subjective judgments. There can be a difference between what the survey respondents think they are learning in class and what they are actually learning. Survey responses may also be biased by political beliefs and how students think they are expected to answer.[7]

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[7] Andrew Kohut, a director of the Pew Research Center for the People & the Press, wrote:

> These findings suggest that for most topics, typical media polls do a good job gauging public opinion. But results based on questions about racial issues may be more problematic. In fact, the experiment suggests that accurately measuring racial antagonisms may be a problem in all survey research. This may help explain why pre-election polls have overestimated white support for black candidates in biracial elections.

Andrew Kohut, *Bias in polls: It's not political, it's racial*, Perspective on Polls, July 1998, http://asne.org/kiosk/editor/98.july/kohut1.htm (last visited May 28, 2012). A more recent similar discussion is provided by Scott Keeter et al., *Perils of Polling in Election '08*, PEW RESEARCH CTR. PUBS., June 25, 2009, http://pewresearch.org/pubs/1266/polling-challenges-election-08-success-in-dealing-with (last visited May 28, 2012). *See also* Jason Carroll, *Will Obama suffer from the 'Bradley Effect'?*, CNN, Oct. 13, 2008, http://articles.cnn

B. Objective measures of student learning vary with the racial composition of classes.

The Fifth Circuit repeatedly invokes the concept of "critical mass." Yet, despite its frequent invocations, apparently no direct evidence has been presented that such a thing as "critical mass" exists in reality. Indeed, to *amici*'s knowledge, there is only one published peer-reviewed paper that directly tests the hypothesis. That paper was coauthored by John R. Lott Jr., J. Mark Ramseyer, and Jeffrey Standen [hereinafter "LRS"].[8]

Using a unique data set, the LRS research tested whether minority students performed better with other students from their ethnic group in a class or school. To do so, they were provided data by two law schools on the ethnicity and performance of each student in all classes at those schools—for three years at one [hereinafter "School A"], and for sixteen years at the other [hereinafter "School B"]. LRS were given access to the entire transcript for every student who attended these schools over these two periods. This allowed tracking each student's performance as they moved from one class to another through law school. Consequently, the data revealed whether performance varied as the number of students belonging to the same or different races changed in their classes, courses, or school.

.com/2008-10 13/politics/obama.bradley.effect_ 1_bradley-effect-bradley-campaign-exit-polls?_s=PM:POLITICS (last visited May 26, 2012).

[8] John R. Lott Jr., J. Mark Ramseyer, Jeffrey Standen, *Peer Effects in Affirmative Action: Evidence from Law Student Performance*, 31 INT'L REV. L. & ECON. 1 (2011).

This unique data set allowed a simple test to see whether students' grades changed as the racial composition of their classmates changed, after also accounting for differences in a student's ability, the difficulty of different classes, how different teachers grade, and possible grade inflation over time.

Justice O'Connor's opinion for the five-Justice *Grutter* majority endorsed the need to ensure a "critical mass" for minority students. *Grutter*, 539 U.S. at 316. It is plausible that lower scores among black students at some schools are the result of those schools not having enrolled a critical mass of black students. Some studies claim, for comparison, that black students learn better at historically-black universities.[9] If these studies suggest minority students learn better in a school (or classroom) with a large number of other minority students, it is plausible that black students do not perform as well because they are still too few. Without other peers of the same skin color, minority students might find themselves isolated—unable to learn because they have less of a support system. But those studies do not address the question being asked here, and plausibility is not certainty.

Neither the University of Michigan Law School nor *Grutter* explicitly define what fraction or number of students constitutes a "critical mass." The admissions office explained the concept as "a number that encourages underrepresented minority students to participate in a classroom and not feel isolated." *Id.* at 318. While not setting forth a clear rule, Justice O'Connor might have suggested that minority students had not attained "critical mass" if the fraction of "minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool." *Id.* at 336. This is the only empirical factor articulated by the Court regarding the topic of critical mass, suggesting it is relevant in determining whether critical mass has been attained. This formulation would at least provide a testable implication: Part of students from a given ethnic group reaching "critical mass" is when their proportion of the student body approximately equals their proportion in the applicant pool.[10]

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[9] *E.g.*, Walter R. Allen, *The Color of Success: Black College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 37–39 (1992); Lamont Flowers & Ernest T. Pascarella, *Cognitive Effects of College Racial Composition on African American Students After 3 Years of College*, 40 J. COLL. STUDENT DEV. 669, 676–77 (1999).

However, as previously mentioned, peer effects could just as plausibly have an opposite effect. *Amici* posit that anyone who has visited a university cafeteria could observe that students often segregate voluntarily, and do so naturally on the basis not only of race, but also of religion, political affiliation, athletic participation, common interests, or any other basis of commonality. But of these, adverse consequences would result only if that basis for self-segregation was also the basis for admitting less-prepared students.

---

[10] Since racial groups' share of the applicant pool vary across groups and over time, Justice O'Connor's hypothesis implies that "critical mass" must also vary across groups and over time. However, no explanation is offered for why this should be true. *Grutter* offers no rationale why Asian-Americans need the support of a certain number of Asian-Americans before they reach "critical mass," but Hispanics require a different number, and American Indians yet another number.

At the university level, surveys document significant levels of self-segregation.[11] It is similar at the secondary school level. One literature review argues that black students form "peer groups that disengage from academic competition."[12] Similarly, Seymour Martin Lipset and his colleagues conclude as "the proportion of black students enrolled at [an] institution rose, student satisfaction with their university experience dropped, as did assessments of the quality of their education, and the work efforts of their peers."[13]

Such self-segregation carries implications for study patterns. By definition, a student admitted under affirmative action is less accomplished academically than that student's classmates. If a law school enrolls few affirmative-action students, then those students may—by sheer lack of choice—study with *non*-affirmative-action students—and those students on average are academically better prepared than the students admitted as a result of racial-preference policies. By contrast, if a school enrolls more affirmative-action students, it is possible those students will choose to study with other affirmative-action students. To the extent that students learn from each other, the minority students in the school (or classroom) with more minority students may lose the benefit from studying with better-prepared peers. If so, it follows that the fewer the affirmative-action students in a school (or classroom), the better the performance of the remaining minority students.[14] They would learn more effectively.[15]

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[11] *E.g.*, Schofield, *Maximizing the benefits*, *in* DIVERSITY CHALLENGED, *supra* note 2, at 103.

[12] Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap*, *in* THE BLACK-WHITE TEST SCORE GAP 300 (Christopher Jencks & Meredith Phillips eds.,1998).

[13] Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 INT'L J. PUB. OPIN. RESEARCH 8, 15 (2003).

C. The empirical evidence does not demonstrate a positive correlation between the number of minority students and the grades of those students.

Some simple graphs illustrate how grades vary for black students and white students at the classroom level as the number of black students increases for the two law schools studied by LRS. The lower line shows the average grades for the black students (gaps in the lines appear when there are no observations for that number of black students in the classroom). In neither Figure 1 nor Figure 2 do black grades increase with the number of black students. Instead, if anything, they fall. While black students' performance drops as more black students are added to a class, there is no effect on white students' grades. *See* App. 1a–2a.

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[14] David J. Zimmerman, *Peer Effects in Academic Outcomes: Evidence from a Natural Experiment*, 85 REV. ECON. & STATS. 9 *passim* (2003). Zimmerman provides evidence that there is a small but statistically significant impact from having an academically better-prepared roommate. While this examines a different problem than that examined by LRS, the result is consistent with self-segregation of affirmative action students lowering their grades. *See also generally* IMPROVING MEASUREMENT OF PRODUCTIVITY IN HIGHER EDUCATION (Teresa A. Sullivan et al., eds. 2012).

[15] *See, e.g.*, Joshua D. Angrist & Kevin Lang, Does School Integration Generate Peer Effects?: Evidence from Boston's Metco Program, IZA Discussion Paper No. 976 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=491482 (investigating this possibility in the context of elementary school busing but finding limited evidence for it in one program).

Figure 1: Comparing Grades for Blacks and Whites as the Number of Blacks in Their Class Increases (School A)

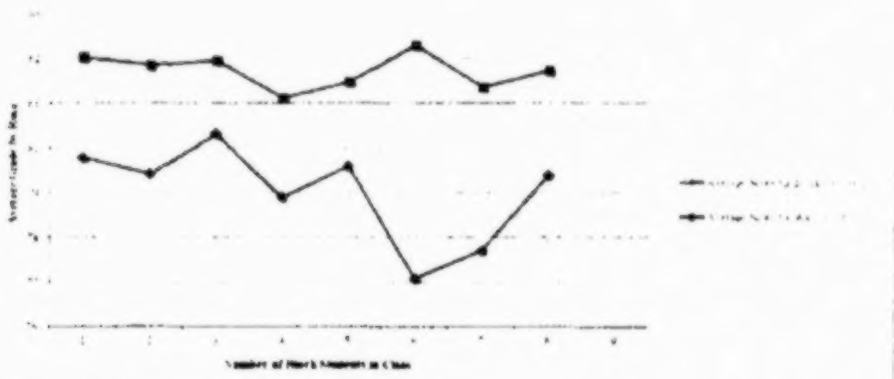
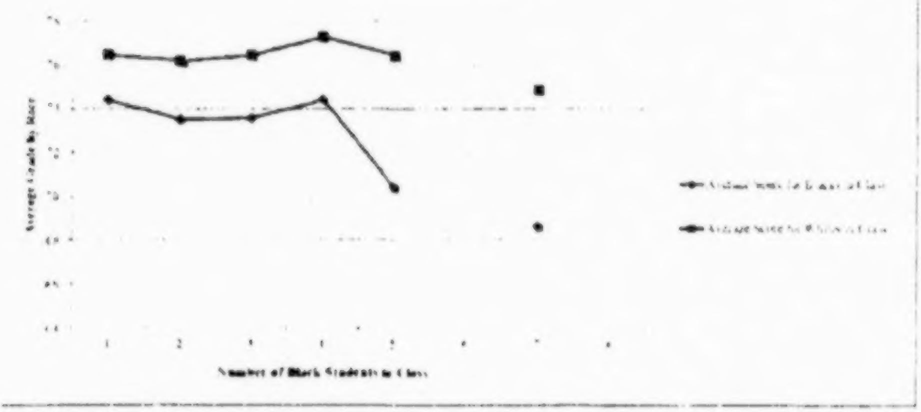


Figure 2: Comparing Grades for Blacks and Whites as the Number of Blacks in Their Class Increases (School B)



Figures 3 and 4 show a similar relationship between the number of Hispanic students in a classroom or course and their grades. For School B, Figure 4 aggregates as "Hispanic" all individuals who identify themselves as either Hispanic, Mexican American, or Puerto Rican. Again, if anything, the relationship here is even more clearly negative for all eight lines, especially when going from one Hispanic student to more than one. *See* App. 3a–4a.

Figure 3: Comparing Grades for Hispanics and Whites as the Number of Hispanics in Their Class Increase (School A)

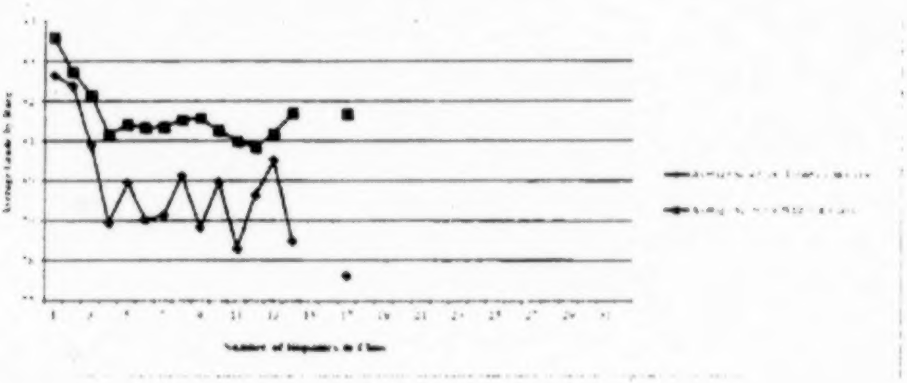
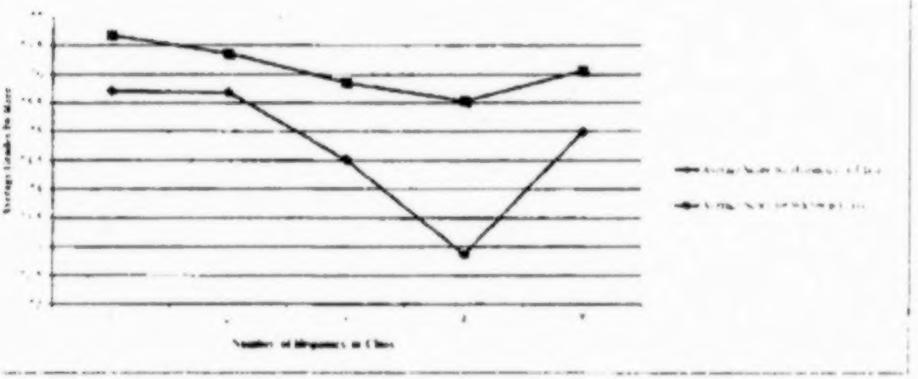


Figure 4: Comparing Grades for Hispanics (Hispanics, Mexican Americans, and Puerto Ricans) and Whites as the Total Number of Hispanics in Their Class Increase (School B)



Of course, these figures do not control for other factors. As a result, the apparently negative relationship between the number of black students and their grades could simply reflect the fact that the classes with the largest number of black students are first year classes—and grades in these classes are lower. Nevertheless, it is difficult to perceive any *positive* relationship between the number of students and their grades, even when comparing classes ranging from one to three or four blacks.

Several sets of regressions were run using Ordinary Least Squares. The first is the simplest: the effect on grades of having more students of only one's own race in a classroom, course, or school. For example, a white student's grade in a particular class is regressed on the number of white students, a black student's grade on the number of black students, and so on. Note that LRS account for the number of students in the classroom, and use fixed effects for professors, students, classes, and semester. The results are mixed. For one school more black students in a class or a course lowered the grades of other black students; for the other school no statistically significant relationship was found.

Other regression specifications examined the cross-effects between races. But *amici* contend the results are usually statistically insignificant and inconsistent across schools. Even in the few cases where they are statistically significant, the impact tends to be extremely small—explaining less than 1% of the variation in a racial group's grades.[16]

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[16] Another potential cost from affirmative action was first raised by Thomas Sowell, who argued that minority students do better when they are placed in universities where they are not too far below the average student. According to Dr. Sowell's theory, the Ivy League schools recruiting of otherwise under-qualified minorities is a disservice to these selected minority

D. Additional evidence contradicts the critical-mass theory.

1. Data on the applicant pool contradict the critical-mass theory.

The foregoing evidence is inconsistent with the "critical mass" hypothesis. Nevertheless, even if having more classmates of the same race does not improve a given student's school performance generally, the possibility remains that it might do so if the proportion of minority students exceeds a critical threshold. It is not obvious why the effect would be discontinuous in this fashion—and *Grutter* offers no explanation—but it is possible that the peer effects are different above and below this critical-mass level. Nonetheless, it is still possible to test this hypothesis.

For one of the two schools examined by LRS, racial information was obtained not only on students enrolled but also on its applicant pool. *Amici* conclude the results were similar: black and Hispanic students showed no benefit even when the number of those two minority groups in a class increases once they exceed their share in the applicant pool. Only for Asians was there evidence that increasing their share of the class after they

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students since they are overmatched and fail. *See* Thomas Sowell, *The Plight of the Black Students in the United States*, 103 DAEDALUS 176 *passim* (Spring 1974). Richard Sander has argued that affirmative action for law schools has not only lowered how well black students have done in school, it has also adversely impacted their chances of passing bar exams. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 442–53 (2004).

exceed their share of the applicant pool increased their grades, but the effect was exceedingly small.

2. The "stereotype threat" hypothesis also fails to support the critical-mass theory.

The so-called "stereotype threat"—the worry people have when they risk confirming a negative stereotype about their group and that they will perform poorly on tests—provides a hypothesis that is tested by the aforementioned LRS research. The claim is that the stigma confirming this negative stereotype should decline and test scores should rise as the number or share of minorities in a class increases.[17] Several scholars write, "Black students show little evidence of stereotype threat at historically Black colleges, presumably because the risk of being stereotyped is low, as are race-based belonging concerns."[18] Others claim that the "stereotype threat" stigma is mitigated by even small increases in the number of friends in their field of study from about three to eight.[19]

Amici argue the problem with this literature is that the tests create artificial environments with small samples where the investigators try to control for the information obtained by those being tested. By contrast, the evidence provided by Lott,

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[17] *See, e.g.*, Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 EDUC. PSYCHOLOGIST 42, 44 (Jan. 2012); G. M. Walton & G. L. Cohen, *A question of belonging: Race, social fit, and achievement*, 92 J. PERSONALITY & SOC. PSYCHOL. 82, 87 (Jan. 2007).

[18] Logel, *supra* note 17, at 44.

[19] Walton, *supra* note 17, at 87.

Ramseyer, and Standen examines the most direct measure of student achievement, student's actual grades under real-world conditions, and sees how a particular student's grades change as the number of minorities in the class, course, and/or school changes.

Carneiro, Heckman, and Masterov are also critical of the stereotype threat. "No serious empirical scholar assigns any quantitative importance to stereotype threat effects."[20] They point out that substantial racial differences in test scores arise in early grades when it is unlikely that stereotype threat is important, *i.e.*, when children are too young to even appreciate that there could be a stigma, and that these differences in test scores have been present since the beginning of the twentieth century, long before this stereotype threat could have been important.

E. No reliable empirical evidence known to *amici* supports the critical-mass theory.

Amici are aware of no noteworthy evidence that adding more black students to a class increases the grades of black students or any other group. If anything, there is evidence that adding more black students to a class or course lowers the grades of other black students. While it is possible the two law schools in the LRS study are different from other university settings, at the very least it can be concluded that no universal peer benefits exist to increasing minority enrollment.

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[20] Pedro Carneiro, James J. Heckman, & Dimitriy V. Masterov, *Understanding The Sources Of Ethnic And Racial Wage Gaps And Their Implications For Policy*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 117 (Laura Beth Nielsen & Robert L. Nelson eds., Springer 2005); *accord* Pedro Carneiro, James J. Heckman, & Dimitriy V. Masterov, *Labor Market Discrimination and Racial Differences in Premarket Factors*, 48 J. L. & ECON. 1, 16–17 (2005).

That said, this unique data set represents a real-world setting and involved a direct, objective measure of affirmative action on how well students learned the material presented in school. Such data are superior to artificially-created data that are provided in psychological studies, which creates artificial events where it must be assumed that the participants are unable to determine the purpose of the study. The data from the law schools are also preferable to survey data that measure subjective judgments.

This new evidence demonstrates that the critical-mass phenomenon theorized by the *Grutter* Court, and followed by the Fifth Circuit, thus fails under a correct application of strict scrutiny. "[T]he concept of critical mass is a delusion used by the [University] to mask its attempt to make race an automatic factor in most instances . . . ." *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

The judiciary must "recognize and confront the [constitutional] flaws and injustices that remain [in public education programs]. This is especially true when we seek assurance that opportunity is not denied on account of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment). The Court should do so here by jettisoning the critical-mass theory from its equal-protection jurisprudence.

CONCLUSION

The Court should hold that the University of Texas has failed to carry its burden of proving that enrolling a critical mass of minority students achieves a compelling public interest of diversity-derived educational benefits, and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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May 29, 2012

APPENDIX

APPENDIX

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Figure 2: Comparing Grades for Blacks and Whites as the Number of Blacks in Their Class Increases (School B) 2a

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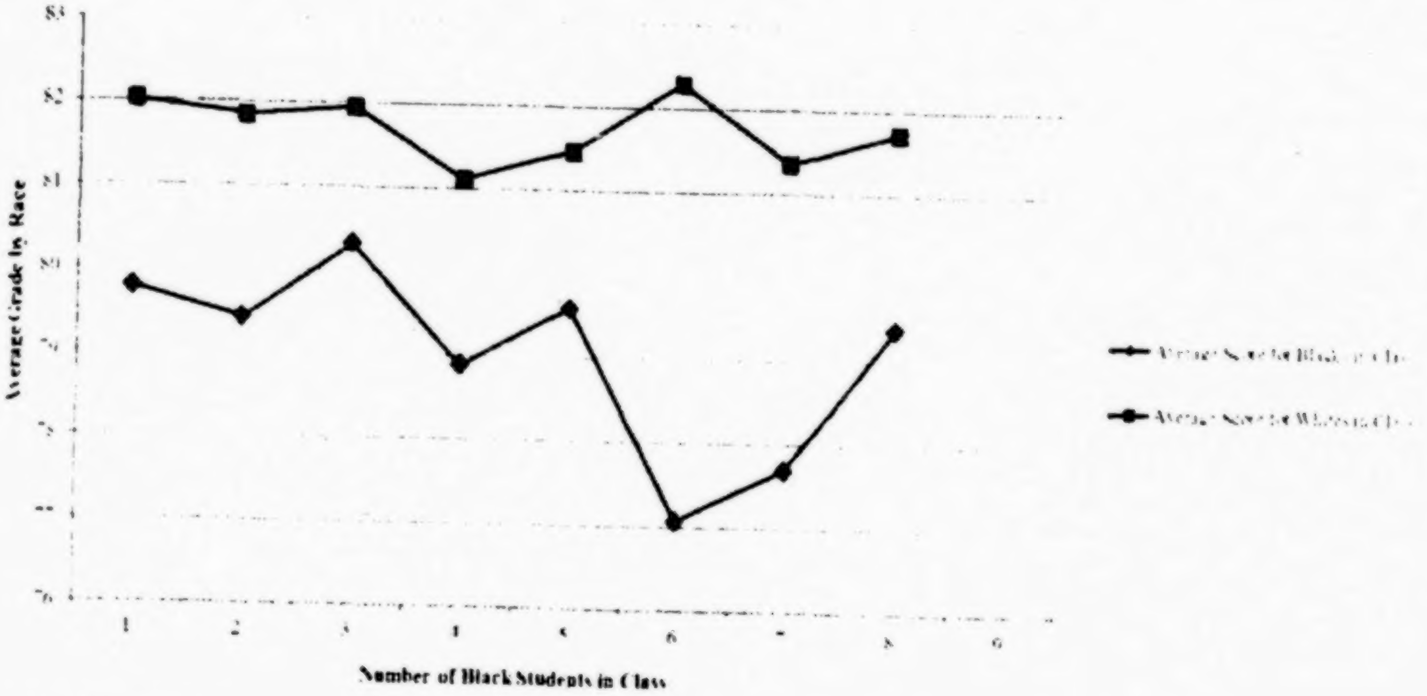

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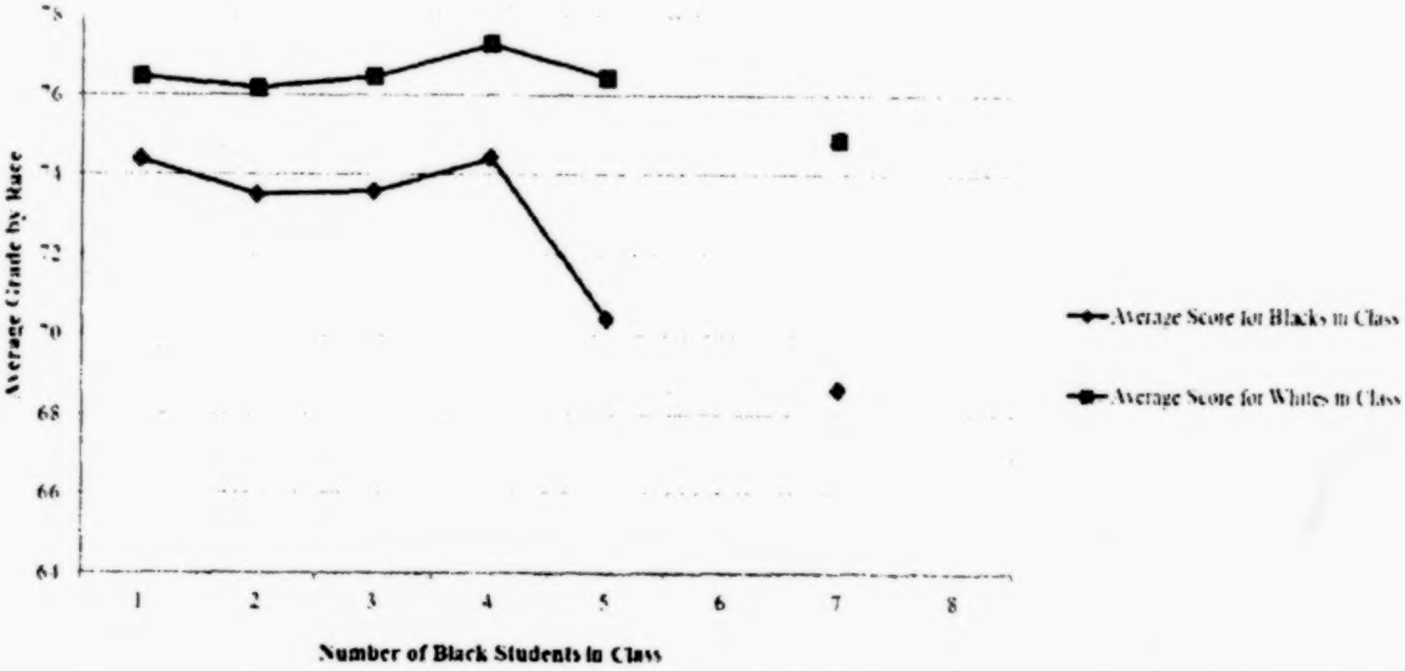

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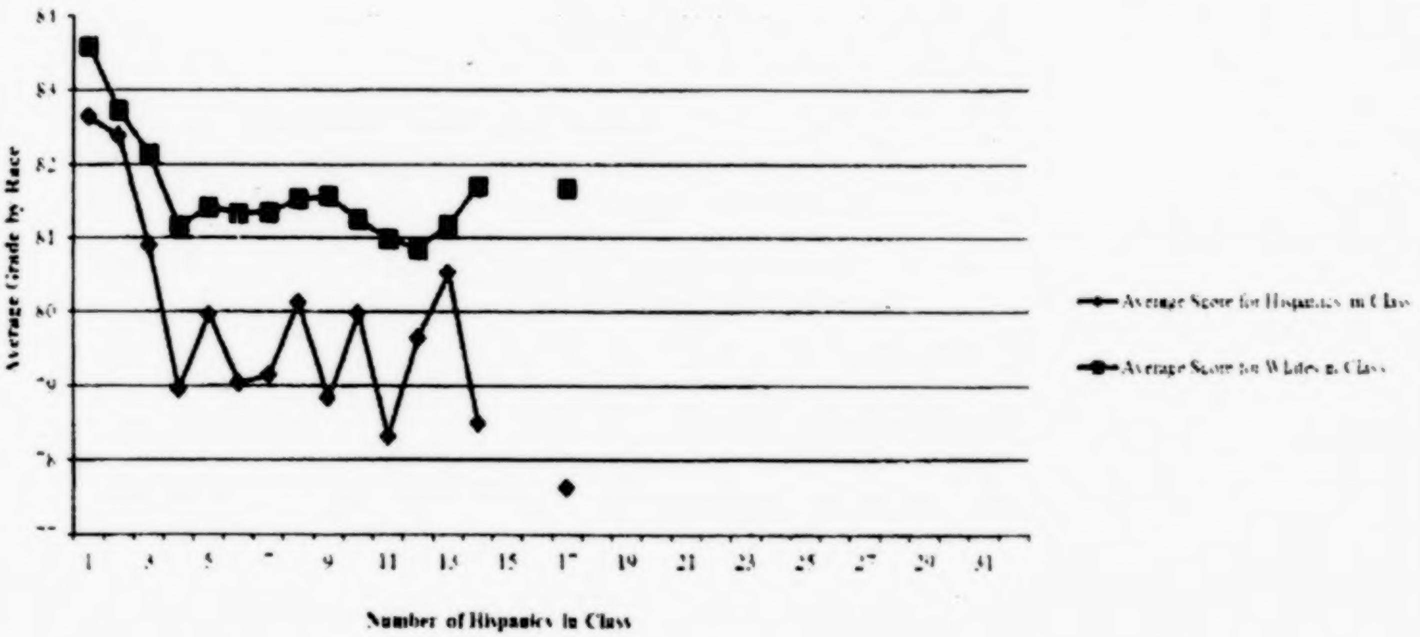

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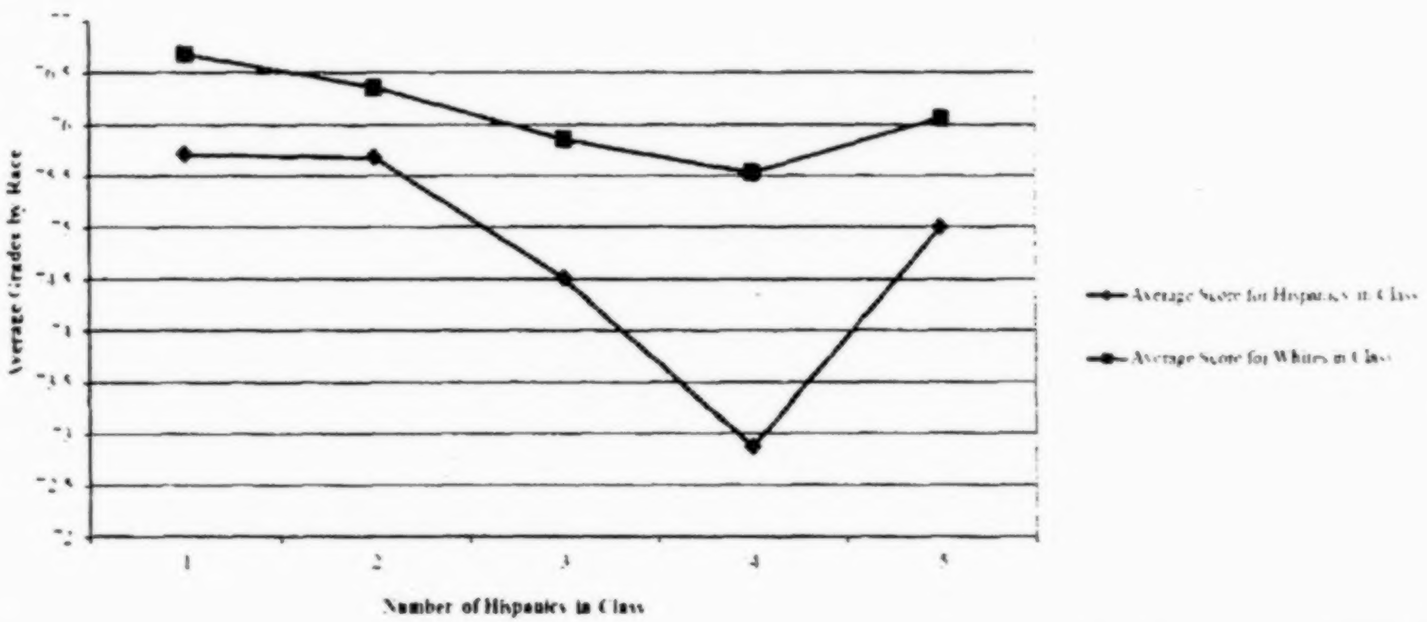

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-345

In The
Supreme Court of the United States

◆

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

BRIEF FOR *AMICI CURIAE* SMALL BUSINESS OWNERS AND ASSOCIATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici comprise numerous small businesses and associations of small businesses, together representing hundreds of thousands of small businesses, as well as current and former small business owners and advocates.

Amici recruit employees who are graduates from, and are themselves graduates from, selective colleges and universities, including the University of Texas at Austin.

Small businesses have created nearly ten million net new jobs in the United States in the past two decades and have a vital interest in ensuring that the University of Texas, and similar colleges and universities, have flexibility to administer diversity programs that equip graduates with the kind of education and training most valuable to both *amici* and our society.

Amici submit this brief, with the consent of the parties,[1] in support of Respondents' argument that diversity in higher education is a compelling governmental interest and that the use of holistic, individualized higher education admissions programs, which take into account many factors including race, satisfy strict scrutiny.

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

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SUMMARY OF ARGUMENT

The signatories to this brief – representing hundreds of thousands of small businesses – believe diversity is increasingly essential to the success of small businesses in this country. Small businesses represent a dynamic engine of growth in the United States economy. Indeed, small businesses contribute more than half of the non-farm private Gross Domestic Product ("GDP")[2] and account for about half of all private sector employment.[3] Moreover, between 1993 and 2009, small firms were responsible for 65 percent of the 15 million net new jobs created in the U.S. economy,[4] and, according to Federal Reserve Chairman Ben Bernanke, small businesses are vital to the country's economic recovery as "[t]hey often offer a level of agility in bringing innovative products to the global marketplace that larger firms cannot match."[5] In an encouraging trend for all Americans, minority and women leaders from diverse backgrounds are helping to lead our nation's economic recovery, as they are increasingly joining the ranks of entrepreneurs and small business leaders.[6]

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[2] U.S. Small Business Administration, Frequently Asked Questions, http://www.sba.gov/sites/default/files/sbfaq.pdf (last visited Aug. 8, 2012).

[3] *Id.*; U.S. Census Bureau, Statistics About Business Size (including Small Business) from the U.S. Census Bureau, http://www.census.gov/econ/smallbus.html (last visited Aug. 1, 2012). In 2008, there were 27.5 million businesses in the United States. The latest available census data show that in 2008 there were 5.9 million small business employer firms and 21.4 million small business firms without employees. Further, of the 120.9 million nonfarm private sector workers in 2008, small firms employed 59.7 million. *See supra* note 2.

[4] *See supra* note 2.

While small businesses have important qualities, such as nimbleness and flexibility, that increase their competitiveness, they also face unique challenges and have distinctive needs that differ from larger enterprises. Small business owners have unique perspectives about the role of diversity in our economy and the features of diversity programs that respond to the needs of the business community today. The ability of small businesses to adapt quickly to changing market conditions – including changes in the demographic make-up and global nature of the market – has proven a necessary component of their success. This distinctive feature of small business, however, requires continuing access to a workforce "'trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

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[5] Luca Di Leo & Jamila Trindle, *Bernanke: Small Businesses Important to Economic Recovery*, WALL STREET JOURNAL (Nov. 10, 2011), http://blogs.wsj.com/in-charge/2011/11/10/bernanke-small-businesses-important-to-economic-recovery/ (last visited Aug. 1, 2012).

[6] U.S. Census Bureau, Preliminary Estimates of Business Ownership by Gender, Ethnicity, Race and Veteran Status: 2007 (July 2010), http://www.census.gov/econ/sbo/ (last visited Aug. 8, 2012) (providing comprehensive data).

Because small businesses have more limited resources to recruit, train, and manage a diverse workforce, small businesses often depend heavily on public institutions like the University of Texas at Austin ("University of Texas") to provide not only the knowledge and skills that small business leaders need to excel, but also access to the business and social networks that are critical to succeeding in business. Given the important role of public education to small businesses, it is crucial that flagship public universities like the University of Texas have the flexibility to voluntarily implement admissions programs to promote diversity within their academic programs that reflect the myriad cultures, races, ethnicities, and perspectives of our great nation.

Nine years ago, this Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). While many large businesses filed *amicus* briefs in *Grutter* and its companion case touting the importance of diversity to the business community, the unique perspective of small businesses was not squarely presented to the Court. As this Court again prepares to consider the role that race may appropriately play in higher education admissions, the signatories to this brief highlight the importance of diversity to the success of small businesses and the vital role that flexible, holistic decision-making plays in achieving diversity in both higher education and small business.

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ARGUMENT

I. PROMOTING DIVERSITY AND CROSS-CULTURAL COMPETENCE IN AMERICA'S EDUCATIONAL INSTITUTIONS IS CRITICAL TO KEEPING AMERICA'S SMALL BUSINESSES COMPETITIVE.

A. Diversity Plays an Integral Role in the Success of Small Businesses.

Our nation's population, workforce, and business leaders have become increasingly diverse. During the brief period since this Court decided *Grutter*, the nation's minority population grew from 31.9 percent to 37.3 percent, with Hispanics/Latinos and Asians experiencing the highest levels of population growth of all demographic groups.[7] Reflecting this rapid growth in the diversity of America, minority workers constitute an increasing share of the American workforce, growing from 26.1 percent of the civilian labor force in 1998 to 31.8 percent in 2008, and likely rising to 36.0 percent by 2018.[8]

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[7] *See* U.S. Census Bureau, *Overview of Race and Hispanic Origin: 2010* (March 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (last visited Aug. 8, 2012).

Minorities have also contributed an outsized share of the recent growth in American business and entrepreneurship. In fact, between 2002 and 2007, the number of minority-owned businesses grew 45.6 percent while the overall population of American firms only grew 18 percent during that period.[9] By 2007, minority-owned businesses employed about 5.9 million workers and accounted for nearly $1 trillion in gross receipts.[10] Fueling this growth, minority-owned businesses have focused on hiring and developing diverse workforces.

Growing diversity from the shop floor to the boardroom is not merely a consequence of emerging population trends. American businesses large and small promote diversity and cultural awareness throughout their ranks because, in their experience, it makes them more successful, whether they operate in a single locale, across the nation, or globally. In this century, characterized by an increasingly interconnected world economy and a highly heterogeneous American society, diversity has become an indispensible part of cultivating customers, forging business partnerships, and fostering a competitive workforce.[11] In a growing and persistent trend, more small businesses are seeking to develop, and are benefiting from, diverse workforces, as they increasingly engage in international trade and commerce. Small business leaders have learned that global commerce is not solely the domain of big business and that penetrating global markets is increasingly critical to the continued growth of their businesses. Small businesses are engaging in global commerce at record rates, and by 2018 at least half of all American small businesses will be involved in international trade.[12] A recent federal government study found that minority-owned businesses that export goods tend to be larger than their non-minority counterparts in the size of their workforces and average receipts.[13]

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[8] *See* Mitra Toossi, Bureau of Labor Statistics, Employment Outlook: 2008-18, MONTHLY LAB. REV. 32 (Nov. 2009).

[9] U.S. Census Bureau, *Census Bureau Reports Minority Business Ownership Increasing at More than Twice National Rate* (July 13, 2010), http://www.census.gov/newsroom/releases/archives/economic_census/cb10-107.html (last visited Aug. 7, 2012).

[10] *Supra* note 7; *see also* U.S. Census Bureau, Preliminary Estimates of Business Ownership by Gender, Ethnicity, Race and Veteran Status: 2007 (July 2010), http://www.census.gov/econ/sbo/ (providing comprehensive data) (last visited Aug. 8, 2012).

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[11] *See, e.g.*, Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIOLOGICAL REV. 208, 219 (April 2009) (finding that in businesses, greater racial and gender "diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits."); Nancy R. Lockwood, *Workplace Diversity: Leveraging the Power of Difference for Competitive Advantage*, 2005 SHRM RESEARCH QUARTERLY (2005), http://www.shrm.org/Research/Articles/Articles/Documents/0605RQ.pdf (last visited Aug. 6, 2012) ("One of the major drivers behind the business case [for diversity] is the demographic changes that directly affect the labor pool and available talent. These changes are significant.").

[12] Matthew Bandyk, *Small Businesses Go Global*, U.S. NEWS & WORLD REPORT (Feb. 22, 2008) (describing an Institute for the Future study).

Diversity plays a critical role in implementing a global business plan for any small business. To compete effectively in global markets, small businesses must be prepared to interact, communicate, negotiate, and partner with people from every ethnic, racial, gender, socio-economic, and cultural background.[14] By promoting and managing diverse workforces and drawing on talented students trained by outstanding, diverse public institutions, small businesses foster the conditions that allow minority and non-minority leaders alike to navigate the complex demands of a global economy.

As this Court correctly recognized in 2003, "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330 (citing Brief for 3M et al. as *Amici Curiae* 5, and Brief for General Motors Corp. as *Amicus Curiae* 3-4). Nine years later, this observation is even more profound, as the explosion of the Internet has connected individuals and small businesses more than at any time in human history. As the Dean of Johns Hopkins Business School recently explained, "[s]mart small businesses today understand diversity is . . . crucial to doing business in a world whose populations, by virtue of speedy air travel and even speedier Internet service, become more interconnected by the day."[15]

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[13] U.S. Census Bureau, *Ownership Characteristics of Classifiable U.S. Exporting Firms: 2007* (June 2012), http://www.census.gov/econ/sbo/export07/.

[14] Yash Gupta, *Understand the Importance of Diversity*, BLOOMBERG BUSINESSWEEK (Jan. 12, 2011), http://www.businessweek.com/smallbiz/tips/archives/2011/01/understand_the_importance_of_diversity.html (last visited Aug. 8, 2012).

As our nation's population increasingly reflects the racial, cultural, and linguistic diversity of the rest of the world, the same strategic considerations that have long made diversity critical to succeeding in global commerce are now a vital part of operating a small business in domestic markets. Having diverse workforces and diverse leaders provides small businesses with many different perspectives and enhanced problem-solving capacities that are vital to competing effectively with businesses of all sizes. Such diversity helps ensure that a "company and its products are attuned to consumers' demands and desires"[16] and reaches a wider customer base. Thus, it comes as no surprise that small firms with significantly greater diversity within their leadership have reported stronger financial performance.

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[15] *Supra* note 14.

[16] *Id.*

reflected by their revenue, net income, and book-to-market equity.[17]

Gilbert Aranza, a successful owner of an airport concessions business in Texas, recently explained how his business has benefitted from embracing diversity. He stated that:

> Here in Texas 90 percent of my hourly workers are minorities and women. I have worked to ensure that two-thirds of my managers are minorities and women. This is a higher percentage than my competitors and it sets us apart and makes us better. We win the customer services awards at Dallas/Fort Worth International Airport just about every year. My employees are happier and more productive working with people who are themselves diverse and who care about diversity. Moreover, my work depends upon maintaining good relationships with the increasingly diverse

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[17] *See* Quinetta M. Roberson & Hyeon Jeong Park, *Examining the Link Between Diversity and Firm Performance: The Effects of Diversity Reputation and Leader Racial Diversity*, DigitalCommons, Cornell University ILR School (Apr. 1, 2006); *see also, e.g.*, Linda S. Hartenian & Donald E. Gudmundson, *Cultural Diversity in Small Business: Implications for Firm Performance*, J. OF DEVELOPMENTAL ENTREPRENEURSHIP (Dec. 1, 2000) (finding a correlation between workforce diversity and firm income in small businesses working in the American service industry); David Smallbone, John Kitching & Rosemary Athayde, *Ethnic Diversity, Entrepreneurship and Competitiveness in a Global City*, 28 INT'L SMALL BUS. J. 174 (2010) (finding evidence to support the conclusion that ethnic and linguistic diversity may be a potential asset to small firms in London).

> political and community leaders who are responsible for our airports. These leaders care a lot about diversity, as they should. I think my efforts to have a workforce that really reflects Texas helps in that context as well.[18]

Today, diverse small businesses and minority-owned businesses are demonstrating they have the ingenuity, entrepreneurial spirit, and drive to create the goods and services that are demanded by an increasingly diverse population at home and an interconnected global economy. These same small businesses depend heavily upon the availability of diverse student populations in America's colleges and universities to supply their workforces.

B. Small Businesses Face Unique Challenges and Need Flexible Approaches to Increase Diversity.

While small businesses depend upon diversity in their workforces to succeed in an increasingly diverse and global economy, small businesses often face unique challenges in pursuing and achieving diversity among their workers. Many small businesses lack the substantial resources of large companies to recruit and retain a diverse workforce.[19] Indeed,

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[18] Phone Interview with Gilbert Aranza, August 4, 2012 (interview notes on file with counsel of record).

[19] *See* G. Beaver & K. Hutchings, *Training and Developing an Age Diverse Workforce in SMEs: The Need for a Strategic Approach*, 47 J. OF EDUCATION & TRAINING 592 (2005) ("Though

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according to recent U.S. Census data, of those small businesses that employ more than one person, over 91 percent employ fewer than 20 employees.[20] Given these numerical limitations, many small businesses cannot create a diverse environment through hiring alone. Nor can small businesses respond to unexpected demographic shifts or market changes simply by hiring additional employees with relevant backgrounds. Instead, many small businesses must take a more nuanced and individualized approach to recruiting and retaining employees, focusing on candidates who have been exposed to a variety of people, ideas, perspectives, and cultures through their educational experiences, prior business experiences, and personal networks.

Darryl Daniels, the managing partner of Jacobsen/Daniels Associates, a nationally recognized transportation and strategic planning business, offered a useful illustration of the unique challenges that small businesses face in responding to demographic shifts:

> We have to be responsive to our customers and our customers are looking for firms with workforces that reflect themselves and their

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lacking the resources of large corporations to develop affirmative action policies, the smaller organisation may, however, utilise its flexibility to take short- and long-term advantage of the strengths offered by diverse sectors of the workforce.").

[20] U.S. Small Business Administration, The Small Business Economy, 2011 Data Tables, Table A.7, http://www.sba.gov/advocacy/849/6282 (last visited Aug. 1, 2012).

> broader communities. We have recently seen a real increase in the number of airports that are based in predominately Hispanic communities and run by Hispanic executives and managers. We have to be flexible enough to be responsive to that and we want to be. But we need the best colleges and universities to be educating the engineers and the business and finance experts that we need. Those colleges and universities need to be doing more to attract and educate racially diverse scientists – a lot more.[21]

Additionally, many small businesses cannot afford to hire full-time diversity officers or fund robust recruitment efforts to identify and recruit diverse applicants. Instead, they often promote diversity within their firms by tapping into the diverse networks of their employees, often created or enhanced by exposure to diverse student populations at institutions of higher education. Moreover, while some smaller businesses do not have the resources to implement diversity training programs,[22] they can markedly

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[21] Phone Interview with Darryl H. Daniels, August 6, 2012 (interview notes on file with counsel of record).

[22] *See* National Urban League, *Diversity Practices that Work: The American Worker Speaks* (2004), http://nul.iamempowered.com/sites/nul.iamempowered.com/files/attachments/Diversity_Practices_That_Work_2005.pdf (last visited Aug. 6, 2012) (finding that less than 30 percent of surveyed workers at smaller firms believe their firms have effective diversity training programs); *see also, e.g.*, Brief of General Motors Corp. as *Amicus Curiae* in Support of Respondents, filed in *Grutter v. Bollinger*, Nos. 02-241 and 02-516, at 20 (explaining that many large businesses such as

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improve the performance of their firms by hiring employees who have previously been exposed to diverse educational and working environments.

Small businesses must also adapt quickly to changing market conditions, and their ability to do so requires ready access to a workforce already equipped with the necessary skill sets. As small businesses generally have fewer resources and less time to cultivate these skills than large businesses, it is even more imperative that small businesses be able quickly to hire qualified candidates from different backgrounds, races, ethnicities, and cultures. As Michael Steele, a small business owner, former Maryland Lieutenant Governor, and former Republican National Committee Chairman explains,

> Any business ultimately wants to be a reflection of its community and the community with which it is doing business. And the color of communities here, and around the world, is changing. Being responsive to that is an indispensible part of a good business plan. But small businesses do not have unlimited resources to devote to diversity consultants. They need employees and managers who leave college already well-prepared to excel

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General Motors provide diversity training to their workers but that this training cannot substitute for the training and experiences employees should have received earlier).

> in a world filled with people of different races with different ideas and experiences.[23]

Small businesses face competition from larger firms with greater resources to attract candidates with *both* the necessary skill sets and educational backgrounds rich in diversity. According to small business owner Darryl Daniels, small businesses in particular face difficulty recruiting employees who possess both educational backgrounds with significant exposure to diversity and training in certain key programs. As he explained,

> It is critical that there be more minority students – of all races – in the top flight science and technical programs at selective colleges and universities. Right now, the top schools have very, very few minority students in the technical fields and that makes it really hard on small businesses. We are based in Michigan and have superb public universities, but we can't compete with GM and Ford for the few minority engineers, architects, and technology experts who are coming out of the University of Michigan and Michigan State. We have just over 20 employees – most of the time we don't have the staff or the resources to go toe-to-toe with the big guys in recruitment. We just need to be educating more minorities and women in science and engineering at our flagship colleges and universities so

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[23] Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

> that small businesses also have access to top flight talent of every race.[24]

Because of these unique challenges, small businesses must be flexible in their approaches to cultivating diversity in their workforces and must often depend to a greater degree than large businesses on pre-existing networks and prior educational and business experiences to achieve desired levels of workplace diversity. Critically, many small businesses rely heavily on public colleges and universities to produce workers who are equipped with the skills and knowledge to be successful in different areas of commerce and who have been exposed to a range of perspectives as varied as the communities and the nation in which they operate.

C. Higher Education Provides a Foundation for Small Business Success; Promoting Diversity in These Institutions is Critical to This Success.

Education in America serves, among other things, to promote the most fundamental of American ideals. Indeed, "[t]he Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701,

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[24] Phone Interview with Darryl H. Daniels, August 6, 2012 (interview notes on file with counsel of record).

782 (2007) (Kennedy, J., concurring). The vitality of this lesson has never been more apparent than now as more and more small businesses come to recognize that embracing diversity strengthens their businesses. However, as businesses seek to increase diversity throughout their enterprises, they rely heavily on America's schools, and especially America's colleges and universities, to facilitate this effort.

All businesses – including small businesses – depend on colleges and universities to furnish their future employees with the knowledge and skills necessary to meet the needs of the marketplace in our increasingly diverse and globally-connected society. Indeed, colleges and universities play an indispensible role in ensuring both that our labor force is visibly open to a cross-section of America and that minority and non-minority students alike are "'trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). It is therefore imperative that a diverse population has access to this invaluable training and education in order to be ready and able to contribute successfully to American small businesses.

Higher education provides still other benefits that small businesses value greatly. Attending a selective institution exposes students to cutting-edge technologies, scientific breakthroughs, and groundbreaking research in every field. Small businesses reap the benefits of this experience when they hire students already exposed to new ideas and able to understand and embrace the latest industry innovations. Too often attending a flagship university such as the University of Texas is the *only* way students become exposed to the latest technologies and research, as most research funding goes to selective universities. Steele provides some useful context in this area:

> As Lieutenant Governor I worked hard to try to improve math, science and technology education for minority students in Maryland. This problem requires a multi-faceted approach. Part of the solution is to provide better resources for HBCUs [Historically Black Colleges and Universities] especially by providing endowed chairs and research and development dollars. We have to resist the powerful interests that say 'just make the science investments in the flagship schools and let the HBCU students visit to take science classes.' I heard those arguments in 2006, but to me they sounded more like 1956. But providing more resources to HBCUs is simply not enough. Minority students deserve to have unfettered access to an excellent education wherever they choose to go to school. And if they want to attend flagship universities, they deserve to have real access in real numbers. If they want to attend HBCUs they deserve fully funded schools

> with excellent science and technology programs. We can and must do both.[25]

Additionally, the opportunity to receive an education and be members of student bodies at selective colleges or universities, such as the University of Texas, provides graduates with access to extensive networks of individuals. These networks, in turn, provide business owners with access to information, advice, customers, suppliers, and capital. Not surprisingly, small businesses with greater access to a wide range of networks are more likely to be successful. The scholarship supports our experience:

> Effective networking helps business owners accelerate the rate of growth and creation of wealth through additional connections with distributors and suppliers, increased innovation in terms of products, methods of production and markets, synthesizing of ideas and suggestions, and increased learning regarding product and process. Social networks serve to expand business owners' boundaries in terms of knowledge and information which can result in increased new venture ideas and more opportunities.[26]

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[25] Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

[26] Cheryl Luczak, *et al.*, *National Culture, Market Orientation and Network-Derived Benefits: Conceptual Model for Service SME's*, 16 ACADEMY OF ENTREPRENEURSHIP J. 1 (July 2010); *see also* Sylvie Laforet, *A Framework of Organisational Innovation and Outcomes in SMEs*, 17 INT'L J. OF ENTREPRENEURIAL BEHAVIOUR

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As an illustration of this point, Chairman Steele recounted that his college roommate became the founder and owner of a very successful dot-com company. "Because I went to Johns Hopkins, that guy is now part of my business network. When I need to do work that involves technology or Wall Street, I can call him and run things by him. You can't tell me that I would have those same connections if I had not gone to a highly selective college. Those connections matter in business."[27]

Small business owner John L. Ricks benefitted from the networks he established in college and graduate school in another unique way. Mr. Ricks went to school with two astronauts. As a result of this association, Mr. Ricks learned about some of the technological opportunities within NASA, equipping him with the knowledge needed to submit a proposal for an air tight hatch door for the International Space Station.[28]

& RESEARCH 380 (2011) ("Networking can lead to positive innovation outcomes. . . . A network can bring numerous advantages for firms. The companies get access to enhanced resources, the risk can be shared and costs reduced. Innovation also requires the convergence of many sources of knowledge and skills, usually linked in the form of a network (*e.g.*, by forming an alliance with universities or research center, [Small and Medium Enterprises] can get access to up-to-date information.").

[27] Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

[28] Phone Interview with John L. Ricks, III, July 25, 2012 (interview notes on file with counsel of record).

Not only does promoting diversity in higher education provide our nation's business leaders with access to critical networks, it also provides important opportunities for previously underrepresented minorities to start and grow successful small businesses. Business scholars have explained that "[a]cquiring appropriate educational credentials, skills, and applicable work experience, accessing financial capital, and exploiting market opportunities have traditionally been more challenging for minorities than for aspiring white entrepreneurs."[29]

Promoting opportunities for minorities to attend flagship universities such as the University of Texas, while not a panacea, is one step to overcoming this historical imbalance. Indeed,

> [t]he minority business community in the United States is profoundly different today than it was 50 years ago. The median business owner is college-educated. Declining restrictive barriers have expanded access to educational and employment opportunities, permitting aspiring minority entrepreneurs to acquire expertise in many fields that were traditionally closed. This greater base of entrepreneurial expertise is perhaps the most important single force driving the growth of

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[29] Timothy Bates, *Minority Entrepreneurship*, 7 FOUNDATIONS AND TRENDS IN ENTREPRENEURSHIP 151, 153 (2011).

> [minority business enterprises] of greater size and scope in a wide range of industries.[30]

The rise in minority entrepreneurship benefits everyone. Not only has minority-owned business ownership grown dramatically in recent years but, according to a recent survey of small businesses, more small businesses plan to add workers in the coming year than cut workers and those small businesses owned by African Americans were the most likely to have plans to hire additional employees.[31] As America draws more broadly from its diverse, culturally rich population, the opportunities for innovation and competition expand as well.

The critical role of diversity in education was aptly characterized by Ray Marshall, holder of a chair in Economics and Public Affairs at the University of Texas, former United States Secretary of Labor, a former small business owner, and a long-time student of the challenges confronting small businesses and businesses led by minorities and women. Secretary Marshall explained:

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[30] *Supra* note 28 at 246; *see also, e.g.*, Stacy Dale & Alan Krueger, *Estimating the Return to College Selectivity over the Career Using Administrative Earning Data*, Nat'l Bureau of Economic Research Working Paper No. 17159 (June 2011).

[31] GazelleIndex, 2012 Economic Outlook for Minority, Women and Nonminority Small Businesses at 5, 13-14 (2012), http://www.gazelleindex.com/wp-content/uploads/2012/06/1st-Minority-Business-and-Economic-Report-2012.pdf (last visited July 27, 2012).

> Colleges and universities have to focus on diversity for many reasons. But four aspects of diversity in education may be the most important. First, teaching students about diversity is fundamental to democracy and social cohesion. Second, diversity is an essential component of an excellent education and diversity in the classroom facilitates critical thinking. Third, diversity is key to fostering creativity and creativity is essential to our economy. And fourth, in the context of a flagship university like the University of Texas, diversity is an important tool of public diplomacy. It demonstrates to future world leaders, many of whom come here to be educated, that America practices what it preaches when it comes to equality and opportunity.[32]

Importantly, business leaders are often among the most prominent civic and community leaders in American society. Ensuring that our institutions of higher education are fully accessible to all segments of our society will help ensure our leadership is similarly accessible to all members of our diverse society. As this Court correctly observed,

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of

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[32] Phone Interview with Ray Marshall, August 2, 2012 (interview notes on file with counsel of record).

> every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

Grutter, 539 U.S. at 332.

Promoting diversity at selective institutions is, indeed, a key step in promoting diversity throughout our nation's leadership in both the public and private sectors. Mr. Steele – himself a graduate of Johns Hopkins University and Georgetown University Law Center – served as the first African American Chairman of the Republican National Committee during the run up to the Republicans' extraordinary success in the 2010 mid-term elections. He believes that the RNC's efforts to harness diversity contributed to its success. According to Chairman Steele, as a result of his efforts:

> There was more diversity in the [RNC headquarters] building while I was there than at any other time. We worked to make sure that there were diverse voices in the room – African Americans, Hispanics, and others. We also invested real dollars during the 2010 election cycle in the coalitions department. We gave them budget, staff and real responsibility for the first time and charged them with building real partnerships and identifying diverse leaders. All you have to do is look at the significantly more diverse Republicans who won election during

> that cycle – in so many different jurisdictions – to understand that our emphasis paid off.[33]

II. THE UNIVERSITY OF TEXAS'S PROCESS OF PROMOTING DIVERSITY SERVES SMALL BUSINESSES' INTERESTS.

Small businesses depend on colleges and universities to educate and graduate classes of students who are themselves diverse and have been exposed to a diversity of cultures and views. Achieving this ambitious goal is far from simple: "Fifty years of experience since *Brown v. Board of Education*, should teach us that the problem before us defies so easy a solution." *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) (citations omitted).

Given both the critical importance of, and inherent challenges in, promoting diversity in higher education, it is imperative that schools be permitted the flexibility to voluntarily devise and implement diversity initiatives that take into account the many facets of the whole person – including special skills, socioeconomic background, unique experiences, culture, ethnicity, and race. This flexibility should permit use of the admissions programs employed by the University of Texas, which couple race-neutral selection criteria with a supplemental, holistic approach to individual candidates.

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[33] Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

A. Universities Need the Flexibility to Supplement Diversity Initiatives With Programs That Consider the Whole Person.

The case at hand aptly demonstrates the need for such a blended approach. In the wake of judicial decisions that rejected diversity programs used in the past by the University of Texas,[34] the Texas State legislature enacted a law under which Texas students who ranked in the top ten percent of their high school classes would be admitted automatically to any Texas state university.[35] Following this Court's decision in *Grutter*, the University of Texas chose to conduct a comprehensive examination into whether it was enrolling a "critical mass of underrepresented minorities." *Fisher v. Univ. of Texas*, 631 F.3d 213, 225 (5th Cir. 2011). That study found that in classes of "participatory size," 89 percent of those classes had either one or zero African American students, and 41 percent had one or zero Asian American students or Hispanic students. *Id.* Moreover, a survey revealed that a majority of students believed that there was "insufficient minority representation" in the classrooms for "the full benefits of diversity to occur." *Id.*

The University ultimately concluded that, while the ten-percent law boosted minority enrollment generally, the program should be supplemented with an approach that considers the many facets of the whole person, including race, in order to promote diversity across the University's academic programs.[36] The University's whole-person approach allows "serious consideration to all the ways an applicant might contribute to a diverse educational environment," *Grutter*, 539 U.S. at 337, and impact the lives of other students who may become leaders in business and government.

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[34] *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

[35] Tex. Educ. Code § 51.803 (1997). This law was later amended to cap the number of students guaranteed admission pursuant to the law to 75 percent of available seats at the University of Texas at Austin. *See id.* § 51.803(a-1) (2010).

The ten-percent law alone is insufficient to serve the legitimate and compelling pedagogic needs of the University of Texas. In *Grutter*, for example, the Court noted that programs like the ten-percent law "preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along the qualities valued by the university." 539 U.S. at 340. Without the ability to supplement the effects of the ten-percent law with a model that takes into account the whole person, the University's ability to promote many facets of diversity and provide educational opportunities would be unduly limited, hindering its ability to help produce a workforce that reflects and advances America's many cultures, races, ethnicities, and perspectives and, critically, a workforce that is essential to the success of small businesses in today's global economy.

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[36] *See* Supplemental Joint Appendix, Tab A, *Proposal to Consider Race and Ethnicity in Admissions* (June 25, 2004).

Employees bring more to a business than just their grade point average. Their skills and experiences are often equally, if not more important, to a small business. The student who works a part-time job throughout high school comes to a future employer with maturity and useful business experience; the high-school musician who devotes hours to practicing the violin brings dedication and creativity; and the star soccer player comes with perseverance and the ability to work with a team. These students may or may not graduate in the top ten percent of their high school classes, but they certainly contribute useful perspectives to college campuses and small businesses. As the experience of the University of Texas demonstrates, the ten-percent law alone, without a supplemental whole-person approach, is a blunt instrument that limits the University's ability to take into consideration an applicant's unique skills and experiences. Drawing upon more than 50 years' experience in higher education, Secretary Marshall aptly explained: "The ten percent rule is not adequate because there are lots of really talented students who are not in the top ten percent for all sorts of reasons. We want those students. And the nation needs us to educate them for the good of our democracy and our place in the global marketplace."[37]

Moreover, application of the ten-percent law without a supplemental holistic, individualized admissions program, inhibits the University's ability to ensure diversity within the various schools and programs that confer specialized skills upon graduates integral to the success of many small businesses. Experience has shown that flexible diversity programs, like the one in place at the University of Texas, are more likely to promote diversity in certain key programs such as business and science.

For example, in 2002 – before the University of Texas at Austin implemented a holistic approach to admissions that considers many factors including race – more than 80 percent of all undergraduate business classes of a certain size had one or fewer African American students and 40 percent of those classes had one or fewer Hispanic students. *See* Supplemental Joint Appendix, Ex. C at 77. That same year, the undergraduate Natural Sciences program reported that 88 percent of certain classes had one or fewer African American students and more than 40 percent of classes had one or fewer Hispanic students. *Id.* at 83.[38] These miniscule numbers are insufficient

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[37] Phone Interview with Ray Marshall, August 2, 2012 (interview notes on file with counsel of record).

[38] *See also* William Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, Working Paper for the Civil Rights Project at UCLA, at 45-49 (Aug. 3, 2012), http://

(Continued on following page)

to "ensure that these minority students do not feel isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 380. Nor do they "provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend." *Id.* Indeed, tokenism cannot satisfy the interests of diversity and can even be counter-productive. Chairman Steele noted the problem of putting one or a very few members of minorities in the position of trying to represent or speak for an entire race – a problem with which he identifies as a black Republican.[39] Secretary Marshall likewise stated:

> We have to continuously ask ourselves, have we moved beyond the token phase? Are your former students now referring your new students? This doesn't work if it is all top down. There have to be enough minority students to ensure the demand for their inclusion comes from the bottom up. We have to institutionalize opportunity the way we formerly institutionalized discrimination. Until we do, we aren't done.[40]

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ssrn.com/abstract=2123653 (noting that absent the ability to implement individualized admissions programs that took into account many factors including race, MBA programs experienced a market drop in minority enrollment).

[39] Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

[40] Phone Interview with Ray Marshall, August 2, 2012 (interview notes on file with counsel of record).

Small businesses depend on universities' continued ability to promote diversity in business and science programs whose graduates may have knowledge and skills particularly valuable to small businesses. Indeed, many small businesses will recruit employees who graduate from these programs. A race-neutral rule that results in a limited increase in minority enrollment generally, but fails to promote diversity in key academic programs critical to small businesses, should not be considered an adequate substitute for flexible, holistic admissions programs that permit consideration of race as one of many factors. High grade point averages, moreover, are hardly the only predictor of success in small business, making the whole-person program an especially valuable and important addition to the ten-percent law at the University of Texas.

Finally, programs like the ten-percent law fail to take into account small shifts in demographic changes – such as new, small immigrant populations or shifts in socioeconomic status – and thus may fail to include the perspectives and cultures from these populations within the student body. Small businesses must be flexible in their ability to respond to demographic and market changes and small businesses depend on universities and colleges to be equally flexible in responding to these changes, and educating student bodies that, to the greatest extent possible, reflect the varied perspectives of the community.

B. The University of Texas's Blended Diversity Initiative Provides Much Needed Flexibility.

As a continuing need exists for race-conscious admissions programs, it is important that universities and colleges have the flexibility to adapt programs to their unique needs. In applying strict scrutiny to race-conscious admissions programs, this Court has emphasized the importance of both flexibility and a holistic approach to promoting diversity. Justice Powell wrote that the admissions process should be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Bakke*, 438 U.S. at 317 (opinion of Powell, J.). Likewise, the *Grutter* Court emphasized that "truly individualized consideration demands that race be used in a flexible, non-mechanical way." 539 U.S. at 334; *see also id.* at 392 (Kennedy, J., dissenting) ("individual assessment" must be "safeguarded through the entire process").

Small business must be able to draw upon a diverse workforce equipped with the skills to address the demands of dynamic, diverse markets. This, in turn, requires that colleges and universities have the flexibility to adopt admissions programs that employ an individualized approach that takes into consideration the many attributes of an applicant that may contribute to the student body and ultimately the workforce.

◆

CONCLUSION

For the foregoing reasons, this Court should reaffirm its prior holdings that the government has a compelling interest in achieving the educational benefits of diversity in higher education and that holistic, individualized admissions programs that take into consideration many factors including race are permissible under the United States Constitution.

Respectfully submitted,

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Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF SOCIAL AND ORGANIZATIONAL PSYCHOLOGISTS AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the University of Texas at Austin's limited consideration of race in its individualized admissions policy is narrowly tailored to serve a compelling governmental interest in achieving the significant benefits of diversity in higher education, as articulated in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and supported by recent social science research.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are social and organizational psychologists who study intergroup contact and the physiological and/or psychological effects of a diverse environment.[1] Amici are college and university faculty who have published numerous books and peer-reviewed articles on topics such as the influence of diversity on cognitive function, bias, and academic achievement. Amici, listed in the Appendix, file this brief to acquaint the Court with current social science research and its consequences for the constitutionality of race-conscious admissions policies.

SUMMARY OF ARGUMENT

The Court ruled in *Grutter v. Bollinger* that a race-conscious university admissions policy meets strict scrutiny review if it fulfills a compelling governmental interest in student body diversity and is narrowly tailored to achieve this interest. 539 U.S. 306, 325-26 (2003). Building on the social science that informed the Court's opinion in *Grutter*, this brief updates the Court with the most recent social science research and offers a deeper understanding of why diversity is even more crucial to academic achievement and civic engagement than previously understood. This brief complements but is distinct from other social science briefs submitted on behalf of Respondents. Amici discuss research—presented for the first time to the Court—on how diversity facilitates better physiological regulation of stress and threat responses in interracial interactions, improves academic performance, reduces prejudice, and has broad positive effects on civic and economic life.

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[1] Petitioner and Respondents have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for Petitioner or Respondents authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, and their counsel, made a monetary contribution to its preparation or submission.

The University of Texas ("UT" or "University") employs a holistic admissions policy that, when combined with the Top Ten Percent Plan (the "Plan"), is narrowly tailored to achieve the University's compelling interest in a diverse student body. Historical circumstances have resulted in disproportionate nationwide hypersegregation and disparate educational opportunities that cannot be accurately assessed without incorporating race as a factor in a holistic and individualized review of each applicant. UT's admissions policy recognizes and accounts for these circumstances. It is narrowly designed to preserve individualized assessment by considering race as only one of many factors in evaluating a student's unique personal and life experiences.

The Court should affirm the Fifth Circuit's decision because UT's holistic admissions policy is narrowly tailored to achieve the University's compelling interest in a diverse educational environment and its significant attendant physiological and psychological benefits.

ARGUMENT

I. DIVERSITY IN HIGHER EDUCATION IS A COMPELLING INTEREST

As the Court has long recognized, promoting diversity in higher education is a compelling governmental interest. *See Grutter*, 539 U.S. at 329. In *Grutter*, the Court made clear that "attaining a diverse student body is at the heart of [an institution's] mission," *id.*, and that public universities have a compelling interest in "obtaining the educational benefits that flow from a diverse student body." *Id.* at 343. The Court explained that these educational benefits were substantiated by "studies show[ing] that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* at 330 (internal quotation marks and citation omitted). Building on the social science findings the Court considered in *Grutter*, this brief presents the newest social science research offering a deeper understanding of how diversity functions and why it is even more crucial than previously understood. This research confirms that racial diversity among students furthers critical educational, economic, and societal benefits that underlie UT's compelling interest.

A. Recent Social Science Studies Deepen Scientists' Understanding of the Benefits of Diversity

1. Diversity Helps All Students by Reducing Anxieties That May Result from Interracial Interactions

Since *Grutter*, social scientists have expanded the breadth of research demonstrating the benefits of diversity.[2] This research shows that initial interactions with "outgroup" members (i.e., individuals from distinct racial, socio-economic, or gender groups) can stimulate anxiety and distress. This initial anxiety manifests physiologically in cardiovascular reactivity, increased production of cortisol (commonly called the "stress hormone"), and changes in the regularity of heart rate per breathing cycle. *See* Jim Blascovich, Wendy Berry Mendes, Sarah B. Hunter, Brian Lickel & Neneh Kowai-Bell, *Perceiver Threat in Social Interactions With Stigmatized Others*, 80 J. Personality & Soc. Psychol. 253, 254 (2001); Elizabeth Page-Gould, Wendy Berry Mendes & Brenda Major, *Intergroup Contact Facilitates Physiological Recovery Following Stressful Intergroup Interactions*, 46 J. Experimental Soc. Psychol. 854, 855 (2010). However, empirical data shows that increased short- and long-term contact with outgroup members ameliorates these stress responses.

Research provides strong evidence that past experience with diverse groups of people, particularly through interracial contact, predicts faster and more efficient physiological regulation across various stress systems in the body. Previous interracial contact predicts better recovery from an autonomic nervous system (ANS)[3] stress response, enabling faster return to a regular heart rate, and quicker neuroendocrine recovery (measured by changes in cortisol levels), rapidly ceasing the production of excess cortisol. Page-Gould, *Intergroup Contact*, *supra*, at 854-56. Exposure to diversity also helps regulate cardiovascular threat response, measured by vascular contractility and lowered circulatory resistance to blood flow. Blascovich, *supra*, at 263. For example, non-Black college students who have high levels of past interracial contact and who interact with a Black fellow student to perform a specific task show lower cardiovascular threat responses than college students with low levels of past interracial contact. *Id.* This physiological regulation facilitates interaction with outgroup members and adaptive coping with intergroup stress and improves long-term cardiovascular and psychological health, preventing chronic hypertension and increasing mental resilience. Page-Gould, *Intergroup Contact, supra*, at 855, 858.

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[2] This research directly refutes assertions by Petitioner's amici. *See* Brief for Amici Curiae Pacific Legal Foundation et al. at 10-15.

The physiological benefits of interracial interactions that occur in diverse settings are not just cumulative; they can appear in a matter of weeks or even days, which is critical for students who arrive at college with little or no previous interracial contact. A 2008 survey of Latino and White participants at a selective public university found that students who were implicitly prejudiced or concerned about outgroup rejection responded to their first interracial interaction with an excessive release of cortisol, which appeared in saliva within twenty minutes of first meeting the outgroup member. Elizabeth Page-Gould, Rodolfo Mendoza-Denton & Linda R. Tropp, *With a Little Help From My Cross-Group Friend: Reducing Anxiety in Intergroup Contexts Through Cross-Group Friendship*, 95 J. Personality & Soc. Psychol. 1080, 1085, 1089 (2008). This physiological reaction significantly decreased over the course of only three interracial friendship meetings. *Id.* at 1089. This data suggests that interracial contact lowers anxiety levels "relatively early in the development of cross-group friendship." *Id.* (finding also that, after their final cross-group meeting, "implicitly prejudiced participants sought out more intergroup interactions, and participants felt less anxious in the diverse university environment"). Thus, interracial interactions can produce short- and long-term physiological benefits to students by reducing their threat and stress responses.

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[3] To assess recovery from ANS stress responses, the authors of the study monitored changes in respiratory sinus arrhythmia, a measure of parasympathetic activation that reflects heart rate acceleration and deceleration during the respiratory cycle. Page-Gould, *Intergroup Contact, supra*, at 855.

2. Diversity Reduces Prejudice and Bias

In addition to improved physiological reactions and lower anxiety levels, social science research shows that interracial interactions reduce implicit and explicit prejudices in the development of interpersonal relationships. In 2012, researchers from Columbia, Stanford, and Tufts Universities released a study that examined over forty years' worth of research on interracial interactions, compiling data from 81 different studies with an aggregate of 12,463 participants. Negin R. Toosi, Nalini Ambady, Laura G. Babbitt & Samuel R. Sommers, *Dyadic Interracial Interactions: A Meta-Analysis*, 138 Psychol. Bull. 1, 6-7 (2012). This meta-analysis found that participants engaging in interracial interactions report feeling more negative emotions (e.g., anxiety) than participants engaging in same-race interactions. Over time, however, repeated interracial interactions produced more positive emotional experiences comparable to those of participants engaging in same-race interactions. *Id.* at 16, 18. Another post-*Grutter* meta-analysis of over 200 studies, including samples of college students, demonstrated that intergroup contact also reduces prejudice and improves attitudes towards the outgroup. *See* Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751 (2006). These analyses indicate that the benefits of interracial interaction increase over time and help reduce bias, anxiety, and other negative emotional responses.

The benefits of diversity can begin to flourish even when an individual has only indirect contact with an outgroup, since an individual's prejudice towards the outgroup is reduced simply by virtue of extended contact through an ingroup mutual friend. Rhiannon N. Turner et al., *Reducing Explicit and Implicit Outgroup Prejudice Via Direct and Extended Contact: The Mediating Role of Self-Disclosure and Intergroup Anxiety*, 93 J. Personality & Soc. Psychol.

369, 384 (2007) (studying White and South Asian high school students). Empirical evidence demonstrates that "[e]xtended contact [is] associated with lower intergroup anxiety . . . which in turn [is] associated with more positive outgroup attitudes." *Id.* at 377.[4] Therefore, by engaging in interracial contact or having close friends who do, individuals experience less anxiety, increased empathy, and lower levels of prejudice towards outgroup members.

In a university setting, students who acquire more cross-group friends during their undergraduate years demonstrate decreased prejudice. *See* Colette Van Laar, Shana Levin, Stacey Sinclair & Jim Sidanius, *The Effect of University Roommate Contact on Ethnic Attitudes and Behavior*, 41 J. Experimental Soc. Psychol. 329, 330 (2004) ("[S]tudents with more outgroup friendships . . . during their second and third years of university showed less prejudice at the end of university . . . ."). One longitudinal study examining two thousand university students showed that both the random assignment of interracial first-year roommates and voluntarily selected second-year interracial roommate pairings are associated with reduced prejudice and increased "ethnic heterogeneity of [students'] friendship circle[s]." *Id.* at 338. Interracial roommate relationships are also "associated with increased interethnic competence [and] decreased interethnic unease." *Id.* at 341. A more recent study surveyed the attitudes of White freshmen randomly assigned to a Black roommate in college and found similar results after only a ten-week quarter, indicating that

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[4] Another study yielded similar findings with a larger independent sample. *See* Turner, *supra*, at 369.

> racial attitudes of White students in interracial rooms became more positive toward [Blacks], whereas the attitudes of White students in same-race rooms did not change. Participants in interracial rooms also reported decreased intergroup anxiety toward [Blacks] at the end of the quarter, whereas participants in same-race rooms did not exhibit [such] change . . . .

Natalie J. Shook & Russell H. Fazio, *Interracial Roommate Relationships: An Experimental Field Test of the Contact Hypothesis*, 19 Psychol. Sci. 717, 721 (2008). These studies show that White students' implicit racial attitudes improve while living with an outgroup roommate for a mere quarter term, underscoring the significance of interracial interactions in the college setting in reducing prejudice. Because college is where many individuals experience their first meaningful and sustained contact with people of different races and backgrounds, *see infra* Section I.B, these early interactions can influence how those students will interact with others as they seek to become productive members of society.

3. Diversity Reduces the Racial Isolation or Solo Status of Underrepresented Students

Diversity within the classroom also reduces "solo status," the isolation experienced by underrepresented students that adversely impacts classroom learning and performance. Denise

Sekaquaptewa & Mischa Thompson, *The Differential Effects of Solo Status on Members of High- and Low-Status Groups*, 28 Personality & Soc. Psychol. Bull. 694, 694 (2002) (defining solo status as "being the only member of one's social category in an otherwise homogenous group"). While solo status can undermine the educational objectives of any student, it disproportionately impacts the classroom performance of students from historically stigmatized groups. *Id.* at 703.

Social scientists previously determined that solo status experienced during performance-oriented tasks (e.g., taking an exam, giving a presentation, or interviewing) increases evaluation apprehension because of the increased attention directed at the individual, which increases the salience of social categorizations such as race. *See id.* at 696. Pre-*Grutter* research showed that individuals from stereotypically low-status groups perform worse than groups not bearing this stereotype, *id.* at 703, and that "the impact of being different from the rest of one's group is greatest when it counts the most: when one is called on to demonstrate one's abilities and skills under the scrutiny of others." *Id.* at 705.

New social science findings reveal that students experiencing solo status see themselves as representatives of their racial group and may intensify their collective self-construal—the degree to which their sense of self is tied to social group membership. Denise Sekaquaptewa et al., *Solo Status and Self-Construal: Being Distinctive Influences Racial Self-Construal and Performance Apprehension in African American Women*, 13 Cultural Diversity & Ethnic Minority Psychol. 321, 321 (2007). Researchers suggest that this increased race representativeness and collective self-construal among individuals experiencing solo status or racial isolation can derail performance. *Id.* at 322. Conversely, they predict that individuals from historically marginalized groups may positively respond to settings where "their race is perceived to be adequately or fairly represented." *Id.* at 326. The research indicates that diversity in the classroom positively affects student performance by mitigating the race representativeness and collective self-construal that occurs when students are racially isolated.

Social science research also demonstrates that students who enter college with high sensitivity to being rejected or dismissed because of their race report greater anxiety after they complete their second or third year than those who enter with low rejection sensitivity. Students with high rejection sensitivity show especially heightened anxiety about discussing an academic problem with faculty, depressed attendance to academic review sessions, and a significant academic achievement gap compared to those with low rejection sensitivity. Rodolfo Mendoza-Denton et al., *Sensitivity to Status-Based Rejection: Implications for African American Students' College Experience*, 83 J. Personality & Soc. Psychol. 896, 913-14 (2002). Opportunities for diverse peer engagement may, however, reduce the alienation that Black and other underrepresented students feel in educational environments. *Id.* at 914.

Researchers re-analyzed earlier studies examining the interplay of race, stigmatization, job satisfaction, and institutional commitment for faculty and students in higher education. They found that solo minority status is associated with high levels of stigmatization, which in turn predicts lower levels of job satisfaction among faculty and lower levels of commitment among students. John F. Dovidio et al., *Racial, Ethnic, and Cultural Differences in Responding to Distinctiveness and Discrimination on Campus: Stigma and Common Group Identity*, 57 J. Soc. Issues 167, 169, 176 (2001) (citing Yolanda Flores Niemann & John F. Dovidio, *Relationship of Solo Status, Academic Rank, and Perceived Distinctiveness to Job Satisfaction of Racial/Ethnic Minorities*, 83 J. Applied Psychol. 55 (1998), and Kevin Snider & John F. Dovidio, Ind. St. U., *A Survey of the Racial Climate at Indiana State University*, 136-d (1996)). Research has long shown that Black students experience higher rates of discrimination and feel "significantly less a part of the university community and [are] substantially less committed to the university than [are] Whites." Dovidio, *Racial, Ethnic, and Cultural Differences*, *supra*, at 177. After reexamining the data, researchers concluded that feelings of community belonging, rather than experiences of discrimination, "significantly [predict] institutional commitment." *Id.* A diverse learning environment is thus essential to defusing feelings of stigmatization and increasing institutional commitment.

4. Diversity Reduces the Effects of Stereotype Threat on Academic Performance

In the absence of a sufficiently diverse environment, racial isolation or solo status and other forms of anxiety and awareness about one's racial group's performance capabilities can result in "stereotype threat." Stereotype threat is a disruptive apprehension that individuals feel when they fear their performance will confirm a salient negative stereotype about the intellectual ability and competence of their identity group. *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. Personality & Soc. Psychol. 797, 797 (1995).[5] This fear of confirming an underperformance stereotype has been found to impair intellectual performance and ability. *Id.* at 808.

Social science research has demonstrated that the academic performance of underrepresented students, including Blacks and Latinos, can be explained by stereotype threat. *See Stereotype Threat: Theory, Process, and Application* (Michael Inzlicht & Toni Schmader eds., 2012) (discussing research conducted over the last fifteen years). The findings on stereotype threat are now supported by over two decades of peer-reviewed research that confirms the real-world effects that stereotype threat has on academic performance.[6]

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[5] *See also* Toni Schmader et al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 Psychol. Rev. 336, 337 (2008) (finding that stereotype activation is triggered by "situations that pose a significant threat to self-integrity" when "one's concept of self and expectation for success conflict with primed social stereotypes suggesting poor performance," which then result in "physiological manifestations of stress").

[6] The Petitioner's amici err in their analysis of the social science data that exist on stereotype threat. *See* Brief for Scholars of Economics and Statistics ("SES") at 31-32; Brief for Gail Heriot et al. at 29-34; Brief for Richard Sander and Stuart Taylor, Jr. ("Sander") at 25-26. Amici respectfully refer the Court to the Respondent's amici for a more thorough discussion

a. Stereotype threat experiences are linked to physiological stress reactions.

Experiencing stereotype threat can result in physiological changes in the body and brain, thus undermining academic performance expectations, increasing feelings of self-doubt, and generally reducing an individual's cognitive resources precisely when they are needed most. *See* Toni Schmader, Chad E. Forbes, Shen Zhang & Wendy Berry Mendes, *A Metacognitive Perspective on the Cognitive Deficits Experienced in Intellectually Threatening Environments*, 35 Personality & Soc. Psychol. Bull. 584, 585-95 (2009); *see also* Schmader, *Stereotype Threat Effects*, *supra* note 5, at 342. Students who experience stereotype threat endure elevated levels of anxiety manifested in their cardiac functioning during outcome-oriented tasks, such as taking an exam. This strain results in the physiological production of cortisol, which greatly increases when one "fears being negatively evaluated during a task." Schmader, *Stereotype Threat Effects*, *supra*, at 343. In large quantities, cortisol impairs the process of memory stores, such as "working memory"—the coordination of cognition and behavior to achieve performance goals in the presence of other competing information that can distract an individual's attention when focusing on a challenging task. *Id.* at 340. Consequently, students may not have full access to their own internal cognitive processes during the very

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of stereotype threat and academic underperformance. *See* Brief for Experimental Psychologists.

moments when they are being called upon to perform tasks that require high cognitive functioning. *Id.* at 351.

b. The actual and perceived diversity of a university environment is an important part of developing a sense of belonging—a predictor for academic success—for students who experience stereotype threat.

Physiological reactions to stereotype threat can be mitigated when students have a strong sense of "social belonging," or have positive relationships with and connections to other people. *See* Gregory M. Walton & Geoffrey L. Cohen, *A Question of Belonging: Race, Social Fit, and Achievement*, 92 J. Personality & Soc. Psychol. 82, 82 (2007). Social belonging is fundamental to students' well-being and intellectual achievement. Students who perceive themselves as outside their social cohort perform poorly academically and can even suffer health problems. *See* Gregory M. Walton & Geoffrey L. Cohen, *A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students*, 331 Sci. Mag. 1447, 1447 (2011) ("Social isolation . . . harm[s] not only subjective well-being but also intellectual achievement and immune function and health.") (citations omitted). Black students are particularly susceptible to feeling uncertain about their place in a university. *Id.* at 1448.

A three-year Stanford University study published in 2011 demonstrates that the achievement gap between Black and White undergraduate students can be narrowed with a social belonging intervention. *Id.* at 1447. After receiving an intervention at the end of their first semester at which older students assured younger Black students that concerns over "fitting in" diminish with time, the younger students improved their GPAs significantly by senior year, narrowing the achievement gap by 52%. *Id.* at 1448.[7] Moreover, the academic performance and self-reported health and well-being of the Black students improved over the three years. *Id.* at 1449. These results suggest that stereotype threat can be mitigated in diverse environments where students can identify as individuals and not solely as members of their racial group.

Belonging and acceptance have implications for not only school performance but also college trajectories and career choices. Findings across the board show that a lack of belonging can turn students away from opportunities as surely as a gatekeeper in admissions. Sapna Cheryan, Victoria C. Plaut, Paul G. Davies & Claude M. Steele, *Ambient Belonging: How Stereotypical Cues Impact Gender Participation in Computer Science*, 97 J. Personality & Soc. Psychol. 1045, 1058 (2009) ("Across all studies, the degree to which people . . . felt they belonged in the environment strongly predicted whether they chose to join that group.").

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[7] Social science research demonstrates that diversity encourages intellectual engagement and improves academic achievement, contrary to the propositions made by Petitioner's amici. *See* Sander Br. 7-13; SES Br. 31-32; Brief for Abigail Thernstrom et al. ("Thernstrom") at 24-32.

Diversity helps allay these concerns.[8] Academic and work environments that emphasize diversity to underrepresented students increase a sense of belonging and foster motivation to participate in those environments.

B. Social Science Studies Show That Diversity Leads to A More Vibrant and Productive Workforce and Civic Life

Diversity is crucial to preparing all students—including our next generation of leaders—to enter the workforce and civic society and collaborate with members of other racial groups. The Court has found that racial diversity in higher education imparts skills that are vital to professionals working in heterogeneous environments. *Regents of the University of California v. Bakke*, 438 U.S. 265, 313-14 (1978).

This finding is supported by extensive social science evidence that college is a critical place for students to learn how to work with those from different backgrounds. *See* Gurin, *Diversity and Higher Education, supra* note 8, at 334-36. White students often have little or no contact with students from other racial and ethnic groups before entering higher education. *See* Gary Orfield & Dean Whitla, "Diversity and Legal Education: Student Experiences in Leading Law Schools," *in Diversity Challenged: Evidence on the Impact of Affirmative Action* 143, 156 (Gary Orfield ed., 2001) (finding that fifty percent of White students at Harvard and University of Michigan law schools had little or no interracial contact prior to entering college or law school). Due to patterns of *de facto* segregation, *see infra* Section II.B, college provides the first opportunity to teach and learn cross-cultural competence.

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[8] Educational outcomes are also enhanced by extensive and meaningful informal interracial interaction. Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 359 (2002). In a national longitudinal study of data collected from over 11,000 students at 184 institutions, interracial interactions consistently accounted for higher levels of intellectual engagement and self-assessed academic skills for Black, Asian American, Latino, and White students. *Id.*

Recent social science research shows that diversity also leads to increased innovation, as group members collaborate with one another more when they recognize that alternative perspectives exist, leading to novel insights and solutions. Katherine W. Phillips et al., *Surface-Level Diversity and Decision-Making in Groups: When Does Deep-Level Similarity Help?*, 9 Group Processes & Intergroup Rel. 467, 475-77 (2006) (finding that diverse groups spent more time discussing a certain task, which improved performance); *see also* Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 Psychol. Sci. 507, 509 (2004) (finding a strong association between the racial diversity of a student's close friends and classmates and the integrative complexity of that student's group discussions); Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 23, 47-50 (2007) (explaining that introducing diverse perspectives creates new ways of organizing knowledge to find efficient solutions and mitigates inefficiencies attributable to groupthink). The inclusion of diverse viewpoints in decision-making thus produces creativity and efficiency.

The mere presence of individuals from other racial or ethnic groups, even when their views are not adopted, also improves the performance of White group members. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 606 (2006). The benefits of diversity extend well beyond having diverse viewpoints adopted or represented in decision-making; rather, the data show that diverse environments and the accompanying expectation of interacting with an outgroup member "can lead White individuals to exhibit more thorough information processing." Samuel R. Sommers et al., *Cognitive Effects of Racial Diversity: White Individuals' Information Processing in Heterogeneous Groups*, 44 J. Experimental Soc. Psychol. 1129, 1132 (2008) ("That simple awareness of group composition can produce such effects suggests that the general influence of racial diversity cannot be attributed in whole to the novel informational contributions" of individuals from other racial groups). Indeed, when individuals from other racial groups are part of a group, the changes in the decision-making process of the entire group are largely attributed to the White participants, and lead to divergent thinking, more creativity, and more accurate judgments. *See* Sommers, *On Racial Diversity*, *supra*, at 606 ("[T]hese differences did not simply result from Black participants adding unique perspectives to the discussions. Rather, White participants [are] largely responsible for the influence of racial composition, as they raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues when they were members of a diverse group."). These recent social science findings challenge prior assumptions that the benefits of racial diversity were singularly attributable to the informational contributions of individuals from underrepresented racial or ethnic groups. Current research provides compelling evidence that "even absent social interaction or exchange of information, mere awareness of a diverse group composition [is] sufficient to impact the cognitive tendencies" of White individuals, allowing for a more robust and productive decision-making environment. Sommers, *Cognitive Effects of Racial Diversity*, *supra*, at 1134.

Civic and social life also improve with increased interaction with outgroup members. Research has long shown that students with diverse college experiences are more willing to influence the political structure, help others in need, engage in community service, resolve conflict, and overcome social division. *See* Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. Issues 17, 31-32 (2004); *see also* Gurin, *Diversity and Higher Education*, *supra*, at 347. Social science research since *Grutter* supports these findings and confirms the importance of diversity in civic engagement. *See, e.g.*, Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. Issues 595, 601-05 (2005) ("[S]tudents who reported frequent contact with diverse peers displayed greater . . . self-confidence in cultural awareness, development of a pluralistic orientation, believe that conflict enhances democracy, and tend to vote in federal and state elections."). Indeed, students who experience diverse campus environments find such experiences essential to democracy. *See id.*; Gurin, *The Benefits of Diversity*, *supra*, at 28-30 (finding that campus diversity encourages students to increase their engagement on campus and instills democratic values).[9]

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The foregoing facts and empirical evidence illustrate the many social, economic, intellectual, physiological, cognitive, and psychological benefits of diversity. Social science research demonstrates that diversity has broad positive effects on civic and economic life, improves academic performance for all students, reduces both implicit and explicit prejudice and bias, and facilitates better physiological regulation of stress and threat responses in interracial interactions. This research has important implications for the Court's understanding of why diversity matters.

In *Grutter*, the Court underscored the university's need to determine pedagogical goals for university education and select a student population that would best serve those goals.[10] 539 U.S. at 329.

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[9] Contrary to the findings put forth by Petitioner's amici, *see* Sander Br. 23-24 and Thernstrom Br. 9-18, the most recent social science research overwhelmingly shows that increased contact and cross-racial understanding produce a positive effect, thus reinforcing the empirical data underlying the Court's ruling in *Grutter*. *See supra* Sections I.A-B.

[10] In *Parents Involved*, the Court recognized that when applying strict scrutiny, "context matters" and "universities occupy a special niche in our constitutional tradition." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701,

Recent social science findings show that there is an even wider array of benefits to diversity in higher education and bolster the Court's conclusion that promoting such diversity is a compelling interest. *Id.* at 329. Diversity is an essential tool that enables schools to fulfill their purpose of educating all students, ensuring that students perform their best academically, and preparing students to be future leaders.

II. UT'S HOLISTIC ADMISSIONS POLICY IS NARROWLY TAILORED AND NECESSARY TO ACHIEVE ITS COMPELLING DIVERSITY INTEREST

The use of race in higher education admissions is constitutional where the means chosen are "narrowly tailored" and "necessary to further a compelling governmental interest." *Grutter,* 539 U.S. at 326-27 (explaining that "strict" constitutional scrutiny ensures that the government is pursuing a sufficiently important goal). UT's carefully rendered admissions policy is narrowly framed, preserving individualized review of an applicant's entire file in an admissions process otherwise based on a single metric: high school class rank. UT's policy is also necessary. The Plan, while increasing enrollment of underrepresented groups, does not ensure that students who do not automatically qualify have a meaningful opportunity to be considered for

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724-25 (2007) (citations omitted). "[T]he expansive freedoms of speech and thought associated with the university environment" underlie the deference given to universities in making "complex educational judgments," *Grutter,* 539 U.S. at 328, that are "unique to institutions of higher education." *Parents Involved,* 551 U.S. at 724 (citations omitted).

admission to the University of Texas. The University cannot rely on the Plan alone because it depends on existing high school segregation in Texas to achieve limited diversity and disproportionately excludes Black and Latino students due to residential hypersegregation.

Nor can UT rely on an admissions policy that fails to consider race to achieve the benefits of diversity. Black and Latino students' relative disadvantage in university admissions results from dozens of demographic, social, and economic factors that vary depending on localized conditions. Universities simply cannot effectively analyze the complex factors that contribute to racial disadvantage as an alternative to considering race. However, the convergence of these factors with race allows UT to consider race as one of many individualized factors as a means to provide a meaningful opportunity for all students to attend UT. A truly holistic race-conscious admissions policy, employed in conjunction with the Plan, is necessary and indispensable to fulfilling UT's critical goals of ensuring that its student body is broadly diverse and the individualized characteristics of each student are considered for admission. For these reasons, UT's holistic admissions policy is narrowly tailored to achieve its compelling interest in diversity.

A. UT's Policy Is Narrowly Tailored Because It Preserves Individualized Review

UT's policy is narrowly tailored to account for the limitations of the Plan and the pedagogical needs of the University because it considers race as one part of a holistic, individualized admissions process. An admissions policy is narrowly tailored if each applicant's file is evaluated in a "highly individualized" way, "giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 337; *see also Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 220-21 (5th Cir. 2011) (explaining that, under *Grutter*, a "university admissions program is narrowly tailored only if it allows for individualized consideration of applicants of all races" so that an applicant is "valued for all her unique attributes"). A holistic admissions policy "adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." *Grutter*, 539 U.S. at 337.

UT's admissions process is both individualized and constitutional. The University considered seriously and in good faith "workable race-neutral alternatives that [would] achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339-40 (finding that the law school "sufficiently considered" these alternatives) (citation omitted); *see also Proposal to Consider Race and Ethnicity in Admissions*, U. Tex. at Austin (June 25, 2004), *in* Supplemental Joint Appendix, filed May 21, 2012 ("SJA") at 1a-39a. However, UT determined that a policy that ignored race was not a "workable race-neutral alternative." SJA 1a-39a.

As in *Grutter*, UT's policy properly gives "substantial weight to diversity factors besides race." *Grutter*, 539 U.S. at 338. Since 1997, UT has employed two metrics to determine freshman admission for non-guaranteed[11] applicants: an "Academic Index" and a "Personal Achievement Index" ("PAI"). *Fisher*, 631 F.3d at 222-23. In the fall of 1999, the year before the Texas Legislature enacted the Plan, UT began an extensive evaluation of undergraduate impressions and empirical data regarding campus diversity over fifteen semesters through 2003. *See* SJA 1a-39a. After this careful analysis, UT concluded in 2004 that considering race in admissions was crucial to achieving diversity and began including it as one of many "special circumstance[s]" within the personal achievement factors. *Fisher*, 631 F.3d at 230.

Race constitutes only one component of an applicant's personal achievement score, which itself is only one third of the overall PAI, and is thus not a predominant or "defining feature" in UT's decision-making. *See Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (reasoning that an admissions policy that considers race is constitutional where the educational institution ensures that "each applicant receives individual consideration and that race does not become a predominant factor in the admissions decision-making."). UT's admissions policy appropriately considers each applicant's race as "one modest factor among many others" that, in concert with the matrix of considerations that UT examines as part of its holistic review, constitute a particularized and truly individualized assessment. *Grutter*, 539 U.S. at 392-93 (Kennedy, J., dissenting) ("To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process.").

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[11] UT's admissions policy affects only those in-state applicants whose grade point averages ("GPA"), as reflected in their class rank, place them outside the top ten percent of their high school class. *Fisher*, 631 F.3d at 227; *Plaintiffs' Statement of Facts in Support of Motion for Partial Summary Judgment*, *in* Joint Appendix, filed May 21, 2012 ("JA") at 140a. Under the original version of the Plan, applicants within the top ten percent of their classes were guaranteed admission to UT, which accounted for over eighty percent of UT's enrolled class. *Fisher*, 631 F.3d at 227. There is a current cap of 75% that expires in 2015. JA 140a.

B. UT's Policy Is Necessary to Achieve A Compelling Interest

Petitioner incorrectly argues that "the success of UT's prior race-neutral admissions system in increasing minority enrollment, primarily through the [Plan]," renders the race-conscious admissions procedure unnecessary and therefore not narrowly tailored. Pet'r's Br. 38. To the contrary, UT's race-conscious admissions policy is carefully tailored to compensate for the limitations of the Plan in achieving the University's compelling interest in creating a diverse student body. UT's inclusion of race as one "special circumstance" within its holistic and individualized admissions process is necessary because Blacks and Latinos disproportionately reside in racially isolated, lower educational opportunity environments, inhibiting their ability to benefit from the Plan alone or with an admissions policy that excludes race. Without a holistic admissions policy, falling outside of the top ten percent would effectively deny many Black and Latino students a realistic chance to be considered for admission to UT.

Research demonstrates that a broad range of complex variables such as socioeconomic status, parental education, school environment, residential stability, and geographic diversity disproportionately affect the educational opportunities available to Blacks and Latinos. All of these factors intersect with race. Given the number and complexity of variables that contribute to racial disadvantage, an admissions policy limited to race-neutral factors cannot capture their cumulative effect on educational opportunity. Considering race within a broader, holistic admissions policy therefore remains the only way to account for the uneven distribution of educational opportunities within and across school districts and generate a broadly diverse student body at UT. UT simply cannot rely on the Plan alone or in conjunction with a race-neutral admissions policy to accomplish this goal.

1. The Convergence of Multiple Factors Inextricably Linked to Race Inhibits Educational Opportunity

In *Brown*, the Court concluded that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Education is important for economic opportunity, civic participation, and democratic engagement. *See supra* at Section I.B. The Court's decisions in *Brown* and *Grutter* both recognize the role education serves for both individuals and society as a whole; accordingly, education must be provided under conditions of equality. *See Brown*, 347 U.S. at 493;

Grutter, 539 U.S. at 332 ("[U]niversities . . . represent the training ground for a large number of our Nation's leaders."); *see also Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that too often it does.").

Standing against this aspiration is the reality that educational opportunity remains uneven across our nation and the state of Texas. Varying local conditions, including teacher quality, teacher experience, per-pupil expenditures, local tax base capacity, school poverty rates, extracurricular activities, textbooks and classroom technology, neighborhood conditions, average parental educational levels, and amenities such as proximity or access to libraries and other educational supports can vastly inhibit or improve student performance. *See, e.g.*, Linda Darling-Hammond & Peter Youngs, *Defining "Highly Qualified Teachers": What Does "Scientifically-Based Research" Actually Tell Us?*, 31 Educ. Researcher 13 (2002); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 Educ. Pol'y Analysis Archives 1 (2000); Linda Darling-Hammond et al., *Does Teacher Certification Matter? Evaluating the Evidence*, 23 Educ. Evaluation & Pol'y Analysis 57 (2001); Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 Educ. Researcher 45 (1989); Jonathan Kozol, *Savage Inequalities: Children in America's Schools, Crown Publishers, Inc.* (1991); Jonathan Kozol, *Still Separate, Still Unequal: America's Educational Apartheid*, 311 Harper's Mag. 41 (2005). Research demonstrates that these varying factors each correlate with educational outcomes, and when clustered together have a tremendous influence on educational attainment and college matriculation. *See* Linda Darling-Hammond, *The Color Line in American Education: Race, Resources, and Student Achievement*, 1 Du Bois Rev. 213 (2004).

Uneven educational opportunity is largely a result of the interaction of race with economic segregation and isolation. Residing in neighborhoods of concentrated poverty and racial segregation has a direct effect on education: it is equivalent to missing an entire year of school. *See* Robert J. Sampson et al., *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 Proc. Nat'l Acad. Sci. 845, 845-52 (2008). The interaction between racial segregation and income segregation is profound,[12] and results in the exclusion of disproportionate numbers of Black and Latino students from educational opportunities. One out of every six Black or Latino students attends a hypersegregated school—in which the student population is 99-100% racially or ethnically homogenous. Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, Harv. U. C.R. Project, 28 (2003).

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[12] Between 1970 and 2009, income segregation—"the extent to which high- and low-income families live in separate neighborhoods"—grew dramatically in the vast majority of metropolitan regions. Sean F. Reardon & Kendra Bischoff, *Growth in the Residential Segregation of Families by Income, 1970-2009*, US2010 Project at 1, 8 (2011) (finding that income segregation increased substantially more among Black and Latino families than White families from 1970 to 2007, including "very sharp[ ]" growth between 2000 and 2007).

Roughly two of every five Black or Latino students in the United States attend "intensely segregated schools," in which 90-100% of the student body is racially homogenous, up from one-third in 1988. *Id.* at 31. More than three quarters of these schools are high poverty schools. Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation* Harv. U. C.R. Project, 31 (2006). Even though there are more poor Whites in absolute numbers, three of four persons living in concentrated poverty—neighborhoods where over 40% of residents live below the Federal Poverty Line—are Black or Latino. Paul A. Jargowsky, *Stunning Progress, Hidden Problems: The Dramatic Decline of Concentrated Poverty in the 1990s*, Brookings Inst., 61 (2003).

The net effect of coming from a family living in generational poverty disproportionately impacts Black and Latino students in significant ways. For example, high levels of parental education correlate with higher test scores, higher grade point averages, and greater educational aspirations for their children. J. R. Campbell et al., *NAEP 1999 Trends in Academic Progress: Three Decades of Student Performance*, 2 Nat'l Center for Educ. Stat. 469 (2000). Similarly, wealth is highly correlated with student performance and educational attainment. *See, e.g.*, Amy J. Orr, *Black-White Differences in Achievement: The Importance of Wealth*, 76 Am. Soc. Ass'n 281 (2003); College Board, *2009 College-Bound Seniors: Total Group Profile Report*, 1, 4 (2009) (illustrating that in 2009, the highest average score on the SAT was posted by students who reported their family income as greater than $200,000 annually); Anthony P. Carnevale & Stephen J. Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," *in America's Untapped Resource: Low Income Students in Higher Education* 106, 141 (Richard D. Kahlenberg ed., 2004) (finding that 74% of students at the 146 most selective four-year colleges and universities in the U.S. came from the top socioeconomic status quarter of American families, versus 3% from the bottom quarter). Racially isolated Blacks and Latinos are disproportionately overrepresented across these and most other determinative factors that inhibit access to educational opportunity. *See* Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 Am. L. & Econ. Rev. 312, 328 (2006) ("By definition, students who attend minority-dominated schools are mostly [B]lack and [Latino], . . . are usually poorer; [and] on average, their parents are less likely to have college degrees . . . ."); *see also* Elizabeth Anderson, *The Imperative of Integration* 2 (2010) ("[Racial s]egregation . . . isolates disadvantaged groups from access to public and private resources, from sources of human and cultural capital, and from the social networks that govern access to jobs, business connections, and political influence. It depresses their ability to accumulate wealth and gain access to credit.").

Given the complex and compounded disadvantages these students face, race is an essential factor in assessing an applicant's past academic and personal achievement and future potential. A holistic, race-conscious admissions policy is consistent with the Court's goal of ensuring educational opportunity, articulated in *Brown*, and its guidance in *Grutter* explaining the need for individualized assessments to achieve this goal.

2. Residential Segregation Necessitates A Race-Conscious Admissions Policy to Achieve UT's Diversity Interest

The economic and social systems that lead to residential segregation and concentrated poverty contribute to the implicit biases, prejudices, racial isolation, and physiological stress responses examined in Section I, *supra*, and reinforce the marginalization of Blacks and Latinos. The Plan relies upon patterns of segregation to ensure some racial diversity at UT, but the Plan alone cannot effectively address the hypersegregation that inhibits the opportunity for racially and economically marginalized youth to compete for admission, thereby requiring additional steps to ensure that these students are not effectively excluded from consideration for admission. *See* Angel Harris & Marta Tienda, *Minority Higher Education Pipeline: Consequences of Changes in College Admissions Policy in Texas*, 627 Annals Am. Acad. Pol. & Soc. Sci. 60 (2010).

Black and Latino students are disproportionately affected by hypersegregation. Seventy-five percent of Black families nationwide reside in only 16% of census block groups. Craig Gurian, *Mapping and Analysis of New Data Documents Still-Segregated America*, Remapping Debate (Jan. 18, 2011), *available at* http:// www.remappingdebate.org/map-data-tool/mapping-and-analysis-new-data-documents-still-segregated-america-0; *see also* U.S. Census Bureau, American

Community Survey, *2009 Data Release* (Dec. 8, 2011), *available at* http://www.census.gov/acs/ www/ data_documentation/2009_release/. Demographic and residential patterns in Texas also result in the disproportionate concentration of Latino students in high schools that are mostly or predominantly Black and Latino. *See* Tienda, *supra*, at 341 (finding that this disproportionate concentration "reflects two circumstances[:] (1) that [Latino] high school seniors outnumber [B]lack seniors by a factor of three to one and (2) that within the state, [Latino] seniors are more regionally concentrated than [B]lacks, largely in South and West Texas."). Consequently, residential hypersegregation and corresponding racial concentration channel Blacks and Latinos into hypersegregated educational environments. *See id.* (explaining that "Texas public high schools are highly segregated").

As discussed in Section II.B.1, *supra*, of Black and Latino students nationwide, one in six attends a hypersegregated school and roughly forty percent attend intensely segregated schools. Frankenberg, *A Multiracial Society*, *supra*, at 28, 31. More than three-quarters of hypersegregated and intensely segregated schools are high poverty. Orfield, *Racial Transformation*, *supra*, at 31; *see also* Tienda, *supra*, at 341 (stating that "[s]patial segregation is a powerful force perpetuating the concentration of economic disadvantage" and "school racial mix and social class composition often are tightly coupled"). "The pernicious underside of school segregation is that it accentuates class differences, which easily trump any admission advantages afforded to Blacks and [Latinos] clustered in predominantly minority schools." Tienda, *supra*, at 341. Given the operative patterns of hypersegregation, the vast majority of Blacks and Latinos—and a disproportionately high percentage relative to other racial groups—may only be considered for admission by additional measures outside of the Plan. *Id.* at 342 ("[B]y itself, [the Plan] appears to be insufficient to broaden educational opportunity for minorities even in the face of pervasive segregation.").

In light of this stark reality and the Plan's limitations, which affect its present and long-term viability, UT took affirmative race-neutral steps to increase diversity. The University created programs that targeted low-income students, actively recruited students from lower opportunity environments, instituted summer training programs, and encouraged private individuals to recruit underrepresented students to apply for admission. *See Fisher*, 631 F.3d at 223-25; JA 146a-150a. However, these race-neutral policies and programs, executed alongside the Plan, predictably failed to effectively account for the many variables that cause Blacks' and Latinos' lower educational opportunity and resulted in a continuing lack of meaningful diversity at UT.

The University's race-neutral efforts were simply insufficient for it to fulfill its mission of achieving a diverse student body and providing an opportunity for public college education to Texas high school students. The Court has recognized that government actors and other policy makers need not passively permit systems that exclude. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) ("Thus, if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."); *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) ("To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."). In connection with its post-*Grutter* decision to reintroduce race and ethnicity to admissions in 2004, the University found that the percentage of classes of five or more students containing zero or one Black or Latino student actually *increased* between 1999 and 2003. *See* SJA 1a-39a. As a result of the University's reintroduction of race as one consideration within its admissions policy, enrollment of Black and Latino students increased. *Fisher*, 631 F.3d at 226. UT therefore appropriately considered race as one of many individualized characteristics to account for the myriad complex, ingrained, and variable factors that inhibit educational opportunity.[13]

* * *

Social science research demonstrates that diversity in higher education is critical to reducing negative physiological and psychological responses, improving academic performance, and better preparing our future leaders. An admissions policy that fails to consider race cannot ensure this diversity given the numerous and variable factors that disproportionately disadvantage Black and Latino students in university admissions. Considering race within a broader, holistic admissions policy, therefore, remains the only effective and efficient way for the University to promote equal educational opportunity for all students and achieve UT's compelling interest in the many benefits of diversity in higher education.

---

[13] Petitioner and their amici ask the Court to adopt an inapplicable "strong basis in evidence" standard to establish the necessity of race in university admissions to satisfy strict scrutiny review. Even if the Court were to adopt this standard, UT has amply satisfied it, having considered and amassed far more than the requisite quantum of evidence to further its compelling interest in a diverse student body.

CONCLUSION

Amici curiae urge the Court to affirm the judgment of the court of appeals.

Dated: August 13, 2012

Respectfully submitted,

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Dr. Max H. Bazerman is the Jesse Isidor Straus Professor at the Harvard Business School. In addition, Dr. Bazerman is formally affiliated with the Harvard Kennedy School of Government, the Psychology Department, and the Program on Negotiation. He is the author, co-author, or co-editor of nineteen books (including *Blind Spots* [with Ann Tenbrunsel], Princeton University Press, 2011) and over 200 research articles and chapters. His work focuses on how humans engage in unethical actions without their own awareness, with implicit discrimination as one form of this bounded ethicality.

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[14] Affiliations are listed for identifications purposes only. Amici submit this brief in their individual capacities alone, and not on behalf of any institution or organization.

Dr. Rodolfo Mendoza-Denton is an Associate Professor of Psychology at the University of California, Berkeley. His research focuses on intergroup relations and the negative impact of stigmatization and lack of inclusion on minority students' educational outcomes.

Dr. Elizabeth Page-Gould is an Assistant Professor of Psychology at the University of Toronto. Dr. Page-Gould's research has primarily taken an experimental and longitudinal approach to understand the role that cross-ethnic friendship plays in psychological and physiological thriving in diverse contexts.

Dr. Katherine W. Phillips is the Paul Calello Professor of Leadership and Ethics in the Management Division at Columbia Business School at Columbia University. Dr. Phillips has published numerous papers on the effects of diversity on work team process and performance, including empirical work on how diversity increases cognitive processing of information and motivation.

Dr. Victoria C. Plaut is a Professor of Law and Social Science and Affiliated Psychology Faculty at the University of California, Berkeley. Dr. Plaut has conducted extensive empirical research on diversity and intergroup relations, including research on the experiences of inclusion and psychological engagement of both majority and underrepresented students and employees.

Dr. Denise Sekaquaptewa is a Professor of Psychology, and Faculty Associate at the Research Center for Group Dynamics, at the University of Michigan, Ann Arbor. Dr. Sekaquaptewa's research focuses on stereotyping, stereotype threat, and effects of solo status on test performance and academic identification.

Dr. Stacey Sinclair is an Associate Professor of Psychology and African American Studies at Princeton University. Dr. Sinclair has conducted extensive research on how interpersonal interactions shape unconscious prejudice and the benefits of inter-ethnic contact in academic settings.

Dr. Samuel R. Sommers is an Associate Professor of Psychology at Tufts University. An experimental social psychologist, Dr. Sommers' research examines issues related to stereotyping, prejudice, and group diversity. His scholarly work focuses on two often overlapping topics: race and social perception, judgment, and interaction; and the intersection of psychology and law.

Dr. Negin R. Toosi is a Postdoctoral Research Scholar and Adjunct Assistant Professor at Columbia Business School, Columbia University. Dr. Toosi conducts experimental research on diversity in group settings, examining the importance of context and various social identities.

Dr. Linda R. Tropp is a Professor of Psychology at the University of Massachusetts Amherst. Dr. Tropp has conducted extensive research on the effects of intergroup contact, including meta-analytic, experimental, and longitudinal studies on the expectations, experiences, and outcomes of contact among diverse racial and ethnic groups.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE

Supreme Court of the United States

◆

ABIGAIL NOEL FISHER,

Petitioner,

—v.—

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SOCIETY OF AMERICAN LAW TEACHERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Founded in 1973, the Society of American Law Teachers ("SALT") is the largest independent membership organization of legal academics in the United States. SALT's 900+ members are law school professors, deans, librarians and administrators. Virtually all active SALT members hold full-time positions in legal education.

Central to SALT's mission is its commitment to "mak[ing] the legal profession more inclusive and reflective of the great diversity of this nation." SALT understands that the most effective way to make collegiate, graduate and professional academic programs more representative of our nation's diverse populations is to utilize holistic admissions processes which incorporate race-consciousness as one of many factors. Since the Court's recent decision in *Grutter v. Bollinger*,[2] positive steps toward diversity have been realized, but African Americans and Latinos, in particular, remain woefully underrepresented at all levels of higher education. Until this imbalance is corrected, race-conscious affirmative action programs remain a necessity.

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[1] This brief is filed with the consent of the parties. Blanket consents to the filing of briefs *amicus curiae* were filed with the Court by the parties on February 22, 2012 and May 1, 2012. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] 539 U.S. 306 (2003).

SALT has supported race-conscious admission policies before this Court in two previous cases. In 1978, SALT filed a brief amicus curiae in support of the University in *Regents of the University of California v. Bakke.*[3] More recently, in 2003, SALT filed a brief amicus curiae in support of the University of Michigan Law School in *Grutter*.

SALT's support of diversity in legal education has not been limited to the filing of briefs amicus curiae. It has organized many scholarly conferences; supported studies of bias in standardized testing, including the LSAT and state bar exams; created programs to mentor diverse minorities, including young academics, law students and potential law students; and led efforts to assure financial support for low-income law students.

The issues raised in the present case are of particular concern to SALT and its membership. Although this case is focused on undergraduate admissions, SALT recognizes that each law school's ability to admit a strong and diverse entering class is directly tied to the pool of available college graduates. A ruling against UT will be followed by public universities across the nation. If universities throughout the country are forced to abandon race-conscious admission programs, the number of racially diverse undergraduate students will decrease dramatically. In turn, the pool of graduates entering the legal profession, government service, and positions of leadership in the private sector will not reflect the diverse talents, resources and capabilities of this nation.

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[3] 438 U.S. 265 (1978).

SUMMARY OF ARGUMENT

In the *Grutter* decision, this Court held that universities have "a compelling interest in obtaining the educational benefits that flow from a diverse student body."[4] Universities seek diversity of many kinds, including racial and ethnic diversity. Social science confirms that interactions with students of diverse racial and cultural backgrounds leads to diffusion of prejudice, increased depths and perspectives in classroom learning, and other educational benefits for all students. A diverse student body also creates a learning environment that better prepares students—both minorities and non-minorities—for the workforce. Diversity is and remains a compelling state interest.

UT's affirmative action policy is narrowly tailored to achieve the compelling state interest of a diverse student body. UT's process of considering race in admissions is holistic and individualized. The program does not utilize quotas and strictly adheres to the guidance set out in *Grutter*. This Court should defer to UT's good faith decision that a limited race-conscious admissions policy is necessary to achieve the educational benefits of diversity. Deference to school administrators is consistent with this Court's precedent.

The day has not yet arrived when "the use of racial preferences [is] no longer . . . necessary."[5] The Top Ten Percent Law in Texas and percentage plans in general are not sufficient race-neutral alternatives. The Top Ten Percent Law increases minority representation only because of racial isolation in Texas. Diversity is a nuanced concept, and percentage plans are blunt tools which cannot alone accomplish the complex task of considering race in an individualized, holistic manner. Furthermore, the Court's decision in this case will have nationwide impact, potentially altering admissions criteria in states where percentage plans are politically unrealistic, minimally impacting on diversity given the state's demographics, or both.

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[4] *Grutter*, 539 U.S. at 343.

[5] *Id.* at 310.

The many schools at which the members of SALT teach have relied on the decision in *Grutter* to craft admissions policies for the past nine years. In light of the nationwide reliance by educational institutions on the guidelines set out in *Grutter*, the principles of stare decisis mandate upholding *Grutter*. SALT supports the affirmative action program at the University of Texas and respectfully requests that this Court affirm the judgment of the Fifth Circuit.

ARGUMENT

I. DIVERSITY IS AND REMAINS A COMPELLING STATE INTEREST

A. This Court has Consistently Recognized the Value of Diversity.

In the *Grutter* decision, this Court held that universities have "a compelling interest in obtaining the educational benefits that flow from a diverse student body."[6] In reaching this conclusion, Justice O'Connor relied heavily on the reasoning of

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[6] *Id.* at 343.

Justice Powell in another seminal university admissions case, *Regents of the University of California v. Bakke.*[7] In *Bakke*, Justice Powell asserted that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[8] He concluded that "the interest of diversity is compelling in the context of a university's admission program."[9] In *Grutter*, the Court upheld its conclusion in *Bakke* that diversity is a compelling state interest in the context of university admissions.[10] This finding remains as accurate and imperative today as it was nine years ago.

This Court has consistently respected the educational judgment of universities in finding that diversity is a compelling state interest. Educational professionals are the most knowledgeable regarding the meritorious effects of a heterogeneous student body on classroom discussions, the learning experience and future success of students.[11] Deference to universities' interest in attaining a diverse student body has been and continues to be supported by expert findings that diversity promotes learning outcomes, helps to break down racial stereotypes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[12] "Given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," universities have historically occupied "a special niche in our constitutional tradition."[13] Courts have respected the freedom of universities to make their "own judgments as to education" and to "select those students who will contribute the most to the 'robust exchange of ideas.' "[14]

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[7] 438 U.S. 265 (1978).

[8] *Id.* at 313 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

[9] *Bakke*, 438 U.S. at 314.

[10] *See Grutter*, 539 U.S. at 325.

[11] *See id.* at 328.

B. Increased Perspectives as a Compelling State Interest.

In *Bakke*, Justice Powell affirmed that diverse classrooms promote an "atmosphere of 'speculation, experiment and creation'" which is "so essential to the quality of higher education."[15] Race, along with other social markers such as class and ethnicity, necessarily affects individuals' social and political opinions.[16] "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experiences of being a racial minority in a society, like our own, in which race unfortunately still matters."[17] College is often the time when young adults explore their preconceived notions through classroom and individual discussions with peers. "Students come to universities at a critical stage of their development, a time during which they define themselves in relation to others and experiment with different social roles before making permanent commitments to occupations, social groups, and intimate personal relationships."[18] It is essential that during these formative years students have the opportunity to interact with individuals who will offer challenging views and unique perspectives. As Justice O'Connor asserted, and the Fifth Circuit in *Fisher v. University of Texas at Austin* affirmed,[19] in diverse classrooms the "discussion is livelier, more spirited, and simply more enlightening and interesting."[20]

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[12] *Id.* at 330.

[13] *Id.* at 329.

[14] *See id.* (quoting *Keyishian*, 385 U.S. at 603).

[15] *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

[16] *See Easley v. Cromartie*, 532 U.S. 234, 257-58 (2001) (concluding that "race in this case correlates closely with political behavior").

[17] *Grutter*, 539 U.S. at 333.

Notably, legal scholarship supports the long-lasting benefits of ensuring that students experience a wide breadth of differing viewpoints and opinions that can only be achieved by maintaining a diverse student body.[21] Statistical data from University of Michigan Professor Patricia Gurin indicate that "interaction with peers from diverse racial backgrounds," both in the university classroom and informally, lead to increased "learning outcomes."[22] "That is, [s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."[23]

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[18] *Grutter*, 288 F.3d 732, 760 (6th Cir. 2002).

[19] 631 F.3d 213, 219 (5th Cir. 2011).

[20] *Id.* (quoting *Grutter*, 539 U.S. at 330).

[21] *See* M.K.B. Darmer, *Teaching Whren to White Kids*, 15 Mich. J. Race & L. 109 (2009); Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in* Diversity Challenged: Evidence on the Impact of Affirmative Action 143 (Gary Orfield with Michael Kurlaender eds. 2001); Patricia Gurin, *Reports submitted on behalf of the University of Michigan: The Compelling Needs for Diversity in Higher Education*, 5 Mich. J. Race & Law 363 (1999).

The significance of diversity to a comprehensive education has been acknowledged by those most directly involved in the academic experience: the students.[24] Gary Orfield and Dean Whitla surveyed the student bodies at Harvard Law School and the University of Michigan Law School to determine the students' views on the importance of a diverse learning environment.[25] Over two-thirds of the students in each school found that diversity enhances how they thought about problems and solutions in their classes; almost two-thirds of students in each school reported that diversity enhances the way topics have been discussed in a majority of their classes; 68% of Harvard students and 74% of Michigan students reported that diversity enhances the way topics are discussed informally at meals, over coffee, or at other similar occasions; and 89% of Harvard students and 91% of Michigan students reported that having students of different races and ethnicities is a positive element of their educational experiences.[26]

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[22] *Grutter*, 288 F.3d at 761; *see also* Patricia Gurin, *Reports submitted on behalf of the University of Michigan: The Compelling Needs for Diversity in Higher Education*, 5 Mich. J. Race & Law 363, 365 (1999)).

[23] *Grutter*, 288 F.3d at 761 (quotation marks and citation omitted).

[24] *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950) ("Few students . . . would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views. . . .").

[25] Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in* Diversity Challenged: Evidence on the Impact of Affirmative Action 143 (Gary Orfield with Michael Kurlaender eds. 2001).

Studies conducted since the Court's decision in *Grutter* confirm that racial diversity remains a critical component to a quality education for all students.[27] The Education Diversity Project (EDP), an empirical study that followed over 6000 law students enrolled in 50 randomly selected ABA schools, found what the Court in *Grutter* and law professors understood intuitively—that racial diversity positively affects the educational experience of all law students.[28] Ninety percent of the students interviewed agreed or strongly agreed that a racially diverse student body enhanced their education by encouraging them to think more critically, exposing them to new perspectives and improving their ability to work in heterogeneous groups.[29] Over 80% agreed or strongly agreed that these benefits extended into their professional lives.[30]

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[26] *Id.* at 158-61.

[27] Two recent reports deserve careful study. William Kidder, *Misshaping the River: Proposition 209 and Lessons for Fisher* (August 3, 2012) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123653 (hereinafter the Kidder Report). The Kidder Report is a comprehensive empirical study on the effect of California's affirmative action ban. Charles E. Daye et al., *Does Race Matter in Educational Diversity: A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. (Issue 2 *forthcoming* 2012) (hereinafter the Daye Report).

[28] Daye Report, 13 Rutgers Race & L. Rev. at 44-45.

In short, classrooms of all sorts, at the undergraduate and graduate level, where boundaries are pushed and assumptions are both confounded and confirmed, are enhanced by the racial heterogeneity of those participating in the discussion.

C. Professionalism and Civic Engagement as a Compelling State Interest.

In addition to the complex benefits to learning outcomes that derive from students' exposure to increased perspectives, the professionalism and civic engagement that results from a diverse student body is a compelling state interest. This Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship."[31] Universities are the training ground for our nation's future professionals and leaders, and students must learn the necessary skills to thrive in their subsequent roles while in attendance.

Students who are educated in a diverse educational environment are better prepared to become successful professionals as well as active participants in society.[32] "[M]ajor American businesses have made it clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[33] Businesses depend upon higher education to "provide the training and education necessary to succeed in America."[34] If American businesses are to achieve a highly qualified and diverse workforce with individuals who have been exposed to different perspectives, individuals of various races and ethnicities must be granted access to higher education.[35] American businesses fully appreciate the importance of educational diversity. Over 65 corporations filed amicus briefs supporting affirmative action in the Michigan cases; in *Fisher* businesses are once again supporting UT Austin's efforts, while zero corporations or chambers of commerce are filing briefs on behalf of Petitioner.

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[29] *Id.*

[30] *Id.*

[31] *Grutter*, 539 U.S. at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

In addition to improving our nation's workforce, a diverse student body also fosters civic engagement. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[36] Consequently, universities must be able to consider all of an applicant's characteristics, race included. And when race cannot be considered, the results are dramatic. A recent study of the effect of Proposition 209 on the educational diversity in California's public universities discovered that the number of African Americans entering California public law schools was cut in half following the affirmative action ban despite the increase in qualified African Americans applying to law schools across the country.[37] California business schools have seen a three-fifths decline in enrollment of African Americans, Latinos and American Indians since the ban was instated.[38] These dismal numbers prompted the UC Regent-led Study on Diversity to conclude that the universities were limited in their ability "to contribute to the diverse leadership cadre of California."[39]

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[32] *See id.* at 330 (citation omitted).

[33] *Id.*

[34] *Id.* at 332-33.

[35] David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 Harv. L. Rev. 1548, 1552 (2004).

[36] *Fisher*, 631 F.3d at 257.

With unwavering resolve, the Court in *Grutter* mandated that the "path to leadership be visibly open to talented and qualified individuals of every race and ethnicity . . . so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[40] Likewise, the EDP study concluded, "Educational diversity is needed to further our highest national interests to educate workers for an increasingly diverse domestic workforce, to prepare qualified professionals for an increasingly diverse domestic society, to compete effectively in a global business world, to enable our military to carry out its mission of national security, to sustain our political and cultural heritage and thereby maintain our society, and to work toward achieving our highest aspiration—our 'dream of one Nation, indivisible.' "[41]

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[37] Kidder Report at 57.

[38] *Id.* at 55.

[39] *Id.* at 55, n.185 (quoting UC Study Group on University Diversity, Overview Report to the Board of Regents, p. 5 (Sept. 2007), *available at* http://www.universityofcalifornia.edu/diversity/documents/diversityreport0907.pdf.)

[40] *Grutter*, 539 U.S. at 308, 332-33.

II. UT'S POLICY IS NARROWLY TAILORED TO ACHIEVE THE COMPELLING STATE INTEREST OF DIVERSITY

A. UT's Policy is Narrowly Tailored to Achieve a Diverse Student Body.

In *Grutter*, this Court held that the University of Michigan Law School's race-conscious admissions policy was narrowly tailored because the law school was not using racial quotas, but was instead using a qualitative race-conscious admissions process to achieve the permissible compelling interest of educational diversity. The key to achieving a narrowly tailored policy was the school's individualistic, holistic review of the admissions applications that considered race as only one among many factors that might contribute to a diverse educational environment. This Court explained that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," and that a "serious, good faith consideration" of race-neutral alternatives satisfies the narrow tailoring requirement.[42] This standard defers to the school's ultimate determination of how best to achieve the compelling interest of educational diversity.

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[41] Daye Report, 13 Rutgers Race and L. Rev. at 87.

[42] *Grutter*, 539 U.S. at 339.

Following (and as a result of) the Supreme Court's decision in *Grutter*, UT did an extensive study of campus diversity and determined that it did not have a "critical mass" of diversity needed at both the institutional and classroom levels. UT therefore revised its admissions policy to reintroduce race as a "factor of a factor of a factor of a factor."[43] In fact, "the weight given to race in UT undergraduate admissions is less than that upheld in *Grutter*."[44] Under UT's policy, race is only one of seven special circumstances that compose one factor of some applicants' personal achievement score, which is one of three factors that makes up the Personal Achievement Index (PAI), which is one of the two elements that determine admission for applicants who are Texas residents but are not admitted automatically under the Top Ten Percent Law.[45] When evaluating a student's PAI, UT undertakes the individualized and holistic approach as directed by *Grutter*. Evaluators may factor in all kinds of circumstances that contribute to diversity other than race, such as socio-economic status, high school environment, and family environment and responsibilities. This approach respects *Grutter*'s insistence that "the importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount."[46] UT does not consider the racial or ethnic composition of the group of admitted students during the admissions decision making process.

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[43] *Fisher*, 645 F. Supp. 2d at 608.

[44] Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race Conscious Admissions*, U. Pa. J. Const. L. (forthcoming Fall 2012).

[45] *Fisher*, 645 F. Supp. 2d at 608.

An especially noteworthy aspect of UT's race-conscious admissions policy is that applicants of all races can gain admission.

> [R]ace can enhance the personal achievement score of a student from any racial background, including whites and Asian-Americans. For example, a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same school. This possibility is the point of *Grutter*'s holistic and individualized assessments, which must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant. Indeed, just as in *Grutter*, UT applicants of every race may submit supplemental information to highlight their potential diversity contributions, which allows students who are diverse in unconventional ways to describe their unique attributes.[47]

UT's admissions program, put into place after thorough study and consideration of the specific educational environment and needs of UT following years of experimentation with a race-neutral alternative that was not entirely successful, comports with the narrow tailoring standard set in *Grutter*. The District Court below found that "UT's admissions policy shares many of the same features as the Law School's policy in *Grutter*, which is not surprising considering the parties agree UT's policy was based on the Law School's policy."[48]

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[46] *Grutter*, 539 U.S. at 337.

[47] *Fisher*, 631 F.3d at 236.

B. Deference to the Judgments of University Administrators is Consistent With Strict Scrutiny.

Just as this Court should defer to educators' determination that diversity is a compelling educational interest, this Court should also respect UT's expert academic judgment that the admissions program is narrowly tailored to fit this compelling interest. Context is relevant to strict scrutiny of race-based decision making and "a university's educational judgment in developing diversity policies is due deference."[49] Deference is warranted because university administrators have expertise in making relevant educational judgments about their academic programs. The Court's focus is on the decision making process, not on the substantive content of the decision itself.[50]

In *Bakke*, the Supreme Court first evaluated race-conscious admissions under the Equal Protection Clause of the Fourteenth Amendment and determined that strict scrutiny was applicable to evaluate admissions decisions based on race and ethnicity aimed at achieving educational diversity. Applying strict scrutiny, this Court determined that the use of racial quotas was not narrowly tailored to satisfy strict scrutiny.[51] The Court reaffirmed the applicability of strict scrutiny in this context in *Grutter* and announced that, even within the context of strict scrutiny, it would defer to the school's determination of the best means to achieve the compelling interest of educational diversity, holding that narrow tailoring requires good faith consideration of race-neutral alternatives, not exhaustion of all possible race-neutral alternatives.[52] The Court scrutinized the process of deciding to adopt a race-conscious admissions policy, not the policy itself, and presumed that the university acted in good faith in implementing that policy.[53]

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[48] *Fisher*, 645 F. Supp. 2d at 609.

[49] *Fisher*, 631 F.3d at 231.

[50] *Id.*

Thus, scrutiny remains strict, but in light of the deference prescribed by *Grutter*, it is scrutiny of the *process* of a decision rather than of the *result* of the decision.[54] As long as race is considered in a holistic and individualized manner (as UT's policy does), and not as part of a quota system (as the *Parents Involved* and *Bakke* programs did), the Court should defer to UT's good-faith decision that its limited race-conscious admissions policy is necessary to achieve the educational benefits of diversity.[55] The narrow tailoring element of strict scrutiny of race-conscious admissions programs defers to schools' judgments as to whether existing race-neutral alternatives are tailored to their educational goals. Narrow tailoring requires only that UT consider, rather than adopt, race-neutral alternatives.[56]

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[51] *Bakke*, 438 U.S. at 319-20.

[52] *Grutter*, 539 U.S. at 339.

[53] *See Id.*

[54] *See Fisher*, 631 F.3d at 231.

Deference to educators' judgments and the presumption of good faith are the only rational applications of strict scrutiny in this context. University professors and administrators are experts in education. These professionals spend their entire careers developing expertise, and their daily work involves implementing various educational methods and observing their results. As a result, they are best suited to determine whether race-neutral alternatives have been or will be adequate as a means to fulfill the compelling interest in educational diversity.

Professors and administrators in institutions of higher education are experts not only in the field of education, but also experts with regard to their own schools and their own students. Every student is different, every class is different, and every school is different. Each school needs an admissions program that suits its unique circumstances, including financial resources, diversity needs and political climate. The specific educational diversity objectives particular to UT are especially important because of UT's "mission and flagship role" to prepare future leaders in the state of Texas.[57] A compelling interest at UT may

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[55] *Id.* at 234.

[56] *See Grutter*, 539 U.S. at 339-40.

[57] As the Kidder report notes, "[t]hose with a sense of history can appreciate how far UT Austin has come in striving to overcome its ignoble past of segregation, discrimina-

not be applicable at other schools, just as what constitutes "critical mass" at UT may not in another school.[58] This Court has repeatedly decided that courts are not the appropriate entity to create educational policy and that the judicial process is too slow and inflexible to evaluate the substance of educational decisions.

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tion and a hostile campus climate toward African American and Latino students." Kidder Report at 12. Until 1969, the Texas Constitution mandated racially segregated schools and colleges, and the record in *Sweatt v. Painter*, 339 U.S. 629 (1950), revealed the egregious and heartbreaking conditions of the times. In 1993, the Fifth Circuit observed, with wry understatement, that "Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute." *League of United Latin Am. Citizens, Council No 4434 v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993). A year later, the District Court in *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) recalled that "during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students. Mexican American students were segregated in on-campus housing and assigned to a dormitory known as the 'barracks', as well as excluded from membership in most university-sponsored organizations. Additionally, until the mid 1960s, the Board of Regents policy prohibited blacks from living in or visiting white dormitories." (at 555). More recently, as Kidder and other scholars have noted, Texas universities suffered through the devastating repercussions of the Fifth Circuit's decision in *Hopwood*—otherwise known as the "Hopwood Chill"—which "severely undermined these universities' efforts to create diverse multiracial campuses." Kidder Report at 11-12, n.26 (and authorities cited therein).

[58] *Id.* at 243.

C. Petitioner's Reliance on Parents Involved is Misplaced

Petitioners argue that UT's policy is not narrowly tailored because it produces minimal gains in diversity, relying on this Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.[59] This argument mischaracterizes and misapplies the language of *Parents Involved*.[60] First, UT's current policy has, in fact, produced concrete results.[61] *Parents Involved* did not state or imply that strict scrutiny of race-conscious admissions policies requires more than "minimal effects" on a compelling interest; instead it reaffirmed *Grutter's* standard for narrow tailoring—"serious, good faith consideration" of race-neutral alternatives.

Parents Involved considered a program using race as a factor in determining student placements in public high schools. The Supreme Court determined that that program was not narrowly tailored because (1) it used quotas, requiring the racial composition of each school to fall within ten percentage points of the District's overall racial balance, and (2) the District did not exercise the required good faith consideration of race-neutral alternatives necessary for narrow tailoring set forth by the Supreme Court in *Grutter*.[62] The *Parents Involved* decision also emphasized the distinction between the contexts of higher education and public secondary schools and stated that the *Grutter* considerations were "unique to institutions of higher education" and that universities have a "special niche" in constitutional tradition.[63] The Court in *Parents Involved* confirmed *Grutter*'s standard of "serious, good faith consideration" of race-neutral alternatives, but found the facts of the two cases distinguishable—that is, the Seattle case contained explicit racial balancing and did not involve, of course, the unique considerations in higher education. Any comparison between UT's program and the program at issue in *Parents Involved* are inapposite.

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[59] Br. of Pet'r at 38.

[60] 551 U.S. 701 (2007).

[61] *Fisher*, 631 F.3d at 226 ("The current policy has produced noticeable results.")

[62] *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712, 735 (2007).

D. Percentage Plans Are Not Sufficient Race-Neutral Alternatives and Should Not Preclude Narrowly Tailored Race-Conscious Admissions Policies.

1. *Texas' Top Ten Percent Law is Insufficient*

In *Grutter*, the Court required good faith consideration of viable race-neutral alternatives to achieve the educational benefits of diversity. It explicitly held, however, that the narrow tailoring prong of strict scrutiny does *not* require exhaustion of any such alternatives.[64] *Grutter* did not consider what effect a moderate level of statistical success of race-neutral alternatives would have on deference to a university's decision to implement race-conscious admissions policies to supplement such alternatives in order to achieve educational diversity goals.

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[63] *Id.* at 724.

[64] *Grutter*, 539 U.S. at 339; *Fisher* 631 F.3d at 239-40.

In 1997, after a sharp decrease in diversity following the prohibition of race-conscious admissions by *Hopwood v. Texas*, the Texas legislature enacted the Top Ten Percent Law, mandating that high school seniors in the top ten percent of their class be admitted to any Texas state university.[65] While this mandate successfully increased the statistical percentage of minority students at UT, in many ways it frustrates the University's efforts to achieve classroom diversity.[66] Although the Top Ten Percent Law, when implemented alone, increased statistical racial and ethnic diversity, the University, after comprehensive good-faith consideration, determined that such statistical increases did not fulfill the educational diversity objectives necessary for its educational mission. As UT has realized, simply increasing the number of minorities enrolled in an institution is not sufficient to achieve diversity. In fact, "[i]t is possible that a race conscious policy that admits only a small number of minority students can have a meaningful, unique impact, if those students add to the diversity of viewpoints and experiences in a manner beyond the race neutral policy."[67] In addition to the fact that diversity of viewpoint is not even a consideration under the Top Ten Percent Law, the minority students admitted to UT under this policy remain clustered in certain programs in effect minimizing classroom diversity.[68]

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[65] 78 F.3d 932 (5th Cir. 1996) (holding that the University of Texas School of Law could not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body).

[66] *Fisher*, 631 F.3d at 239-42.

[67] Harpalani, *supra* note 44.

The Top Ten Percent Law's success in increasing minority enrollment "comes at a high cost and is at best a blunt tool for securing the educational benefits diversity is intended to achieve."[69] Because it focuses on geographic diversity as a proxy for race and ethnicity, the Top Ten Percent Law is far more limited than race-conscious admissions to achieve not just diversity itself at the institutional level, but the actual educational benefits of diversity which are the compelling interests. Those minority students who attended more competitive high schools but did not finish in the top 10 percent of their graduating classes, and who could contribute to diversity in various ways, are precluded from automatic admission to UT by the Top Ten Percent Law.[70] Further, the Top Ten Percent Law challenges the very foundation of *Grutter* as it is a policy that increases minority representation only because of racial isolation in Texas public high schools.[71]

Petitioner argues that because the Top Ten Percent Law has achieved statistical racial and ethnic diversity at UT as a whole, the race-conscious program at UT is unconstitutional because it has minimal impact on the racial composition of the students admitted and is, therefore, not narrowly tailored. If anything, however, the fact that the race-conscious program at UT is only applied to a small portion of applicants makes the policy more narrowly tailored rather than less. For the vast majority of UT applicants, race is entirely irrelevant.

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[68] *Fisher*, 631 F.3d at 241.

[69] *Id.* at 242.

[70] Harpalani, *supra* note 44; *see also Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages.").

[71] Harpalani, *supra* note 44.

2. *Percentage Plans are Ineffective Nationwide*

If this Court rules in favor of the Petitioner, it will mandate a dramatic change to the admissions process for colleges and universities nationwide, institutions where a Top Ten Percent Law is not in place, where such a plan may be either politically unrealistic, or have minimal impact on diversity given the state's demographics, or both. In many states, race-conscious admissions may be the only possible or practical method of working towards educational diversity. Overruling UT's use of race-conscious admissions will discourage other schools from continuing or implementing race-conscious admissions policies, even if those policies are needed to meet the compelling interest of educational diversity.

Different universities in different states must be free to tailor their admissions programs to meet their own demographics, political realities, financial resources and educational needs. Courts are not equipped to fashion these policies, and the judicial process is certainly not nimble enough to evaluate such policies on an ongoing basis, as universities can and must. For example, the specific educational diversity objectives described in UT's 2004 Proposal to Consider Race and Ethnicity in

Admissions are particular to UT and are especially important to UT specifically because of its "mission" and "flagship role" to "prepare its students to be the leaders of the state of Texas."[72]

Educational objectives must be tailored to each specific institution.[73] Since critical mass is defined not in terms of numbers or percentages, but instead in terms of educational objectives of a particular school, what constitutes "critical mass" in one state may not in another state. At any given school, critical mass today may be different from critical mass ten years ago, and again different from critical mass five years from now.[74] For this reason the Fifth Circuit appropriately refused to "bless the university's race-conscious admission program in perpetuity,"[75] As the court explained "it is more a process than a fixed structure that we review."[76]

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[72] *Fisher*, 645 F. Supp. 2d at 602.

[73] Important lessons are being learned from the California experience in the wake of Proposition 209, which prohibited, *inter alia*, the use of race as a factor in university admissions. The University of California has been, for generations, our nation's largest and most highly regarded public university system. With an economically and racially diverse population, the state has served as an invaluable laboratory for evaluating the effectiveness of class-based, race-neutral admission policies. The results have been indisputable: class-based affirmative action programs cannot substitute for race-conscious policies. *See* Kidder Report at 53, n.177 (citing Mark C. Long, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 Public Admin. Rev. 315 (2007); Alan Krueger et al., *Race, Income and College in 25 Years: The Continuing Legacy of Segregation and Discrimination*, NBER Working Paper 11445 (June 2005) *available at* http://www.nber.org/papers/w11445.pdf; Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions, in* Chilling Admissions: The Affirmative Action Crisis And The Search For Alternatives 17, 28 (Gary Orfield & Edward Miller eds., 1998).).

[74] *Fisher*, 631 F.3d at Black's Law Dictionary 1537 (9th ed. 2009).

In addition to the difficulty of applying percentage plans such as the Top Ten Percent Law to undergraduate institutions around the nation, such plans are, of course, not relevant or useful to law schools or other graduate and professional schools, even though the need for diversity is equally compelling. Graduate and professional schools need race-conscious admissions programs to achieve their institution-specific missions and goals, and a legislatively-imposed percentage plan cannot meet this need.

The consequences of prohibiting race-conscious admission at UT following the implementation of the Top Ten Percent Law are harsh. Requiring UT to disband the minimal portion of their admissions process that is race-conscious would discourage other schools from ever implementing any race-neutral alternatives in the future. Deeming the Top Ten Percent Law sufficient to meet UT's diversity needs would send the message to other schools that if a race-neutral alternative meets with some success, they will no longer be permitted to use race-conscious admissions going forward. Such a message defeats the vision of the narrow tailoring requirement of considering facially neutral alternatives because it discourages experimentation with those alternatives and, from the perspective of school administrators trying to achieve diversity, potentially punishes administrators for even partial success by precluding a tool that they would otherwise have. Universities must be allowed to experiment flexibly with various tools to increase diversity without fear that some amount of success with a facially neutral alternative might preclude future efforts to increase diversity.

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[75] *Id.* at 246.

[76] *Id.*

III. STARE DECISIS REQUIRES FIDELITY TO THE GRUTTER DECISION

The basic legal principle of stare decisis provides that "a court must follow earlier judicial decisions when the same points arise again in litigation."[77] In *Grutter*, this Court addressed and decided the question of "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[78] This Court answered in the affirmative, and universities around the country have relied on the guidance of *Grutter* to plan their admissions policies ever since. In fact, the Court's analysis has been consistent since *Bakke* that universities may consider, in limited ways, an applicant's race without violating the Constitution. Lower courts have applied *Grutter's* holdings and upheld challenged admissions programs when they complied with *Grutter's* reasoning.

Furthermore, in *Parents Involved*, this Court reaffirmed that diversity is a compelling state interest, declining to overrule *Grutter*. Universities across the nation. already relying on *Grutter*, viewed *Parents Involved* as confirmation of those principles and continued to build their admissions policies around the principles established in *Grutter*.

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[77] Black's Law Dictionary 1537 (9th ed. 2009).

[78] *Grutter*, 539 U.S. at 322.

It is undisputed that the affirmative action program at UT is modeled after the *Grutter* plan and is reviewed frequently to ensure compliance with the principles set out in that case and affirmed by this Court. To overrule *Grutter*, just nine years after that seminal decision, would overhaul university admissions policies across the nation. Educational institutions, including undergraduate colleges, law schools, and other graduate and professional schools - public and private - will be forced to immediately revamp their admissions polices and procedures. Schools across the country have studied, developed, and modified their admissions procedures based on the guidance of this Court in 2003. A dramatic change in the affirmative action jurisprudence will have real consequences for the institutions attempting to comply with the mandates of this Court. Such a change will necessitate the redevelopment of policies, training of staff, and education of the university communities. In this context, the principle of stare decisis requires *Grutter*'s reaffirmation.

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[79] *Grutter*, 539 U.S. at 310.

CONCLUSION

In *Grutter*, Justice O'Connor expressed the hope that "25 years from now, the use of racial preferences will no longer be necessary" to further the interests of diversity.[79] Those in the business of higher education, including the members of SALT, are keenly aware that such a day has not yet arrived. Diversity of student body remains a compelling state interest which has not yet been achieved and therefore, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
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In The
Supreme Court of the United States

◆

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

◆

BRIEF OF THE SOUTHEASTERN LEGAL FOUNDATION, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONER

◆

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation, Inc. (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the federal Circuit Courts and the Supreme Court of the United States. In particular, SLF advocates for a color-blind interpretation of the Constitution. To that end, SLF has participated in litigation all over the country, including in this Court, in such cases as *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Ne. Fla. Ch. of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993), and *Adarand v. Mineta*, 534 U.S. 103 (2001).

SLF supports Petitioner's reasons for reversing the decision below. SLF writes separately to further emphasize the necessity of requiring any governmental entity seeking to engage in race-conscious activity – even one of higher education and regardless of whether the activity is intended as a remedy against past discrimination or to promote future diversity – to demonstrate that the activity is necessary and is narrowly tailored to address the perceived problem. SLF believes that the strong basis in evidence standard or an equally rigorous burden can and should be applied to all governmental classifications based on race. Requiring a showing of a strong basis in evidence is especially significant when the program at issue is intended, as is the University of Texas at Austin's (UT) program, to promote "diversity." Unless such a showing is required, universities will effectively have carte blanche to engage in race-conscious selections and activities, which is inconsistent with the Fourteenth Amendment, this Court's jurisprudence, and SLF's advocacy for a color-blind Constitution.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of *amicus curiae* briefs by filing letters evidencing their consent with the Clerk of Court.

◆

SUMMARY OF ARGUMENT

Since this Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), it has been the law that "*all* racial classifications, imposed by *whatever federal, state, or local governmental actor*, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 227 (emphasis added). But that maxim has not prevented numerous governmental entities from testing this Court's resolve to carefully scrutinize their attempts at classification of individual persons according to race. For innumerable reasons, accompanied by limitless energetic justifications, through creative legal and political acrobatics, new devices to categorize people by race seem to be an unending source of diversion for governmental entities of all types.

The Fourteenth Amendment in design and in application has served to guarantee racial equality from its conception. Certainly, the somber history and purpose behind American jurisprudence regarding equality of all races is well known to this Court and need not be catalogued here. However, given the more recent attack on Abigail Fisher's rights to equal protection as a result of UT's race-conscious admissions program and the corrosive nature of the theory espoused to support it, some retrospection of this Court's reasoned pronouncements on race-conscious governmental action is in order.

"All racial classifications" is a set that requires little clarification. When persons are distinguished, preferred, rejected, elevated, diminished, sorted, labeled, recognized, etc., according to their race, by a government actor, strict scrutiny and its attendant elements must be applied. *Id.* The first question upon review, then, is whether review will be "strict scrutiny" or not. When that question is answered in the affirmative, elements – "necessity," "compelling interest," "narrow tailoring" – can be rolled out in turn to be probed by a reviewing court.

But UT wants to avoid strict scrutiny in its definitive form, and to create a crevice in which other governmental entities will inevitably seek to escape it, by leading the Court to accept that "deference" to its self-defined "mission," including the efforts it will take to achieve it, is equivalent to exercising meaningful judicial review. In fact, deference to any person or institution's self-described internal goal is unremarkable and need not implicate this Court's duty and purpose to interpret the law. UT can believe fervently that diversity, of any kind and to any degree, will help reach its goals, and this Court or any other fact finder may accept, defer to, or laud that belief, so long as unconstitutional authority is not claimed. What the Court must not do is allow itself to be convinced that no further engagement is required when racial classifications have been imposed by a governmental actor.

Universities, executive agencies, indeed any governmental institution composed of expert personnel, will be naturally disposed to crave autonomy from judicial oversight to select and to implement programs of their choosing, whether or not they implicate a protected class – or perhaps, especially if they do. Up to and including *Grutter v. Bollinger,* 539 U.S. 306 (2003), the check on that impulse has been that, if race-conscious measures were included in such programs, the government had the burden to show that its means and ends were constitutionally sound. UT has chosen, deliberately upon *Grutter's* publication, to test whether this Court would untether even a small segment of government – "higher education" – from those constraints altogether under the guise of "deference."

There is no reason for this Court to abandon or to lessen the burdens on governmental actors under strict scrutiny. The same searching review applied to all other governmental entities for all other race-conscious programs may easily be and should be applied to educational institutions for their "diversity" initiatives. The Fifth Circuit was under no compulsion from the precedents of this Court to substitute "deference" for an acknowledgment that strict scrutiny is applicable to UT's admissions and student placement program. Having acknowledged that strict scrutiny is required, the Fifth Circuit should have demanded a showing from UT commensurate with that exacted from any other governmental entity.

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ARGUMENT

I.

This Court should review the predicate for race-conscious programs designed to promote diversity in education with the same rigor as that applied to programs designed to remedy the effects of constitutional or statutory violations.

In SLF's view, strict scrutiny should be applied to all race-conscious programs, and the diversity rationale offered by UT is subject to more searching judicial scrutiny than the Fifth Circuit gave it.

As Justice Powell observed in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), race-conscious steps do not serve as a remedy for past discrimination unless "judicial, legislative, or administrative findings of constitutional or statutory violations" against affected groups have been made. 438 U.S. at 307 (Powell, J.).

> After such findings have been made, the governmental interest in preferring members of the injured groups, at the expense of others is substantial, since the legal rights of the victims must be vindicated.
>
> . . . [T]he remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.

Id. Significantly, the challenged UT program bestows benefits on minority students who have not been found to have suffered a legally cognizable injury. In addition, any oversight comes from UT administrators, not an unbiased fact finder.

Race-conscious programs designed to create "diversity" are in many ways necessarily different from "remedial" measures. For one thing, UT, rather than any judicial, legislative, or administrative entity, decided its program was necessary and defined its scope. But "necessity" and "tailoring" are constitutional prerequisites for race-conscious governmental activity that must not be left to individual government actors without oversight. To illustrate, here UT decided that its program was "necessary" *after* a federal court had declared its previous race-conscious program unconstitutional and the Texas Legislature had created a successful race-neutral alternative that made significant impacts in producing racial diversity at UT.[2]

This Court has rejected the position that diversity is "simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means," and has instead recognized that some governmental interests in diversity are "compelling" and that particular means may, in some cases, be tailored narrowly enough to achieve such interest without running afoul of constitutional equal protection guarantees. *Grutter*; *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (quoting Brief for Petitioner at 17-18, 40-41). But recognition by this Court of the potential for government to meet its burden under strict scrutiny as to a particular stated interest in diversity does not equate to negating the burden for any governmental entity that relies upon a concept – "diversity" – to supply its compelling interest. Inasmuch as this Court scrutinizes remedial race-conscious measures by governmental entities, it should likewise be critical of so-called diversity programs, since "diversity" has not become any more bounded, defined, or definite in the years since *Grutter* and *Gratz*.

Indeed, the validity of "diversity" as a goal sufficient to justify race-conscious programs is not unlimited. In *Adarand v. Pena (Adarand)*, for example, this

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[2] *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996); *see also* Brief of Petitioner at 4-5, *Fisher v. University of Texas at Austin, et al.*, No. 11-345 (May 21, 2012).

Court reversed *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), to the extent that *Metro Broadcasting* endorsed application of intermediate scrutiny for so-called "benign" racial classifications. 515 U.S. at 225. The *Metro Broadcasting* decision had upheld FCC policies that considered race in the interests of "enhancing broadcast diversity." 497 U.S. at 567. *Adarand* re-asserted the general principle that the most searching scrutiny applies to all racial classifications used by governmental entities. 515 U.S. at 223. In addition, *Gratz* demonstrates that not all invocations of "diversity" in the higher education context will pass constitutional muster under strict scrutiny, if narrow tailoring is not demonstrated.

The Court should also be wary of "diversity" as a blanket justification for race-conscious programs because such programs vindicate an interest that is redolent of interests and justifications for intervention that this Court has previously rejected. *See Bakke*, 438 U.S. 265; *Wygant v. Jackson Board of Education*, 476 U.S. 276 (1986). The goal of UT is to attain an undefined "critical mass" of underrepresented minority students, which is apparently more than the 21.4% of all freshman students that those minorities represented when race-conscious measures were re-introduced. *See Fisher v. University of Texas*, 631 F.3d 213, 243 (5th Cir. 2011). Furthermore, UT wishes to redistribute that critical mass of minority students among its undergraduate programs because, under the Top 10% plan, they showed an apparently distressing tendency to cluster in certain programs. *Id.* at 240 ("It is evident that if UT is to have diverse interactions, it needs minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs.").[3]

UT hopes that one effect of its race-conscious program will be to "produce graduates who are capable of fulfilling the future leadership needs of Texas." *Fisher*, at 237. The Fifth Circuit commented, "[t]his objective calls for a more tailored diversity emphasis. In a state as racially diverse as Texas, ensuring that graduates learn to collaborate with members of racial groups they will encounter in the workplace is especially important." *Id.* But, this "diversity emphasis" sounds uncomfortably close to the kind of "faces-in-places" rationale for race-conscious action which Justice Powell rejected in *Bakke* and this Court denounced in *Wygant*. In *Bakke*, the University of California (UC) suggested that reserving places in its Medical School for minority students would, among other things, help increase "the number of physicians who will practice in communities underserved." 438

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[3] It is unclear how UT will cure what appears to be a voluntary sorting phenomenon, and that obscurity further illustrates that UT has not fully established the necessity and scope of its program. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989) (finding minority contractors may make different "career and entrepreneurial choices" from others). Furthermore, if commentators who point to a mismatch effect, such as *amici* Stuart Taylor and Richard Sander, are correct, the perceived problem cannot be cured by UT through its racial balancing of particular programs and classes, without some coercion of practically every student at UT. *See Amicus Curiae* for Richard Sander and Stuart Taylor, Jr., in support of Petitioner, *Fisher v. University of Texas at Austin, et al.*, No. 11-345 (Oct. 19, 2011).

U.S. at 306. Justice Powell concluded that "there is virtually *no evidence in the record* indicating that [UC's] special admissions program is either needed or geared to promote that goal." *Id.* at 310 (emphasis added). In other words, UC was attempting to substitute invocation of "diversity" for a strong basis in evidence revealing a "narrowly tailored" "compelling interest," and the Court rejected that proxy.[4] Likewise, UT has not presented evidence to establish that its own special admissions program is needed or geared to promote "leadership" or "collaboration with members of racial groups" among its students. In particular, no evidence has been presented that leadership and collaboration cannot be inculcated from within undergraduate programs of the students' own choosing. Nevertheless, even if UT had presented such evidence, those goals have not been held to be "compelling interests" under any strict scrutiny analysis to date.

Moreover, *Bakke* also rejected the "underserved communities" rationale based upon reasoning from the opinion of the California Supreme Court, which had identified race-neutral ways of accomplishing UC's purported goal. *Id.* As that court stated,

> [A]n applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary

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[4] Similarly, in *Wygant*, this Court rejected the notion that a race-conscious layoff policy adopted by the school board would provide "role models" for minority children. 476 U.S. at 269.

> professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage.

Id. at 311 (quoting *Bakke v. Regents*, 18 Cal. 3d 34, 56, 132 Cal. Rptr. 680, 695, 553 P.2d 1152, 1167 (1976)). Likewise, continuing to allow college students at UT to choose their own programs of study based on interest and skill, without deferring to a particular formula of racial balance preferred by administrators, is more likely to result in desirable role models of all races. This seems particularly so in a setting such as UT, where more than 75% of entering freshman are scholars who graduated in the Top 10% of their high school class, which demonstrates as well as any other evidence on record their aptitude for leadership, achievement, and comprehension.

UT does not claim it seeks to correct something in the same way a remedial plan does, despite the fact that it has used "diversity" as a euphemism for some problem it perceives exists. In UT's view, a Top 10% race-neutral plan apparently does not bring enough minority students to the University or plant them into the right classrooms. In SLF's view, UT's concern with manufacturing race-centric "leadership" edges toward trying to resolve an issue as sprawling as societal discrimination, which has not been demonstrated by UT as to the affected students or the population served by its graduates.

Of course, this Court rejected the pretext of societal discrimination as justification for race-conscious activity by governmental entities long ago. In *Bakke*, Justice Powell astutely observed that such a sweeping rationale would change a remedy for specific injuries into "a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." 438 U.S. at 310.[5] *Wygant* goes even further:

> [A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive. *In the absence of particularized findings*, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

476 U.S. at 276 (emphasis added).[6] Certainly, "diversity" at the level of particular programs of study or classrooms is amorphous and timeless in its ability to affect future student bodies at UT, since the catalog of

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[5] The City of Richmond, Virginia's, affirmative action plan for subcontracting on city construction projects in *Croson* demonstrates the wisdom of Justice Powell's concern. That plan gave preferential treatment to, among others, Spanish-speaking, Oriental, Indian, Eskimo, and Aleut controlled subcontractors, even though there was "*absolutely no evidence* of past discrimination" against them in Richmond. *Croson*, 488 U.S. at 506 (emphasis in original).

[6] *See also Bakke*, 438 U.S. at 307 (Powell, J.) (The goal of "redress[ing] . . . specific instances of racial discrimination" is "far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.").

courses offered, the number of total students as well as students of any particular race, and the trends in student preferences for particular programs or classes presumably change regularly.

In *Grutter*, Justice Scalia, concurring in part and dissenting in part, noted:

> [I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated.

539 U.S. at 346 (Scalia, J., concurring in part and dissenting in part).[7] Justice Scalia no doubt described the experience of many motivated Top 10% students at UT who out-paced their peers despite inadequate or unequal educational opportunities at underserved or minority high schools and earned a spot at UT. Forcing those students into contrived settings of program or classroom "diversity" neither corrects the

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[7] In *Croson*, this Court compared the claim in *Bakke* that "discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions" to an "amorphous" claim of past discrimination in an industry, finding both insufficient to support "an unyielding racial quota." 488 U.S. at 499.

deficiencies of their previous education nor rewards their relative achievements. Instead, it will result in forcibly sorting capable students out of self-selected programs in which they might excel.

Put simply, there is no reason, either established by UT or discernible in the controlling precedents of this Court, not to apply strict scrutiny to university programs that seek increased diversity in the same way that it is applied to remedial programs or indeed to "*all* racial classifications, imposed by whatever federal, state, or local governmental actor." *Adarand*, 515 U.S. at 227. No race-conscious programs should be found constitutional unless they are supported by a strong basis in evidence showing the government's compelling interest and a narrowly tailored means of achieving it. *Id.*

II.

The Fifth Circuit's deference to UT's declaration of necessity for classroom diversity to achieve its educational mission exceeds the holistic approach approved under strict scrutiny in *Grutter*.

Given the degree to which the Fifth Circuit purported to rely on *Grutter v. Bollinger*, SLF believes it is important to clarify the limitations of what this Court held in that case. *Grutter* is the only holding on race-conscious governmental action in which this Court has deferred to the decisionmaker regarding the necessity of its action. *See Parents Involved in*

Community Schools v. Seattle School District No. 1, 551 U.S. 701, 765 (2007) (Thomas, J., concurring). Arguably, since the Court simultaneously rejected the University of Michigan's (UM) undergraduate race-conscious program, *see Gratz*, 539 U.S. 244, a university law school or similar entity is the only decisionmaker which has been offered such deferential consideration by the Court, such that "good faith" regarding its determination may be "presumed" absent "a showing to the contrary." Nonetheless, the Fifth Circuit's decision in *Fisher* represents an expansion of *Grutter* that stretches the treatment of "diversity" as a compelling interest.

In *Grutter*, this Court stated that it would defer to the school's "educational judgment" that a racially diverse student body was "essential to its educational mission." 539 U.S. at 328. The Court said that its consequent recognition of diversity as a compelling interest was "informed by our view that attaining a diverse student body is at the heart of the Law School's institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" *Id.* at 329 (quoting *Bakke*, 438 U.S. at 318-19 (Powell, J.)). Even so, such deference is not unlimited, but is only "a degree of deference to a university's academic decisions, within constitutionally prescribed limits." 539 U.S. at 328.

Deference to UT's "educational judgment" in the case of Abigail Fisher's claim against the University is misplaced. In *Grutter*, the UM Law School's admissions program had an effect that was linked to the Law School's goal of achieving an experience-diverse student body to foster dynamic education. But, UM Law School's comparatively modest goal of introducing a mix of perspectives into its student body is much narrower than UT's scheme to mandate a particular mix of racial diversity in specific classrooms, demonstrating that UT's concept of diversity reaches far more widely than the *Grutter*-approved program ever purported to.

Significantly, in *Grutter*, without UM's consideration of race, its student body might have looked noticeably different, which was established by expert testimony. One expert testified that membership in preferred minority groups was "an extremely strong factor" in the law school's admissions decisions and that applicants from preferred minority groups received "an extremely large allowance" in their favor. *Id.* at 320. Another testified that, without the program, preferred minority students would have been only four percent of the student body instead of 14.5 percent. *Id.* According to that expert, "a race-blind admissions system would have a 'very dramatic,' negative effect on underrepresented minority admissions." *Id.* (quoting App. to *Grutter* Pet. 223a). Thus, there was at least arguably a strong basis in evidence to connect the school's desire to create diversity with its determination that consideration of race was "essential" and the means chosen to achieve its goal.

The same cannot be said of the University of Texas. The Top 10% plan had already substantially increased racial diversity in the student body prior to implementation of the challenged race-conscious measures, albeit not as much or as uniformly-distributed as UT administrators might prefer. Judge Garza observed, the effects of the University's program in addition to the gains under the Top 10% plan are effectively unquantifiable. *Fisher*, 631 F.3d at 259 (Garza, J., concurring specially) (The University's claim that it has not achieved critical mass " . . . is difficult to evaluate. The University refuses to assign a weight to race or to maintain conclusive data on the degree to which race factors into admissions decisions and enrollment yields."). Without any way to tell whether UT's program has an effect, there is no justification to defer to its "educational judgment," which UT has not attempted to support with expert testimony or other evidence, as was offered in *Grutter*. Further, Judge Garza's point is well taken, that the program's effect is as likely to be insignificant as not, rendering the essential link between goal and remedy broken from the outset. *See id.* at 260-63.

No evidence was presented, and SLF is unaware, of any singular relevant perspective originating from a student's race that a student might contribute to a class in math, physics, chemistry, or astronomy. If there is no such perspective, then UT's goal of classroom diversity in those subjects is doomed to failure on the narrow *Grutter* objective of creating diversity in educational experience by introducing alternative minority viewpoints. Moreover, as the Petition shows, classroom diversity as measured by mere demographic head-counts decreased even as minority enrollment was increasing under the Top 10% plan from 1996 to

2002. Pet. at 10, n.9.[6] No evidence has been presented to explain the reduction, which leaves open myriad possibilities such as UT's own failure to fragment diluted class sections or to offer more class sections in particular subjects targeted to underrepresented demographics.

This Court should also be uncomfortable with UT's race-conscious admissions program due to its expansive scope. In contrast with *Grutter*, which involved an entering law school class of 350 students, UT takes in some 7,000 freshmen each year. Three-quarters of them are admitted through the prestigious Top 10% plan, yet UT wants to redistribute those demonstrably motivated students by micromanaging them into seats in racially diverse classrooms. In other words, UT apparently subordinates their value as self-determined scholars to their value as placeholders for their respective race in some undefined aesthetic ideal. SLF would also characterize it as heavy-handed – and thoroughly unjustified – social engineering.

Notwithstanding the expansive scope of UT's program, it has some inconsistent self-imposed limits, which call into question both the "necessity" and the

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[6] In 2002, even after the Top 10% plan had produced greater diversity by the numbers in the entering class, 4,448 of the 5,631 classes the University offered (or 70 percent) had zero or one African-American student, and 1,689 (or 30%) had zero or one Hispanic student. *Fisher*, 631 F.3d at 260 (Garza, J., concurring specially).

"tailoring" of the race-conscious scheme. First, the schools of architecture and fine arts at UT, as well as some honors programs, are on a separate admissions track that includes "special portfolio, audition, and other requirements." *Fisher*, 631 F.3d at 266, n.25 (Garza, J.). In those programs, "aptitude is essential." *Id.* However, UT displays no particular concern about "diversity" in those programs, despite having concluded elsewhere that diversity is "necessary" for producing positive education outcomes for Texas' multicultural population. 631 F.3d at 231. If UT's stated mission to produce future leaders by means of manually-assembled classroom diversity is to be given deference, it is a fair question to ask why graduates from its most prestigious and selective programs are not subjected to the same mission. Similarly, there appears to be no concern about diversity in UT's athletic departments, from which leaders and role-models for underrepresented minorities as well as women on college campuses often find their first platform of influence. In short, UT's consideration of race in some contexts but not all undermines any appeal to deference for its conclusion that the challenged admissions programs is either "necessary" or "narrowly tailored" to achieve its stated goal and makes some students more equal than others.

III.

This Court applies the "strong basis in evidence" test to all racial classifications.

The "strong basis in evidence" test originated in Justice Powell's plurality opinion in *Wygant*. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009) (citing *Wygant*, 476 U.S. at 277). Thereafter, the standard was applied in *Croson* and *Ricci*. But, even where this Court did not explicitly require a strong basis in evidence in those cases, its review of race-conscious governmental action was no less searching. This Court's holdings in the context of government employment and contract awards – which, like public education, comprises a distinct field of governmental activity that is occupied by government but routinely delegated to industry "experts" – are fully applicable to governmental entities of higher education. A brief review of this Court's holdings from *Wygant* through *Ricci* will show how *Grutter* fits in – and how UT's program does not.

Initially, SLF notes that the Fifth Circuit's distinction of "backward looking" remedial programs from "forward looking" programs intended to increase diversity lacks support in this Court's jurisprudence. The linear orientation of a race-conscious program, remedial or diversity-based, makes no difference because all race-conscious programs are evaluated under strict scrutiny. 515 U.S. at 227. In addition, so-called "backward looking" remedial programs such as minority set-asides have forward looking effects because they govern future subcontractors' awards. In fact, they seek to correct and to avoid the sins of the past by contriving diversity in the future. Such programs were declared unconstitutional in *Croson* and *Adarand*.

In *Wygant*, this Court held that a layoff provision favoring minority teachers with less seniority over non-minority teachers with greater seniority violated the Equal Protection Clause. The school district claimed the program helped provide minority students with "role models." But the court found that the "role model theory" lacked a "logical stopping point" and therefore was not narrowly tailored. *Id.* at 275. The plurality went on to hold that the school district could not justify the program as a remedy for past discrimination without "a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 277.

Three years later, in *Croson*, this Court found that Richmond, Virginia's, minority set-aside plan requiring prime contractors on city projects to award thirty percent of their subcontracts to "minority business enterprises" violated the Equal Protection Clause. Because the program reserved thirty percent of each project's funding for subcontractors chosen by race, strict scrutiny was required. The Court explained, "[t]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool." 488 U.S. at 493. By engaging in a "searching judicial inquiry into the justification" offered by the City, the Court could distinguish between "benign" or "remedial" classifications and classifications "in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.*

Applying strict scrutiny, this Court in *Croson* rejected both the "factual predicate" offered to support the plan and the trial court's findings. The factual predicate failed because it was too "generalized" and lacked boundaries. *Id.* at 498. The trial court's findings failed to provide the necessary "strong basis in evidence" required to support race-conscious governmental action. This Court emphasized, "[r]acial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Id.* at 500 (emphasis added). The City's program was also overbroad in that it benefitted minorities with no history of discrimination in the Richmond market.

In 1995, three years after *Croson*, *Adarand* held: "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test. . . ." 515 U.S. at 237. This Court instructed the Tenth Circuit on remand to "address the question of narrow tailoring . . . by asking, for example, whether there was 'any consideration of the use of race-neutral means,'" and consider "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Id.* at 237-38 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

In *Gratz*, this Court concluded that UM's undergraduate admissions scheme unconstitutionally used race as a selection criterion in a way that was not narrowly tailored to its stated goal of promoting diversity. In order to be found constitutional, this Court explained, the program at issue had to undergo "a most searching examination" to establish a "most exact connection between justification and classification." 539 U.S. at 270. The *Gratz* program failed this test because of its inflexibility; 20 "points" on their admissions applications were automatically given to underrepresented minority applicants, with the only criterion for those points being a factual determination of "whether an individual is a member of one of these [underrepresented] minority groups." *Id.* at 270-71. The 20 point bonus was enough to guarantee that "virtually every qualified underrepresented minority applicant is admitted." *Id.* at 273.

In 2007, this Court held that the race-conscious public school student assignment plans of Seattle, Washington, and Jefferson County, Kentucky, were not narrowly tailored to serve a compelling interest and were, as a result, unconstitutional. *Parents Involved*, 551 U.S. 701. Neither plan was aimed at remedying the effects of past discrimination; rather, the districts wanted to use race to "balance" student populations at the high schools in Seattle and at elementary schools in Jefferson County, respectively – in other words, to manually create "diversity." This Court declined to expand *Grutter* beyond the unique law school context to elementary and secondary schools, and concluded that, "[i]n design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate," 551 U.S. at 726, since the plans were held to "work backward" to approximately reflect the racial demographics of the community. *Id.* at 729. Furthermore, this Court pre-figured the very premise challenged by Abigail Fisher when it stated: "[t]o the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end." *Id.* at 733.

The programs challenged in *Parents Involved* ultimately had a small effect. In Seattle, during the 2000-2001 year, only 52 students were assigned to a school they did not prefer and to which they would not otherwise have been assigned. In Jefferson County, the guidelines accounted for only about three percent of the assignments. *Id.* at 734. This Court observed, "[t]he minimal impact of the districts' racial classifications on student enrollment casts doubt on the necessity of using racial classifications." *Id.* at 735. Moreover, neither district showed that it had "considered methods other than explicit racial classifications to achieve their stated goals." *Id.*

Ricci v. DeStefano involved the application of Title VII of the Civil Rights Act of 1964 rather than the Equal Protection Clause, but, this Court explained, "[o]ur cases discussing constitutional principles can provide helpful guidance in this statutory context." *Ricci*, 129 S. Ct. at 2675. It went on to "adopt" the strong basis in evidence standard "as a matter of statutory construction," *id.*, demonstrating that all racial classifications by governmental entities are subjected to strict scrutiny, in whatever form, under whatever legal authority, and by whatever type of entity is creating the classifications.

Accordingly, any racial classification for whatever purpose should be required to satisfy strict scrutiny's requirements of "necessity" and "tailoring." The caliber of inquiry in each of the foregoing cases is the same: they all involved a searching judicial inquiry. The University and the Fifth Circuit are bound by those requirements as well.

As Judge Garza observed, the deference given to UM Law School in *Grutter* and to "public university administrators" generally is "unusual." *Fisher*, 631 F.3d at 259 (Garza, J., concurring specially). Indeed, in all other contexts, this Court's review of race-conscious actions has been anything but deferential. "[B]lind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501. The strong basis in evidence test, on the other hand, is an objective one. That trait alone elevates it above the non-standard of "deference" to transitory educational administrators and would-be social engineers.

IV.

Institutions of higher education are not immune from the obligation to show a strong basis in evidence.

The Fifth Circuit rejected the contention that it should apply the strong basis in evidence test in reviewing the constitutionality of UT's program. It dismissed reliance on cases like *Wygant*, *Croson*, and *Ricci*, which support application of strong basis in evidence review, as "backward-looking" and irrelevant to the kind of "holistic" consideration that was used in a supposedly "forward-looking effort to obtain the educational benefits of diversity." *Fisher*, 631 F.3d at 233. Instead, the court said, "*Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment." *Id.*

SLF disagrees with the suggestion that a university need not have a strong basis in evidence to support the consideration of race in an attempt to create or increase diversity. Rather than being treated as carte blanche for the universities, as the Fifth Circuit treated it, *Grutter* should be viewed within this Court's " . . . well-established framework for assessing equal protection challenges to express racial classifications. . . . " *Parents Involved*, 551 U.S. at 735. That framework requires strictest scrutiny, under which the government bears the burden of showing that its race-conscious action was "narrowly tailored" to serve a "compelling interest." *Adarand*, 515 U.S. at 227. Just because *Grutter* allowed for deferential treatment of the UM Law School's determination that a holistic consideration of race would further its mission of diversity does not establish that federal courts must affirm any declarations by education administrators that either their programs or their missions satisfy the rigors of strict scrutiny. Indeed, such an inherently judicial determination is emphatically the province and duty of the judiciary. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The thing which distinguishes *Grutter* is that it is the "only" instance in which this Court has deferred to the decisionmaker. *See* 551 U.S. at 765 (Thomas, J., concurring).

The well established framework appurtenant to strict scrutiny entails a rigorous review of the necessity and tailoring of race-conscious activities, even when universities undertake them. In several cases, *Wygant*, *Croson*, and *Ricci*, this Court looked for a strong basis in evidence. In *Adarand*, it called for "detailed examination, both as to ends and means." 515 U.S. at 236. In *Gratz*, it held that the use of race in a university's undergraduate admissions program was not narrowly tailored toward achieving the goal of racial diversity, and in *Parents Involved*, it did the same for elementary and secondary schools. Thus, both before and after *Grutter*, this Court has demanded that the need for and the scope of race-conscious programs be justified, even in the education context. Indeed, *Grutter* itself does not undercut the need for justification by a governmental entity seeking to impose race-conscious programs to achieve diversity, despite over-reaching conclusions to the contrary from UT and the Fifth Circuit.

In *Gratz*, this Court responded directly to suggestions first offered by Justice Ginsburg in dissent, to the effect that its decision would force universities that wanted to continue to use race-conscious selection schemes to resort to "winks, nods, and disguises." 539 U.S. at 305 (Ginsburg, J., dissenting). This Court found Justice Ginsburg's suggestions remarkable for two reasons:

> First, they suggest that universities . . . will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.

Id. at 275, n.22.

Subsequently, in *Parents Involved*, this Court linked *Grutter* to the rest of its jurisprudence regarding racial classifications in education, noting, "[t]he point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance. . . ." 551 U.S. at 723. Accordingly, this Court made it clear that its narrow tailoring analysis was the same in *Grutter* as it was in

Gratz and *Parents Involved*. In other words, there are limits to the deference that universities can expect.

◆

CONCLUSION

The University of Texas at Austin has not carried its burden under strict scrutiny to establish the strong basis in evidence required to sustain the constitutionality of its race-conscious efforts to increase diversity. The University's dissatisfaction with the results achieved through its Top 10% plan indicates that an underrepresented minority population of 21.4% at UT is by some measure too low for administrators. Yet, increasing that percentage through the use of race-conscious selection methods edges toward the racial balancing that was categorically condemned in *Parents Involved* and *Croson*.

The University's program fails strict scrutiny because its effect is neither traceable to the consideration of race nor significant. As Judge Garza observed, UT's "refus[al] to assign a weight to race or to maintain conclusive data on the degree to which race factors into admissions decisions and enrollment yields" makes it hard to say that the program has a measureable impact. *Fisher*, 631 F.3d at 259 (Garza, J., concurring specially). Even the Fifth Circuit majority could not tie the recorded increase in preferred minorities admitted at UT to its race-conscious program. "Because of the myriad programs instituted, it can be difficult to attribute increases in minority enrollment to any one initiative. In addition, demographics have shifted in Texas, so increases in minority enrollment likely in part reflect the increased presence of minorities statewide." *Id.* at 226.

In addition, UT's program fails strict scrutiny because it lacks a foreseeable logical stopping point.[9] The Fifth Circuit said that it would not approve the University's plan "in perpetuity," *Fisher*, 631 F.3d at 246, but no sunset date similar to Justice O'Connor's twenty-five-year expiration on holistic evaluation of law student diversity in *Grutter* was included in the court's opinion. With "deference" rather than a strong basis in evidence as the purported check on perpetual racial discrimination by governmental entities, educational institutions will have self-renewing license to redefine goals and revise the means used to achieve them – which essentially is license to discriminate against Abigail Fisher and others, based on their race, without scrutiny from this or any other federal court. SLF believes "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," 551 U.S. at 748, and the time to begin is now.

---

[9] Some government officials may prefer that no stopping point be imposed. U.S. Attorney General Eric Holder, when questioned about Abigail Fisher's predicament, wondered of race-conscious governmental action, not "when will it end?" but "at what point do we start the clock?" and posited that the need for diversity initiatives may not ever cease. Yasmin Gagne, *Holder Talks Financial Crime, Affirmative Action a Low*, http://www.columbiaspectator.com/2012/02/24/holder-talks-financial-crime-affirmative-action-low (last visited May 29, 2012).

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to reverse the decision below.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

AUG 1

In The
Supreme Court of the United States

◆

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

◆

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

◆

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QUESTION PRESENTED

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.

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INTEREST OF AMICUS CURIAE

The State of California submits this brief pursuant to Supreme Court Rule 37.4 as an amicus curiae in support of the respondents because of its unique position with respect to the issues at play here. California is not only the most populous state in the Union, but also one of the most diverse. According to 2010 U.S. Census data, California has the largest White, Latino and Asian populations in the country, as well as the most American Indians/Alaskan Natives and Native Hawaiians/Pacific Islanders.[1] It has the fifth largest Black/African American population.[2] California even has the largest population of those identifying as belonging to a race other than those mentioned above and to more than one race.[3] As such, California has a particularly compelling interest in ensuring that its public universities provide the educational benefits that derive from having a diverse student body.

In addition, in November 1996, the California electorate amended California's constitution to provide, in relevant part, that the "State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31, subd. (a), added by initiative, Gen. Elec. (Nov. 5, 1996), commonly known as Proposition 209. In the wake of Proposition 209, and without regard to this Court's important ruling in *Grutter v. Bollinger,* 539 U.S. 306 (2003), which is largely irrelevant in California, this State's public institutions of higher education have endeavored to achieve a suitable level of student body diversity without reliance on race-conscious admissions standards. They have not been successful in achieving a level of diversity that will adequately educate and prepare students for social and civic life following graduation.[4] If California, with the broad diversity in its population, cannot achieve a suitable level of diversity at its universities, other states, with more homogenous overall populations, will face even greater challenges.

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[1] 2012 Census, Table 18 (Resident Population by Hispanic Origin and State: 2010) and Table 19 (Resident Population by Race and State: 2010), available at http://www.census.gov/compendia/statab/cats/population.html.

[2] 2012 Census, Table 19 (Resident Population by Race and State: 2010), available at http://www.census.gov/compendia/statab/cats/population.html.

[3] *Id.*

California's decision to eschew race-conscious methodologies to achieve optimal student body diversity is, of course, a policy choice within the prerogative of California's voters. But California's policy choice should not be understood to reflect in any measure a diminishment of the strength of California's belief in the importance of student body diversity as an essential component of a comprehensive collegiate education.[5] Nor should it be understood to diminish California's belief that *federal* constitutional standards for evaluating race-conscious admission policies must allow state universities and colleges broad discretion to fashion suitable admission standards within the limits of the Fourteenth Amendment as described by this Court in *Grutter*.

---

[4] Amicus is informed that the President and Chancellors of the University of California plan to submit an amici curiae brief that will explore in detail the impacts of Proposition 209 on the enrollment of underrepresented students of color at the University of California.

Notwithstanding Proposition 209, California has a keen interest in ensuring that its future leaders are adequately prepared to function productively in an increasingly diverse and increasingly urban society.

Moreover, California seeks to ensure its future against balkanization and resegregation of communities. Student body diversity at the college and university level is a critical piece of this effort. Many students arrive at college having had limited exposure to different races and cultures, and with biases already imprinted upon them. Their college years provide the opportunity for them to interact "with different people from different places, cultures, races, religions, and socio-economic backgrounds" and to "learn the lessons that will shape their behavior for the rest of their lives." Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 Pepp. L. Rev. 663, 703 (2008) (footnote omitted). In the same vein, the educational experiences uniquely provided by a diverse student fellowship are critical to future civic participation and leadership. Today's college and university students are tomorrow's citizens and leaders. As a state facing complex and daunting fiscal, social, and environmental challenges, California is keen to ensure that its future leaders and citizens are up to the task.

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[5] Indeed, in a post-Proposition 209 effort to open California's public colleges and universities to underrepresented minorities, California has afforded non-citizen, undocumented students who attend a California high school for at least three years the ability to pay resident, rather than non-resident, tuition, to attend a California public institution of higher education. *See Martinez v. The Regents of the University of California*, 50 Cal.4th 1277 (2010), *cert. denied*, 131 S.Ct. 2961 (2011).

If the efforts of California's public institutions of higher education continue to be unsuccessful at achieving the needed diversity of their student bodies without resort to race-conscious admission methods, California's voters may choose to abandon the choices reflected in Proposition 209. If they do, California will need the flexibility and deference permitted by *Grutter.* For that reason, California endorses the views expressed by New York and its supporting States. California submits this separate brief as amicus curiae to clarify the importance of diversity to the State notwithstanding its self-imposed limit on the methodology for achieving diversity in its public institutions of higher education.

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SUMMARY OF ARGUMENT

In *Grutter,* this Court affirmed that public universities have a compelling interest in securing the educational benefits of a diverse student body, which interest can justify admissions policies that consider race as one of many factors taken into account in a holistic, individualized assessment of an applicant. In doing so, this Court correctly recognized that significant benefits for all students derive from having a diverse student body at public universities. Majority and minority students alike benefit from campus environments that more realistically reflect the pluralistic society in which they live and in which they will be expected to contribute socially and economically, and to assume positions of leadership.

In addition, meaningful diversity on university campuses benefits not only students, but society as a whole. *Grutter* acknowledged the overriding importance of preparing students for work and citizenship. A diverse student body better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals. Moreover, it has been shown that because of the "resegregation" of American society, many students enter college with limited precollege exposure to people of different races, cultures, and ethnicities. Interaction during college years with students of different races and cultures can help disrupt the cycle of resegregation and lead to more positive cross-racial interaction and understanding.

Providing underrepresented students of color access to full participation in the social and economic life of the community after graduation is equally important. This Court has noted that effective participation by members of all racial and ethnic groups in the Nation's civic life is essential if the dream of one Nation, indivisible, is to be realized.

The reasoning and conclusions of the Court in *Grutter* should be reaffirmed.

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ARGUMENT

DIVERSITY AT PUBLIC UNIVERSITIES, INCLUDING RACIAL DIVERSITY, ENHANCES THE EDUCATIONAL EXPERIENCE FOR STUDENTS AND PRODUCES GRADUATES BETTER PREPARED TO CONTRIBUTE TO A PLURALISTIC SOCIETY

Diversity encompasses the "broad understanding that all types of background experiences . . . bring different perspectives and added complexity" to human dynamics. Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum,* 29 Chicano-Latino L. Rev. 1, 3 (2010). Although the term "diversity" refers broadly to a number of social, political, and cultural factors, including "class, national origin, sexual orientation, geographic region, political affiliation, religion, ability/disability and age," race, like gender, has "a distinct, significant, and foundational role in shaping experiences in the U.S." *Id.* (footnote omitted).

To be sure, consideration of race in governmental decision-making has traditionally been prohibited because, in the vast majority of cases, race is irrelevant. But, as this Court has recognized, "[c]ontext matters"; not every decision influenced by race is equally objectionable. *Grutter*, 539 U.S at 327. In the context of higher education, the consideration of race, along with a whole host of other factors that differentiate students from one another, has proven to be indispensable in achieving the educational benefits of a diverse student body – an interest sufficiently compelling to justify the use of race in university admissions. *Id.* at 325. Diversity, including racial diversity, not only signals that the doors of public education are truly open to all, but also contributes to the educational experience of college students and better prepares graduates to function productively in an increasingly pluralistic society.

A. Diversity Benefits Students in the Classroom

The benefits of diversity are not merely theoretical, but real and substantial. *Grutter*, 539 U.S. at 330. The college-level classroom experience, intended as a laboratory within which students are challenged to think "outside of the box," both individually and collectively, is greatly enhanced by the presence of diverse cultures and life experiences. Numerous studies have confirmed this, at every level of a student's education. *See, e.g.*, Emily J. Shaw, *Researching the Educational Benefits of Diversity*, College Board Research

Report No. 2005-4, available at http://professionals.collegeboard.com/profdownload/pdf/051092RDCBReport05-4_050420.pdf (surveying social science studies regarding the educational benefits of diversity). At the university level, campus diversity promotes cross-racial understanding; breaks down racial stereotypes; fosters better understanding of different races; and leads to classroom discussions that are livelier, more spirited, more enlightening and more interesting. *Grutter*, 539 U.S. at 330; Goodman, *supra*, 35 Pepp. L. Rev. at 667-68. The "benefits of educational diversity . . . include well-developed critical thinking skills, cognitive development, and an ability to interact with other members of our increasingly diverse society." Deo et al., *supra,* 29 Chicano-Latino L. Rev. at 31 (footnote omitted). Indeed, students who interact with peers from diverse backgrounds show greater relative gains in critical and active thinking. *Id.*

These benefits are particularly relevant to development of critical thinking. Prof. Kevin R. Johnson, Dean of the law school at the University of California at Davis, comments: "[D]iversity and excellence are inextricably interrelated, mutually reinforcing, and well worth striving for by any . . . school worth its salt." Kevin R. Johnson, Symposium: *The Future of Legal Education: The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective,* 96 Iowa L. Rev. 1549, 1550 (2011). Dean Johnson continues: "[M]embers of different minority groups in the aggregate bring different life experiences, perspectives, and knowledge to bear on the analysis of the law and legal doctrine than their white counterparts." *Id.* at 1562; *see also*, Kevin R. Johnson, *Cry Me a River: The Limits of "A Systemic Analysis Of Affirmative Action In American Law Schools,"* 7 Afr.-Am. L. & Pol'y Rep. 1, 15-20 (2005) ("The impact of environment on students of color in law school, particularly the effects of unconscious racism on minority students' feelings of belonging and their actual performance, is well-documented.").

B. Diversity in the Classroom Benefits Society Later

Beyond the benefits to classroom learning itself, increased enrollment of underrepresented students of color better prepares students to enter a diverse society upon graduation and to contribute to social-cultural harmony. Deo et al., *supra,* 29 Chicano-Latino L. Rev. at 31; *see also* Rebecca K. Lee, *Implementing Grutter's Diversity Rationale: Diversity and Empathy in Leadership*, 19 Duke J. Gender L. & Pol'y 133, 141 (2011) (citing numerous amici curiae briefs in *Grutter* submitted by businesses and corporations extolling the importance of an appreciation of diversity in developing leadership); Goodman, *supra*, 35 Pepp. L. Rev. at 669 (quoting Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation and Disability into Law School Teaching*, 32 Willamette L. Rev. 541, 553-54 (1996)). This Court has acknowledged the overriding importance of preparing students for work and citizenship (*Grutter,* 539 U.S. at 331) and has recognized that a diverse student body better prepares students for an increasingly diverse workforce and society. *Id.* at 330. Employers and corporate and military leaders agree that in the modern workplace, experience with, and the ability to work effectively with, individuals from different backgrounds and cultures is an important proficiency. Lee, *supra,* 19 Duke J. Gender L. & Pol'y at 139-141. Analyzing the briefs of amici curiae filed in *Grutter,* Prof. Lee observed that:

> Workplace diversity is important because it contributes to a work environment that is less discriminatory and more effective as well as "inclusive, comfortable, and reflective of the multicultural communities in which [businesses do] business." Employers also can make better decisions and creatively problem-solve by drawing upon the diverse input from a diverse workforce, enabling businesses to more successfully compete in the marketplace. As the business amici emphasized, these abilities must be taught in order to properly prepare individuals for future leadership posts. As one amicus asserted, this training must be provided in institutions of higher education, before students fully join the workforce, because business employers cannot reproduce the protected environment of the school setting where differing perspectives can be shared freely. Nor can employers provide a non-hierarchical setting where learning can best take place among equally situated individuals.

Id. at 141-42 (footnotes omitted).

No less important to California, however, is the hope that the honing of critical-thinking skills with respect to the issue of diversity can contribute to a more sophisticated and nuanced interpretation of cultural differences and conflicts, which in turn may help to identify the root sources of racial, ethnic, and cultural conflicts. *See, e.g.*, Hemant Shah, *Press Coverage of Interethnic Conflict: Examples from the Los Angeles Riots of 1992,* 2007 J. Disp. Resol. 177 (2007); Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. Cal. L. Rev. 1581 (1993). The successful development of such critical-thinking skills, however, is improbable if culturally diverse voices are absent from the college classroom.

C. Diversity Benefits California by Countering the Effects of Resegregation

Manifestly, racial and ethnic diversity can facilitate increased cross-racial interactions. Such a contribution to a student's social development takes on added importance given that "more and more students come to college with few or no experiences with racially or ethnically diverse peers." Victor B. Saenz, *Breaking the Segregation Cycle: Examining Students' Precollege Racial Environments and College Diversity Experiences,* 34 Rev. Higher Educ. 1, 2 (2010). Most of the nation's largest cities "have predominantly minority school districts, with most of them surrounded by overwhelmingly White suburban school districts." *Id.* at 3 (citations omitted). African American students overwhelmingly attend predominantly minority schools and all students are "increasingly less likely to live in diverse communities or attend diverse schools, curtailing their opportunities for meaningful diversity experiences prior to college." *Id.* at 4.

A 2004 study of California's public high schools, based on 2000 data, illustrates that racial segregation is regrettably the reality for many high school students. Robert Teranishi et al., *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, Teachers College Record 106, No. 11 (2004). Teranishi's study found that, of California's 823 comprehensive public high schools, 373 schools had a majority of White students (comprising on average 71.2% of the students), 209 schools had a majority of Chicano/Latino students (comprising on average 70.6% of the students), and 11 schools had a majority of African American students (comprising on average 66.5% of the students). In total, 66% of White students in California in 2000 attended White majority schools and 56% of Latinos attended Latino majority schools. When combined, "Latinos and African Americans in Latino majority schools constituted an average of 95% of all enrolled students." *Id.* at 2230-32.

Research shows that "racial separation, especially in the adolescent years, could potentially foster negative effects, allowing stereotypes and myths about other racial and ethnic groups to flourish because students lack direct experiences that can contradict or challenge their misinformed opinions." Saenz, *supra*, 34 Rev. Higher Educ. at 5. Researchers at the University of North Dakota, where an overwhelming percentage of the students are White, also found that students "bring with them ideological predispositions and the baggage of political socialization by parents, peers, schools, and the media." Kathryn R.I. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale,* 54 J. Legal Educ. 316, 322 (2004). Students' "perceptions of people of color are circumscribed by their upbringing in racially homogeneous communities, and by their lack of exposure to diversity in the classroom." *Id.* at 327. Students who come from the most segregated of precollege environments (i.e., White students from predominantly White environments) are likely to benefit significantly from attending diverse institutions. Saenz, *supra,* 34 Rev. Higher Educ. at 31; *see also* Brandon Paradise, *Racially Transcendent Diversity*, 50 U. Louisville L. Rev. 415, 469-72 (2012) (reviewing studies that research the impact of racially mixed secondary schools on experiences of attending those schools). Students benefit from exposure to diverse classmates not only in the classroom experience, but also in the community after graduation.

It is essential to California's future success as a multicultural society that historic patterns of segregation not be perpetuated. Racially and ethnically diverse college settings and a student's college diversity experiences can "significantly mediate or interrupt these perpetuation effects" of increasingly segregated precollege environments. Saenz, *supra,* 34 Rev. Higher Educ. at 30-31.

D. Diversity Benefits California by Lending Greater Legitimacy to Social and Political Processes

Diversity in education also serves as a bridge linking citizens to their government, providing legitimacy to the Nation's leaders and our political processes. Goodman, *supra,* 35 Pepp. L. Rev. at 670. This diversity in institutions of higher education plays an important role in our democratic system. *See, e.g.*, Carla D. Pratt, *The Tenth Annual Frankel Lecture: Commentary: Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown,* 43 Hous. L. Rev. 55, 57 (2006).

In fact, this Court has recognized that diversity in educational institutions benefits society by fostering effective participation by members of all racial and ethnic groups "in the civic life of our Nation," which "is essential if the dream of one Nation, indivisible, is to be realized." *Grutter,* 539 U.S. at 332. The Court explained:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

Id.

Put another way, the "delegated trust" placed in our government and the legitimacy of "the project that is our democracy," is increased when "individuals from historically subordinated and marginalized groups have a meaningful opportunity to effectively participate in our democracy." Pratt, *supra,* 43 Hous. L. Rev. at 59. Pratt explains this benefit of diversity in the context of the legal profession, but the rationale is just as applicable to other areas of society:

> [T]he need for a diverse legal profession extends far beyond the desire to open the doors of individual success to people of color. . . . Because governance by the people and the dispersal of power are normative ideals underlying democracy, our democracy is enhanced by policies directed to achieve these ideals. A democratic rationale for affirmative action in legal education looks forward to creating diverse democratic leadership for the future. But it also looks back to a time when our democracy stood on the verge of collapse because we did not fully subscribe to the foundational democratic principles of freedom, inclusion, and equality. The civil unrest that erupted during the Civil Rights Movement is indicative of what can happen when a nation that proudly professes to be built upon democratic ideals fails to extend the rights and privileges of democracy to everyone equally.

Id. at 62 (footnotes omitted).

It is also important that California's broad and rich diversity is reflected in its appointed and elected leaders. For example, California's Chief Justice, The Honorable Tani Cantil-Sakauye is Asian-Filipina American. California's Attorney General, Kamala D. Harris, is African American/Asian. In addition to the Chief Justice, three Associate Justices on California's Supreme Court, Justices Kennard, Chin, and Liu, are Asian American. Recently retired Associate Justice Carlos Moreno is Mexican American, and former Associate Justice Janice Rogers Brown, now a judge of the United States Court of Appeals for the District of Columbia Circuit, is African American. Manifestly, maintenance of this sort of representation in state government can only be achieved by efforts to ensure diversity in undergraduate and law school classes.[6] States that see a need to use race as one part of a holistic scheme to achieve such diversity should be permitted to do so.

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[6] As indicated earlier, California has chosen to eschew use of race-conscious admission standards in its public law schools. Efforts by the California's public universities and colleges to achieve a suitably diverse student body are supplemented by private universities which are not limited by Proposition 209. For example, Associate Justice Kennard graduated from the University of Southern California School of Law; Justice Chin, from the University of San Francisco School of Law; Justice Liu from Yale Law School; and former Justice Moreno, from Stanford Law School.

CONCLUSION

The State of California respectfully urges this Court to reaffirm that public institutions of higher education have a compelling interest in providing the educational benefits that derive from having a diverse student body, and that such interest can justify the use of race-conscious standards as part of a holistic admissions scheme.

Dated: August 13, 2012

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No. 11-345

IN THE
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for the Fifth Circuit**

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IN THE

Supreme Court of the United States

No. 11-345

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* TEACH FOR AMERICA, INC. IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

Amicus Teach For America, Inc., is a national corps of top college graduates and professionals who commit to teach for two years in urban and rural public schools and become lifelong leaders in the effort to expand educational opportunity. Its network includes more than 10,000 corps members teaching in 46 regions across the country and nearly 28,000 alumni working in education and other sectors to create the systemic changes that will help end educational inequity. Its alumni have proved to be an important source of leadership for improving education, with many winning the highest recognitions teachers can win, more than 700 serving as urban and rural school principals, others leading whole school systems and state departments of education, and still others leading policy reforms and pioneering new approaches for meeting the needs of low-income children.

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[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amicus* or its counsel made a monetary contribution to the brief. All parties filed blanket *amicus* consent letters.

Teach For America has an interest in the maintenance of a national higher education system that produces talented, diverse graduates. If colleges and universities are no longer permitted to consider applicants' race as part of a holistic admissions process to attain diversity, they will enroll, and graduate, fewer minority students. Such a development would impede Teach For America's efforts to address the crisis in K-12 education by recruiting and training a diverse and talented corps of teachers and education leaders.

SUMMARY OF ARGUMENT

The racial achievement gap in K-12 education creates lifelong disadvantages for many minority students and impairs the nation's economic progress and national security. A racially diverse corps of talented teachers and education leaders is vitally needed to help close that gap, but the leadership pipeline will remain diverse only if colleges and universities can continue to enroll diverse student bodies. Reversing progress toward a diverse leadership pipeline would have exactly the wrong effect: it would perpetuate the cycle of racial inequity and merely extend the need for race-consciousness in higher education admissions.

ARGUMENT

AMERICAN K-12 EDUCATION DEPENDS ON COLLEGES TO PRODUCE A CADRE OF DIVERSE LEADERS.

A. Persistent Racial Inequity In K-12 Education Devastates Minority Communities And Obstructs National Progress.

Every day, Teach For America teachers witness the pervasive racial inequities that plague our K-12 education system. The color of a child's skin and where she is born too often predict whether she will receive the kind of education that will give her access to the same opportunities in life as her more privileged peers. The gap starts early and widens over time. In 2011, 84 percent of African American and 82 percent of Latino fourth graders were reading below grade level, compared to 58 percent of white fourth graders. Compared to white students, African Americans are nearly twice as likely, and Latino students more than three times as likely, to drop out of high school. Yet we have also seen that students of color can excel academically and perform at the same level as white students when they have equal access to a quality K-12 education.

The wide disparities in K-12 education have devastating effects for millions of students, their communities, and the nation. Inequalities in K-12 education affect minority students for the rest of their lives. High school dropouts, for example, have three times the unemployment rate of college graduates. And young male high school dropouts are 47 times more likely than college graduates to be incarcerated.

Students are not the only victims of the persistent inequality in K-12 education. Research shows that racial inequality in primary and secondary education undermines the nation's economic prosperity and its national security. The achievement gap costs the United States hundreds of billions of dollars a year, contributing to the "economic equivalent of a permanent national recession." McKinsey & Co., *The Economic Impact of the Achievement Gap in America's Schools* 6 (Apr. 2009). Similarly, a task force led by former New York City Schools Chancellor Joel Klein and former Secretary of State Condoleezza Rice concluded that the failure to adequately educate our students jeopardizes national security. As the report warned, "Educational failure puts the United States' future economic prosperity, global position, and physical safety at risk." Council on Foreign Relations, *U.S. Education Reform & National Security* 4 (2012).

We cannot fulfill our potential as a democracy if generations of children in historically disenfranchised communities do not acquire in school the basic knowledge and critical thinking skills needed to engage fully as workforce participants and citizens. With each passing year that racial inequality in education persists, we pay a massive price—in moral, civic, and economic terms.

B. A Pipeline Of Diverse Leaders Is Needed To Break The Cycle Of Racial Disadvantage.

To close the achievement gap in K-12 education and break the stubborn cycle of racial disadvantage, we need the most effective corps of teachers and education leaders the nation can muster. History and research show that students from all backgrounds are best served when their classrooms and schools are led by a diverse staff of teachers and principals. Yet without a diverse pipeline of graduates from the nation's leading colleges and universities, our schools will struggle to recruit the heterogeneous cadre of leaders they badly need.

The past century has shown that public education serves students best when the teaching corps is not homogeneous. Diverse teachers have a powerful impact on student achievement. For example, research demonstrates that students benefit greatly from interaction with role models from backgrounds similar to their own, as well as learning from teachers from different backgrounds. *See* Nat'l Collaborative on Diversity in the Teaching Force, *Assessment of Diversity in America's Teaching Force* 6 (Oct. 2004).

A diverse cohort of teachers and education leaders inspires trust across a broad swath of communities, in a way that homogenous leadership cannot. As this Court said in *Grutter v. Bollinger*, 539 U.S. 306 (2003): "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." Our experience in classrooms and communities across the country confirms that view.

Recruiting a corps of education leaders from a variety of racial and ethnic backgrounds is a continuing challenge for the country. More diversity in the teaching profession, which is an important foundation for other positions in education leadership, is badly needed. Only 7 percent of public school teachers are African American and 7 percent are Latino, whereas 15 percent of public school students are African American and 23 percent are Latino. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics* 117 (June 2012). Yet Teach For America's experience in K-12 education highlights both the possibility of achieving a diverse teaching and leadership corps and the importance of diversity in higher education to that critical mission.

Our teachers and alumni are a significant and growing part of the new talent pipeline that is driving positive change in American public education. In 2012, for example, 5,800 recent college graduates joined Teach For America. In total, 10,000 first- and second-year corps members will reach 750,000 low-income students in 46 communities this school year.

Our most recent corps is one of the most diverse in Teach For America's history: 35 percent come from low-income backgrounds, 23 percent are the first in their family to earn a college degree, and 38 percent identify as people of color, including 13 percent African American and 9 percent Latino. These and our other corps members will, if history is an indicator, contribute immeasurably to the communities they serve.

We would not be able to recruit and develop such a diverse group of corps members and alumni if the nation's leading colleges and universities became less diverse. The talent pipeline from which we recruit is inextricably linked to the diversity of the cohort of college graduates.

Even today, the disproportionately low representation of minority students at top universities presents a challenge. At the 340 most selective public and private universities, only 5 percent of graduates are African American and 6 percent are Latino. If leading colleges and universities graduate fewer minority students, the ranks of teachers and education leaders from minority backgrounds will diminish. Such a rolling back of the number of highly talented teachers and education leaders would be a devastating blow to our efforts to address the stark inequities that afflict K-12 education.

Race-conscious admissions policies play an important role in creating and sustaining a pipeline of talented, diverse future leaders. Teach For America has seen again and again that children who overcome the extra challenges of race discrimination and poverty can become powerful classroom and community leaders—if they receive a college education. A person of color who has overcome such obstacles not only brings new experiences and perspectives to her college peers, she also can apply her experience in important ways after college. These benefits can't be measured under a purely academic achievement rubric. The consideration of race as part of a holistic admissions process thus helps colleges assemble a diverse student body comprised of individuals who are likely to succeed in college and thrive in life.

In *Grutter*, the Court expressed its expectation that affirmative action in higher education would one day become unnecessary: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

539 U.S. at 343. Teach For America and many other organizations and committed leaders are working hard to achieve that goal by ending inequality in lower education. But if the pipeline of new teachers and education leaders the nation's leading colleges and universities graduate becomes racially and ethnically less diverse, our efforts will be greatly impeded, and racial disparities in lower education will persist longer. Colleges must be allowed to use race-conscious means to pursue student diversity in higher education. The ability to marshal the best teaching and leadership corps for K-12 education, and to fulfill the hope that one day race need no longer play a role in college admissions, depend on it.

Petitioner's argument in this case threatens the successes achieved by Teach For America and similar path-breaking organizations. Were higher education institutions precluded from pursuing diversity by considering race in admissions, the pipeline of graduates prepared to help lift disadvantaged students out of the cycle of inequality will surely dwindle, to the detriment of the nation. The Court should reject Petitioner's argument and reaffirm the constitutionality of narrowly tailored race-conscious admissions policies in higher education.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

August 13, 2012

Respectfully submitted,

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for the Fifth Circuit**

BRIEF OF ABIGAIL THERNSTROM, STEPHAN THERNSTROM, ALTHEA K. NAGAI, AND RUSSELL NIELI AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Abigail Thernstrom,[2] Stephan Thernstrom,[3] Althea K. Nagai,[4] and Russell Nieli,[5] political and social scientists who have conducted research and written widely in the fields of race, education, school desegregation, and related civil rights issues.

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[1] This *amicus* brief is filed with the consent of the parties. Counsel for the Petitioners and Respondents have granted blanket consent for the filing of *amicus* briefs in this case, in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to these cases or their counsel authored this brief in whole or in part, and that no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

[2] Abigail Thernstrom is Adjunct Scholar at the American Enterprise Institute and the Vice-Chair of the United States Commission on Civil Rights. With her husband Stephan, she is the author of *America in Black and White: One Nation, Indivisible* and of *No Excuses: Closing the Racial Gap in Learning*, and editor of *Beyond the Color Line: New Perspectives on Race and Ethnicity in America*. Dr. Thernstrom is currently working on another joint volume on the concept of de facto segregation, particularly in K-12 education and in housing. Her other books include the prize-winning *Whose Votes Count? Affirmative Action and Minority Voting Rights* and *Voting Rights – and Wrongs: The Elusive Quest for Racially Fair Elections*. Dr. Thernstrom was a member of the Massachusetts State Board of Education from 1995-2006. In 2007, the Thernstroms were the recipients of a prestigious Bradley Foundation prize for Outstanding Intellectual Achievement.

[3] Stephan Thernstrom is Winthrop Research Professor of History at Harvard University. In recent years he has worked collaboratively with his wife Abigail on the volumes mentioned above. His other books include the *Harvard Encyclopedia of American Ethnic Groups; A History of the American People; Poverty and Progress: Social Mobility in a 19th-Century City*; and *The Other Bostonians: Poverty and Progress in the American Metropolis, 1880-1970*, which won the Bancroft Prize in American History. In 2007, the Thernstroms were the recipients of a prestigious Bradley Foundation prize for Outstanding Intellectual Achievement.

In this brief, *amici curiae* present a critical examination of the social science research relevant to the Court's evaluation of whether the University of Texas at Austin's use of race in making admissions decisions passes the strict scrutiny analysis required when government actors engage in race-based decision making.[6] The *amici curiae* question the proposi-

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[4] Althea K. Nagai is a political scientist and an independent statistical consultant in the D.C. area, specializing in statistics and social policy. She has done extensive statistical work on institutions of higher education and racial/ethnic preferences. A former Fulbright scholar, Nagai has also done work on East Asian politics, intellectual history and culture, as well as research and teaching on Asian Americans. Nagai has a Ph.D in political science from the University of Chicago and a B.A. from the University of Hawaii.

[5] Russell Nieli has written extensively on the issue of racial preferences in higher education and is the author of the forthcoming book, *Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide*, which will be published this summer. With Carol Swain, he co-authored *A Common Destiny*, a study of race relations in Bermuda, and *Contemporary Voices of White Nationalism in America*, a study of the increasing appeal of white racial fringe groups in America. For many years he has been a lecturer in Princeton University's Politics Department.

[6] In *Grutter v. Bollinger*, the Court relied upon social science and other evidence of the benefits of diversity presented by *amici curiae*. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing to briefs submitted by the American Educational Research Association *et al.*; 3M *et al.*; General Motors Corp.; Julius W. Becton, Jr., *et al.*). The Court also cited studies that were not introduced into evidence at trial. *See id.* at 330 ("In addition to the expert studies and reports entered into evidence

tion that racial diversity, when achieved through differential admission standards, is a sufficiently "compelling state interest" to justify racial discrimination in college and university admissions.

SUMMARY OF THE ARGUMENT

Although this Court held in *Grutter* that diversity in higher education is a compelling state interest sufficient to justify consideration of race in higher education admissions, 539 U.S. at 330, that holding can and should be revisited in light of the demonstrated negative impact of race-conscious admissions on minority students and on race relations within institutions of higher education as a whole. In fact, should the Court revisit the question of whether racial diversity justifies racial discrimination, its decision would simply place *Grutter* in its proper historical place, given that the Court has ultimately revisited nearly every decision it has issued justifying race-based decision making by government actors. *See, e.g.*, *Brown v. Board of Education of Topeka*, 347 U.S. 483, 494-95 (1954) (overruling the "separate but equal" doctrine and overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995) (holding that strict scrutiny is the proper standard of analysis of all racial classifications and overturning *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)).

The Court in *Grutter* found that diversity constituted a compelling state interest primarily because of certain purported benefits of diversity, such as

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at trial, numerous studies show that student body diversity promotes learning out-comes, and better prepares students for an increasingly diverse workplace and society, and better prepares them as professionals.") (internal citations omitted).

promotion of cross-racial understanding, breaking down racial stereotypes, enabling students to better understand persons of different races, and enhancement of classroom discussion. 539 U.S. at 330. In reality, however, research on race and diversity in the educational context indicates that diversity as generated by race-based admissions simply does not lead to those purported benefits. Quite the contrary, the evidence suggests that use of race-based admissions actually undermines race relations on college and university campuses by heightening stereotypes and creating greater separation and self-segregation between racial groups. In addition, the evidence indicates that race-based admissions negatively impact black and Latino students by increasing students' self-doubts about their abilities to succeed academically, by promoting the creation of social groups that encourage black and Latino students to put in minimal effort academically, and by creating disincentives for minority students to work hard due to students' expectations that they will receive favorable treatment on the basis of race in the future.

In *Brown v. Board of Education*, this Court recognized that the concept of "separate but equal" was not only constitutionally suspect but resulted in real harm to black students. 347 U.S. at 494-95. Similarly, it is now time for the Court to recognize that the many purported "benefits" of race-based admissions in higher education upon which this Court relied for its decision in *Grutter* have not materialized that race-based admissions policies are in fact harmful to race relations among students and are particularly harmful to the very black and Latino students whom such policies are intended to benefit most, and that research has shown that black and Latino students do not catch up with their peers who attended better schools before college as a result of affirmative action admissions but actually underperform relative to their own past grades and test scores. As such, the Court should reverse *Grutter* and hold that diversity in higher education is not a compelling state interest sufficient to justify racial discrimination in the admissions process.

ARGUMENT

I. The primary justifications for the use of race-based preferences in higher education admissions that the Court relied on in *Grutter* are flawed and fail to support the notion that there is a compelling state interest in diversity in higher education.

Proponents of race-based admissions use two primary arguments to support the claim that diversity in higher education is a compelling state interest: (1) that racial preferences in admissions increase diversity thereby enhancing the educational experience of students, an argument that is commonly known as the "diversity-enhancement rationale," and (2) that race relations among students improve as a result of increased diversity by virtue of the fact that students come into greater contact with students of other races. The Court in *Grutter* relied on these justifications in finding a compelling state interest in diversity in higher education. 539 U.S. at 330. These justifications are fundamentally flawed, however, and are therefore insufficient to support a finding of a compelling state interest. The first of these justifications is flawed because it ignores the zero-sum nature of university admissions whereby the diversity gains of one school are necessarily the diversity losses of another. The second justification is similarly flawed because researchers have disproven the theory that mere contact with individuals of other races enhances the educational experience for all students. Thus, the primary rationales upon which the Court relied in *Grutter* fail to support a finding of a compelling state interest sufficient to justify the use of race as a factor in admissions.

a. The diversity-enhancement rationale for granting racial preferences in admissions is fundamentally flawed because it ignores the zero-sum nature of university admissions as a whole.

Proponents of racial preferences in university admissions frequently argue that affirmative action increases diversity at institutions of higher learning, which, they argue, enhances the educational experience. This justification for the use of racial preferences in admissions is commonly known as the "diversity-enhancement rationale." The Court in *Grutter* relied on the diversity-enhancement rationale to support its decision to affirm the use of racial preferences in admissions at the University of Michigan. 539 U.S. at 330. The diversity-enhancement rationale is fundamentally misleading and ultimately unpersuasive as a justification for the use of racial preferences in admissions, however, because it ignores the zero-sum nature of the student admissions process.

In the United States, virtually all individuals with a high school diploma or GED who wish to do so have the ability to gain admission to an institution of higher education after high school. *See* Stephan Thernstrom and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 389-91 (Harvard University Press 1997) [hereinafter *Amer-*

ica in Black and White]. The question is thus not *whether* an applicant can gain acceptance to a college but into *which* college that applicant will be accepted and enroll. As such, every student who matriculates to one university will necessarily decline to matriculate to all other universities. Moreover, the college-eligible population of minority students is a fixed population. This construct shows why the diversity-enhancement rationale breaks down.

By offering preferential admission to black and Latino students, elite educational institutions engage in what has become known as the "upward-ratcheting" of students. That is to say, many black and Latino students are given admissions preferences that allow them to attend colleges and universities that are one, two, or three levels of selectivity above the competitive level at which they would likely have been admitted in the absence of such preferential admissions treatment. *See generally* Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. Tol. L. Rev. 377, 395 (1970) (discussing the "pervasive shifting effect" caused by race-based admissions preferences). Thus, Tier-1 schools enroll many students who, in the absence of racial preferences, would have enrolled in Tier-2 schools; Tier-2 schools enroll students who would otherwise have enrolled in Tier-3 schools; and Tier-3 schools engage in the same process vis-à-vis the institutions immediately below them on the selectivity scale. This upward-ratcheting continues down the ladder of selectivity.

Due to upward-ratcheting, increased racial diversity at more elite institutions is purchased at the cost of decreased racial diversity at less elite institutions. *See* Stephan Thernstrom and Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. Rev. 1583, 1625-28 (1999) [hereinafter *Reflections*]. As such, the diversity-enhancement rationale fails as a justification for the use of race-based preferences in admissions because such admissions practices do nothing to increase overall diversity in higher education but merely result in some institutions becoming more racially diverse while other institutions become less diverse. If the Court were to ignore this fact, it would in effect be ruling that increasing artificially manufactured diversity at a very small number of elite academic institutions is so compelling an interest, so essential to the public good, that it outweighs the costs of decreasing naturally occurring diversity at all other institutions and that it outweighs the many, well-documented societal harms that result from government approved, nationwide racial discrimination.[7]

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[7] As discussed fully below, research has clearly shown that the purported benefits of diversity on college and university campuses have not in fact materialized. Indeed, race-based admissions cause a host of harms to minority and non-minority students alike. Moreover, even if there was empirical evidence that the mere fact of increased racial diversity enhanced the educational experience and decreased racial separation among students, one could certainly question whether students at the country's most elite academic institutions are really the most appropriate targets for initiatives aimed at improving race relations. The students at elite institutions are among the most intelligent, highly educated, and globally diverse of any student populations. As such, they are already among the least likely students to internalize racial stereotypes or accept racial intolerance—at least in the absence of the negative impact on race relations created by affirmative action admissions policies—which further undermines the argument that exposing such students to a few more black or Latino students is sufficiently compelling to justify the harms created by racial discrimination in admissions throughout the entire higher education system. Indeed, it is arguably of greater importance to maintain a larger

See generally Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 435-36 (2005) (summarizing the many harms of government approved racial discrimination). Even assuming for the sake of argument that diversity benefited college and university students of all races, which the research discussed below clearly indicates it does not, the costs of the bargain that the Court would strike by reaffirming the use of race-based admissions are simply too great to be justifiable.

b. The mere fact that racial diversity increases contact between students of different races does not improve race relations among students.

Much of the support for racial preferences in higher education admissions stems from the theory that a more racially diverse college or university campus will increase the probability of cross-racial interactions, which in turn is likely to lead to greater tolerance and understanding between people of different racial groups. This theory assumes that ignorance, prejudice, and the negative stereotyping of other racial groups are the result of social isolation and the lack of person-to-person contact between people of different races and ethnicities. The hypothesis is thus that simple contact between people of different races and ethnicities helps to further "cross racial understandings," breaks down "racial stereotypes," and enables people "to better understand persons of

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degree of naturally occurring diversity at less selective academic institutions, where students may be more susceptible to acceptance of racial stereotypes or racial intolerance as compared to their peers at more elite institutions.

different races." 539 U.S. at 330. But this "contact hypothesis" has been discredited by more than half a century of research and is no longer accepted by any reputable social scientist. Only under very specific conditions, ones which are unlikely to be met when racial preferences are used, does mere contact with diverse people have the positive effects attributed to it of breaking down stigmas and stereotypes while furthering intergroup harmony and understanding. Therefore, although everyone can agree that improving race relations in our country is a desirable goal, the research suggests that the increased contact between races created by the use of race-based preferences in admissions is simply not an effective way to achieve that goal. Instead, organically occurring racial diversity that comports with core American values such as merit-selection is a far better means of breaking down racial barriers.

Whether in the former Yugoslavia or Central Africa, in Hapsburg, Vienna or modern Lebanon, in Sri Lanka or the Far East, contact between people of different racial and ethnic groups is more likely than not to lead to tension, ethnic conflict, and a tendency to self-segregate and harbor deep suspicions of outsider groups than it is to further intergroup cooperation and trust. Human beings are tribal, as observers often say, and simply bringing people who identify with different groups together in the same location can lead to tension and conflict at least as often as to harmony and mutual respect. *See generally* Thomas Sowell, *Preferential Policies: An International Perspective* (William Morrow 1990).

Even in the United States, where ethnic relations have rarely led to the kinds of strife so common in much of the rest of the world, current research indicates that the more ethnically diverse a community is, the more people distrust one another and the more difficulties they have in coming together to engage in mutually beneficial civic undertakings. Harvard political scientist Robert Putnam is the author of an important study of "social trust" among Americans—called the Community Benchmark Survey—that looked at approximately 30,000 residents in 41 different communities across the United States. Robert Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, Scandinavian Political Studies, vol. 30, 2007, at 144. The communities ranged from large urban centers with a population of a million or more to much smaller cities, suburban areas, and rural towns. Four whole states—Delaware, Indiana, Montana, and New Hampshire—were also among the 41 communities included in the study. *Id.*

What Putnam found certainly contradicted the more naive forms of contact theory. The degrees to which blacks, whites, Asians, and Latinos in the study said they trusted members of the three ethno-racial groups to which they did not belong varied, but were inversely related to the ethno-racial diversity of a given community. *Id.* at 147-49. That is, the more racially and ethnically diverse a community was, the more people distrusted members of the groups different from their own. Putnam interpreted this to mean that the less contact people have with members of other ethno-racial groups, the more likely they are to trust them. The more contact they have with other groups, however, the more suspicious they are of them. In fact, it was the increased contact of living in the same community that helped to *further* distrust between racial groups. According to Putnam, "[i]nter-racial trust is relatively high in homogeneous South Dakota and relatively low in heterogeneous San Francisco or Los Angeles." *Id.* at 147. Thus, "[t]he more ethnically diverse the people we live around the less we trust them." *Id.*

Those who told researchers that they trusted members of other races "a lot" were much more common in places like Lewiston, Maine, Bismarck, New Hampshire, and the state of Montana, where whites constitute the great majority of the population—and non-whites are not frequently encountered in most community settings—than in places like East Bay, California, North Minneapolis, San Francisco, California, or Los Angeles, California, where the populations are much more racially and ethnically intertwined. *Id.* at 142-43. This finding, fundamentally, is inconsistent with simple contact theory. The study was all the more remarkable in light of the fact that lower levels of interracial trust were often expressed by people living in some of the more politically liberal areas of the country where norms of political correctness and socially-acceptable response patterns might be expected to dampen substantially the level of ethnic distrust to which respondents (especially whites) would freely admit. The social pressures to affirm publically one's trust in members of other racial and ethnic groups is almost certainly greater in places like San Francisco and Los Angeles than in places like Montana or rural South Dakota, suggesting that the real trust-gap is even greater than that indicated in the Community Benchmark Survey data.

Having surveyed much of the literature from around the globe on these issues, Putnam was not entirely surprised by these findings. *Id.* at 142-43. They were consistent with many other studies, using many different methodologies, carried out in many different places around the world. *Id.* These studies show that people of different racial and ethnic groups have a harder time getting along with one another—and trusting one another—than do people of the same race or same ethnic group. *Id.* The more numerous the members of the outsider group present, and the more contact people have with them, the greater the level of inter-group distrust. *Id.* at 145-49.

Besides the trust question, respondents in Putnam's study were asked a battery of other questions designed to assess the relationship between ethnic diversity and various correlates of social capital such as participation in community projects, registering to vote, doing volunteer work, etc. *Id.* at 147-51. As with the trust question, these other measures of social cooperation and community engagement were found to negatively correlate with ethnic heterogeneity—that is to say that the greater the ethnic heterogeneity, the less social cooperation was present. *Id.* at 149. In racially and ethnically diverse communities, there is a decline in social solidarity, community activities, and general neighborliness as people tend to withdraw into themselves and become more isolated and alienated from others nearby. In Putnam's words, people under such circumstances "hunker down" and "pull in like a turtle." *Id.* Although Putnam believes that in the long run racial and ethnic diversity can have beneficial effects, his study shows that in the short run its effects are overwhelmingly negative. *Id.* at 164. Social isolation, alienation, and anomie are its immediate results. *Id.* at 147-51. "Diversity," he says, "at least in the short run, seems to bring out the turtle in all of us." *Id.* at 151.

The contact hypothesis gained some credibility in the immediate post-WWII era because of certain high-profile success stories in a number of areas of American life where contact clearly did forge cross-racial bonds of cooperation and trust. Perhaps the greatest success along these lines was the racial integration of baseball and, following baseball, basketball, football, and other professional sports. Despite initial resistance, when Jackie Robinson broke the color barrier in professional baseball in 1947, his white teammates and white fans came to accept him for the outstanding athlete he was, helping to dispel the prejudices of countless white New Yorkers.

Robinson's case—and the integration of professional sports more generally—showed that the contact hypothesis was sometimes quite valid. Under certain circumstances, contact clearly can reduce prejudice and further cooperation and understanding between members of different racial and ethnic groups. Beginning in the 1950s, social scientists began to tease out the factors that distinguished prejudice-reducing contact from contact which did not have this effect. Harvard psychologist Gordon Allport's influential book, *The Nature of Prejudice*, was the first systematic attempt along these lines. *See generally* Gordon Allport, *The Nature of Prejudice* (Addison-Wesley 1979). Allport was most concerned with black/white cooperation, and he realized that simple contact did not dispel prejudice. No group of whites in America, he realized, had more daily contact with blacks than those in places like Mississippi, Alabama, and other areas of the Deep South, yet none held stronger prejudices against blacks. *Id.* at 273-76. One of the key ingredients to prejudice-dispelling contact, Allport came to realize, was what he called "equality of status." *Id.* at 273.

Whites knew blacks in the Deep South primarily as uneducated maids, janitors, field hands, and prison-release laborers but generally knew few blacks of higher status. "The jobs that most Negroes and members of certain other minority groups hold are at or near the bottom of the occupational ladder," Allport wrote. *Id.* at 273-76. "They carry with them poor pay and low status. Negroes are usually servants, not masters; doormen, not executives; laborers, not foremen." *Id.* at 273. Allport went on to explain that "evidence is now accumulating that this differential status in occupation is an active factor in creating and maintaining prejudice." *Id.* "[O]ccupational contacts with Negroes of equal status," he said, "tend to make for lessened prejudice. It helps also if one knows Negroes of higher occupational status than one's own." *Id.* at 276. Allport also suggested that the pursuit of common goals requiring intergroup cooperation, coupled with the outside support of custom, authorities, and reigning social values, could be important factors in enabling contact situations to reduce intergroup prejudice. *Id.*

Since Allport's pioneering work, researchers have isolated other prejudice-reducing factors. Social psychologists today generally agree that most of the following six factors must be present for contact to have a strong positive effect in reducing negative stereotyping and furthering greater harmony among diverse ethno-racial groups: (1) equality of status between those making the contact; (2) the opportunity to encounter sufficient numbers of people who counter the negative stereotype one group may hold of the other; (3) a non-competitive environment in which one ethnic group's gain is not seen to be at the expense of another group's loss; (4) the challenge of a common goal or common task that requires some collective or cooperative effort to achieve; (5) the lack of artificiality to the interaction; and (6) the support of wider community norms and of those in authority. *See* Miles Hewstone and Rupert Brown, eds., *Contact and Conflict in Intergroup Encounters* (Basil Blackwell 1986); Thomas Pettigrew, *Intergroup Contact Theory*, Annual Review of Psychology, vol. 49, 1998, at 65-85; John Dovidio, Samuel Gaertner, and Kerry Kawakami, *Intergroup Contact: The Past, Present, and Future*, Group Processes and Intergroup Relations, vol. 6, 2003, at 5-21. Subsequent research has thus shown that cross-racial interactions do have the ability to break down racial barriers, but only when they occur in ways that satisfy these factors.

Given this list, it is easy to see why contact with a high-performing black infielder like Jackie Robinson might greatly enhance prejudice-reduction among his white teammates and fans. All six factors were present when Dodger owner Branch Rickey tapped Robinson to play for Brooklyn. It is equally easy to see why the upward-ratcheting of under-qualified black or Latino students into competitive colleges and universities in contravention of the widely shared norm of academic merit might not have such prejudice-reducing effects. Almost none of the listed prerequisites and facilitators are present in the context of race-preferences for higher education admissions.

As discussed more fully below, researchers in major studies of race on college and university campuses have found that white and Asian students report a significant "social distance" regarding black and Latino "beneficiaries of affirmative action." Douglas S. Massey, Camille Z. Charles, Garvey F. Lundy, & Mary J. Fischer, *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges* *and Universities* 138-45 (Princeton University Press 2006) [hereinafter *The Source of the River*]. In his many years of teaching at the University of California, Berkeley, John McWhorter similarly saw the black/white and black/Asian difference in entering academic credentials brought on by affirmative action as a major impediment to successful racial integration. *See* John McWhorter, *Losing the Race: Self-Sabotage in Black America* 89, 229-30, 236 (The Free Press 2000) [hereinafter *Losing the Race*]. Blacks tended to self-segregate, McWhorter observed, in part because they felt that whites and Asians might be looking down on them because of their inferior academic accomplishments. *Id.* In Allport's terminology, the black affirmative action students lacked an equivalent "social status" to many whites and Asians on competitive college campuses where social status is often measured by academic achievement and brain power.

Besides its violation of the principle of "status equality," the use of racial preferences in college admissions also violates two other principles of prejudice reduction, namely, respect for widespread community norms and avoidance of group-against-group competitive antagonisms. The widespread community norm in this case, of course, is the principle of merit-selection, a principle with considerable resonance across the American demographic spectrum. And the principle of avoiding group-against-group antagonisms is surely breached in the very process of allocating burdens and benefits according to ethnic and racial group membership.

Thus, contrary to both the arguments of proponents of affirmative action and the Court's apparent belief in *Grutter*, research suggests that increased contact between racial groups on college and university campuses as a result of race-based admissions preferences does not enhance race relations and, as discussed more fully below, arguably undermines such relations.

II. Race-based preferences in admissions are harmful to race relations on college and university campuses and negatively impact black and Latino students.

Although few college and university administrators will openly acknowledge the fact, administrators commonly equate "diversity" in higher education with having a percentage of black and Latino students in a student body that reflects the percentage of such races in the larger population. Thus, colleges and universities like the University of Texas at Austin use race-based admissions criteria in an unspoken attempt to achieve a "population-proportional quota system."

As noted above, proponents of affirmative action and the courts frequently attempt to justify these attempts to manufacture increased racial diversity by arguing that increased diversity benefits all students by improving race relations and eliminating racial stereotypes among students, while noting that diversity particularly benefits black and Latino students by giving them greater educational opportunities. Subsequent sociological research has shown, however, that use of race-based preferences in admissions often undermines race relations at colleges and universities and negatively impacts black and Latino students.

a. Use of racial preferences in admissions undermines race relations on college and university campuses.

Scholars and the courts have long-recognized that discrimination on the basis of race is anathema to the core principles of our society and negatively impacts race relations as a whole. Indeed, this is the very reason that the courts require a "compelling state interest" in order to allow overt discrimination on the basis of race. Despite the obvious harms to our society that are associated with government actors favoring one race over another in distributing benefits, the use of race in admissions in higher education lingers as one of the few clear instances of overt racial discrimination by government actors in our country. Although all Americans can appreciate the value of diversity as an ideal, as one scholar has noted, Americans value diversity "when it is achieved in ways that are consistent with deeply held moral values like merit." Peter H. Schuck, *Diversity in America* 190, 321-22 (Harvard University Press 2003). Thus, research suggests that, while Americans support the notion of naturally occurring diversity, when efforts to manufacture diversity fail to comport with widely shared American ideals such as merit and fairness, such efforts actually harm race-relations.

This phenomenon is evident in a series of studies focusing on race-based preferences and academic diversity.[8] In a study titled *The Shape of the River*, researchers found widespread support among students on 28 competitive college campuses for their college's or university's emphasis on "diversity." William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 241-47 (Princeton University Press 1998) [hereinafter *The Shape of the River*]. This was true of white students as well as black students. *Id.*

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[8] Significantly, these studies are among the largest and best funded studies ever conducted on race-relation issues on college and university campuses. Moreover, the studies were funded by the Andrew W. Mellon Foundation, an organization strongly committed to preserving the use of racial preferences in aca-

But in a second study titled *The Source of the River* carried out by Princeton sociologist Douglas Massey and his colleagues, a question was asked of students on the same 28 campuses regarding how close the respondents felt to various demographic groups, including students who had "benefited from affirmative action." *The Source of the River* at 138-45. Both whites and Asians expressed considerable "social distance" from blacks and Latinos who "benefited from affirmative action." *Id.* As the authors of this second study acknowledged, this evidence of increased "social distance" suggested a stereotype among students that "without affirmative action most black and Latino students would not be admitted." *Id.* at 143, 145.

Moreover, the authors of *The Source of the River* noted that there was a widely shared rank order of racial groups in terms of perceived traits favorable to academic success, with Asians being perceived most favorably, followed by whites, followed by Latinos, and finally followed by blacks. *Id.* at 145. The study noted that Latinos and blacks were perceived as being particularly "academically underqualified." *Id.*

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demic admissions, which largely eliminates any possible concern that the studies were biased in a way that would overstate the negative impacts of race-based preferences on such campuses.

Although the authors of the study did not offer an explanation of the different perceptions of the academic qualifications of the various racial groups, the fact that Asian and white students were infact significantly better qualified academically than their Latino and black peers certainly suggests that racial preferences in admissions may have played a significant role in such perceptions. What the authors considered unfortunate "stereotypes" were in fact simply accurate perceptions of group differences in academic skill.

The "social distance" and stigma harm uncovered in *The Source of the River* was highlighted in a third study of students at the same colleges titled *Taming the River*. Camille Z. Charles, Mary J. Fischer, Margarita A. Mooney, & Douglas S. Massey, *Taming the River: Negotiating the Academic, Financial, and Social Currents in Selective Colleges and Universities* 189, 206 (Princeton University Press 2009) [hereinafter *Taming the River*]. On the stigma-harm of racial preferences, the study noted that "[i]f white students believe that many of their black peers would not be there were it not for 'lowering' of standards under affirmative action and, more important, if black students *perceive whites* to believe this, then affirmative action may indeed undermine minorities' academic performance by heightening the social stigma they already experience because of race or ethnicity." *Id.* (emphasis in original).

The newest research bearing on this question examined a large sample of students enrolled in one of six liberal arts colleges and seven universities. *See* Jesse D. Rude, Gregory C. Wolniak, & Ernest T. Pascarella, *Racial Attitude Change During the College Years*, 2012 Annual Meeting of the American Educational Research Association, Apr. 6, 2012 [hereinafter *Racial Attitude Change*]. It is novel in compiling data that reveals how student attitudes about race change over the course of four years of education in an environment that has been shaped by preferential admissions policies. Students in the sample were asked about their view of "the importance of helping to promote racial understanding." *Id.* at 7. If racial preferences worked as they were supposed to, over the years students would be expected to become increasingly convinced of the benefits of having a highly diverse student body. The researchers found, to their surprise and dismay, that over their four years in school students in each demographic category came to feel less and less committed to the goal of "helping racial understanding." *Id.* at 17-19. What is more, the sharpest drops in support of this aim came from black and Hispanic students. *Id.* at 26-29.

Although these studies are certainly among the largest and most recent documenting the problems of "social distance" and stigma related to the use of race-based preferences, these problems have long been recognized by opponents of the use of race-based preferences. Justice Douglas once noted that "a segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions." ***DeFunis** v. **Odegaard***, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). Many scholars have reiterated this concern. In particular, Thomas Sowell's classic study, ***Black Education Myths and Tragedies***, was prescient, advancing criticisms of preferential policies that remain just as pertinent four decades later. *See* Thomas Sowell, ***Black Education:** Myths and Tragedies* 242 (David McKay Co. 1972).

The use of racial preferences has also been thought by some of America's most perceptive observers of race relations on college campuses to encourage a kind of protective self-segregation, especially among black students. Harvard sociologist Orlando Patterson, who has said that his original vision of affirmative action was one that encouraged hope of promoting an integrationist ideal of an "ecumenical America," found his hope dashed by the actual situation on leading American college campuses. Orlando Patterson, *The Ordeal of Integration* 157 (Counterpoint 1997). "[B]oth on and off our campuses," he wrote, "affirmative action seems to have been distorted by its beneficiaries into the goal of balkanizing America both intellectually and culturally. One has only to walk for a few minutes on any of the nation's great campuses to witness the extent of ethnic separatism, alternating with periodic outbursts of ethnic, gender, and other chauvinistic hostilities. The thought that repeatedly haunts me as I travel the nation's campuses is that the South did indeed finally win the moral battle over integration, for no group of people now seems more committed to segregation than Afro-American students and young professionals." *Id.*

Patterson goes on to suggest that there is an even more harmful spill-over effect in which black students who have self-segregated on affirmative action campuses carry this segregationist trend with them when they leave college. "To a lesser extent," he writes, "the tendency of the new Afro-American middle class to segregate itself residentially and to scoff at the norms and values of the ecumenical mainstream are simply the off-campus versions of this lamentable betrayal and abandonment of the once cherished goal of integration." *Id.*

b. Use of racial preferences in admissions negatively impacts black and Latino students.

In addition to increasing racial self-separation and fostering stereotypes among students at colleges and universities, thereby negatively impacting all students, black and Latino students in particular suffer various negative impacts as a result of the use of race-based preferences in admissions. Chief among these negative impacts are: (1) the increased risk that such students will underperform in college relative to their past academic achievements, which may result in disidentification with academic excellence; (2) a reduction in effort by black and Latino students, known as "low effort syndrome;" and (3) the creation of motivational disincentives based on the expectation of the benefits of future racial preferences.

1. Use of racial preferences in admissions increases the risk that minority students will underperform in college relative to their past academic achievement, which may result in disidentification with academic excellence.

Research has long shown that black students "underperform" relative to their entering SAT scores and high school grade-point-averages after matriculating to a college or university. *See, e.g.*, Robert Klitgaard, *Choosing Elites* 160-65 (Basic Books 1984). "Underperformance" is a technical term in the educational research literature and refers to the fact that if blacks are matched with whites attending the same college who have the same entering academic credentials in terms of high school grades and standardized test scores, the blacks on average will get substantially lower grades and wind up with a lower class ranking than the whites. Studies of Latinos in this regard are much more limited, though they too appear to "underperform."

This underperformance phenomenon has been observed with black students since the very beginning of the affirmative action era in the early 1970s and persists to this day. Black students with comparable SAT scores and high school academic backgrounds to white students do not do as well as the white students in terms of their grades in college and by other college academic measures. *See America in Black and White* at 401-05; *Reflections* at 1605-08; Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 121-23 (Harvard University Press 2003). Indeed, as noted in *The Shape of the River*, "[a]t almost every college in our sample, black students are not only performing less well academically than whites but also performing below the levels predicted by their SAT scores." *The Shape of the River* at 77, 88. This underperformance in turn has been shown to cause black students to "disidentify" with the realm of academic excellence and focus their energies in areas like social life and extracurricular activities where they do not feel inferior.

Studies suggest that colleges and universities that give very significant affirmative action boosts to black students over white students and Asian students enhance the risk of disidentification with academic excellence among minority students. Some of the best documentation of these effects is found in *Taming the River*, in which the authors acknowledge that the greater disparity between academic credentials of black students and others at the same university, the greater the degree of underperformance by the black students. *Taming the River* at 174, 186, 199-200, 208. These acknowledgments of the detrimental impacts of affirmative action admissions on black students are particularly significant given that the authors of the study and those funding the research are firmly in favor of race-based preferences.

2. Use of racial preferences increases the risk that black and Latino students will suffer "low effort syndrome."

Disidentification with academic excellence will often produce what anthropologist John Ogbu called "low effort syndrome." *See* John Ogbu, *Black American Students in an Affluent Suburb: A Study of Academic Disengagement* (Lawrence Erlbaum Associates 2003). By this Ogbu meant the tendency for many students to do just enough work to pass their courses and avoid academic trouble without actually working to do as well in school as their talents suggest they might. *See generally id.* Individuals who disidentify with academic excellence will often adopt such a low effort syndrome on their own, but the phenomenon becomes more prevalent when subcultures develop in which low effort postures are cultivated and reinforced by subcultural norms. Even more than most people, teenagers and young adults like to spend time with people like themselves, and their peer group norms can often be enormously powerful in influencing behavior beyond individual inclinations.

The clearest example of a college subculture of this kind that researchers have explored is the "jock subculture" of recruited athletes, consisting of students who have often been accepted to highly competitive colleges on the basis of their athletic prowess without meeting their institution's normal academic standards. In *The Game of Life*, James Shulman and William Bowen explain how subcultures of athletes often form around their team sport and how such athletes usually put little effort into academic striving. *See* James Shulman and William Bowen, *The Game of Life: College Sports and Educational Values* (Princeton University Press 2001). Like many black students admitted under affirmative action programs, athletes often "underperform" their entering academic credentials and, even in the off-season, get lower grades than their SAT scores and high school grades would predict. *Id.* at 59-86. Shulman and Bowen see a clear parallel between the causes of underperformance among recruited athletes and affirmative action black students, with the culprit in both cases being the lowered standards of admission applied to both of the underperforming groups. *Id.* at 83-86.

Much has been written about the taunting of hard working black elementary and secondary school students by their peers for "acting white." *See* Roland Freyer, *"Acting White": The Social Price Paid by the Best and Brightest Minority Students*, Education Next, vol. 6, Winter, 2006, at 53-59; Roland Freyer and Paul Torelli, *An Empirical Analysis of "Acting White"*, National Bureau of Economic Research, Working Paper 11334 (May 2005); Stuart Buck, *Acting White: The Ironic Legacy of Desegregation* (Yale University Press 2010). Presumably, those blacks who make it to the more competitive colleges and universities have avoided the corrupting effects of the more extreme versions of this anti-intellectualism. But what little research has been done on black work ethic in college is not encouraging. In *The Source of the River*, the college students in their sample consistently rated blacks the laziest of the four ethno-racial groups, while Asians were seen as the hardest working. Most revealing, "the group that rated blacks as laziest . . . was blacks themselves." *The Source of the River* at 147. Not surprisingly, in *The Shape of the River*, black graduates of the schools surveyed were much more likely than whites to say that they wished they had studied more when they were in college. *The Shape of the River* at 208. "These retrospective expressions of regret by African American respondents," the authors concluded, "need to be thought about in the context of the debate over factors affecting their academic performance . . . and especially the suggestion that peer group pressures discourage studying." *Id.*

3. Use of racial preferences at the undergraduate and graduate levels create disincentives for black and Latino students to work hard by creating expectations among such students that they will benefit from preferential treatment on the basis of race in the future.

Arguably the greatest harm to the academic performance of black and Latino students in college comes not from the upward-ratcheting system that exists at the undergraduate level but from the similarly structured preference regime that they know awaits them once they get out of college. This is the same disincentive to hard work that critics have long charged works to diminish the need for college-bound black and Latino high school youth to work as diligently as their white and Asian classmates. Since almost all highly selective professional schools and graduate programs, as well as many businesses, demand less of black and Latino college graduates than of whites and Asians, those in the preferred groups, it is claimed, need not compete head-to-head with those in the non-preferred groups. Enormous racial preferences are given in admissions to graduate and professional schools. *See Reflections* at 1609-14; Abigail Thernstrom and Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, Constitutional Commentary, Spring 2004, at 229-32. Regrettably, Justice O'Connor's faith that the racial gap in achievement in higher education would disappear within 25 years, and was indeed already closing, was not based on any close inspection of the available empirical data. *See Grutter*, 539 U.S. at 343.

Unfortunately there is little survey data relevant to evaluating this claim, though it has great commonsense appeal, and there are certainly strong personal testimonies that confirm it. For instance, John McWhorter explained how knowledge of preferential admissions at the undergraduate level adversely affected his own work ethic in the Philadelphia prep school he attended. "I can attest that in secondary school I quite deliberately refrained from working to my highest potential because I knew that I would be accepted to even top universities without doing so. Almost any black child knows from an early age that there is something called affirmative action which means that black students are admitted to schools under lower standards than white; I was aware of this at at least the age of ten. And so I was quite satisfied to make B+'s and A-'s rather than the A's and A+'s I could have made with a little extra time and effort." *Losing the Race* at 233.

McWhorter found a similar attitude among many of his black students at Berkeley, and he was scathing in his indictment of affirmative action policy. "In general," he wrote, "one could think of few better ways to depress a race's propensity for pushing itself to do its best in school than a policy ensuring that less-than-best efforts will have a disproportionately high yield . . . . If every black student in the country knows that not even the most selective schools in the country require the very top grades or test scores of black students, that fine universities just below this level will readily admit them with even a B+/B dossier by virtue of their 'leadership qualities' or 'spark,' and that even just a better-than-decent application file will grant them admission to solid second-tier selective schools, then what incentive is there for any but the occasional highly driven student to devote his most deeply committed effort to school?" *Id.*

Many other observers with extensive experience with black college students have had similar experiences as McWhorter. Vanderbilt Law School professor Carol Swain, for instance, found a similar harm to the on-campus work ethic of black students in the undergraduate college she attended. "As an older undergraduate student in the 1980s," Swain wrote, "I often encountered other black college students struggling with grade point averages at or below a 2.00 on a 4.00 scale who voiced aspirations of wanting to become lawyers and doctors. If I challenged them directly by responding, 'But I thought you needed a 3.0 to get into law or medical school'—almost invariably the student would respond, 'Oh, they have to let us in. They have to let us in, because of affirmative action.' Now, I don't believe that many of those students were actually admitted to professional schools, but the misinformation led some genuinely to believe that traditionally white professional schools were obligated to take them, regardless of their less-than-stellar performance. This perception, I believe, affected how hard these students trained. The knowledge of affirmative action's double standards no doubt caused some to neglect burning the midnight oil . . . . Could such beliefs be a factor in the well-documented fact that black students in college underperform their SAT scores—that is, black students with the same SAT scores as whites exhibit a considerably lower performance in college than white students?" Carol Swain, *An Inside Look at Education and Poverty*, Academic Questions, Spring, 2006, at 48-49.

A final observation is provided by Shelby Steele, who notes the distressing fact that so many black students from privileged backgrounds do worse academically in secondary school and college than whites and Asians from more modest backgrounds. "The top quartile of black American students," Steele writes, who often come "from two-parent families with six-figure incomes and private school educations, is frequently not competitive with whites and Asians even from lower quartiles. But it is precisely this top quartile of black students that has been most aggressively pursued for the last thirty years with affirmative-action preferences. Infusing the atmosphere of their education from early childhood is not the idea that they will have to steel themselves to face stiff competition but that they will receive a racial preference, that mediocrity will win for them what only excellence wins for others." Shelby Steele, *A Dream Deferred* 226-27 (Harper and Row 1998).

Mediocrity winning for some "what only excellence wins for others" is perhaps the best description of the incentive harm done by current affirmative action programs. By granting huge racial preferences, both at the undergraduate and postgraduate levels, the institutions of higher learning in America have offered a license to underperforming minorities to stay underperforming and not to compete with others. Such policies serve as a "pernicious palliative" that help to maintain the status quo in the performance profiles of the higher- and lowering-achieving groups. Far from constituting a "compelling state interest," their maintenance constitutes no positive interest at all but a great social harm. They deserve the same opprobrium as segregated classrooms and Jim Crow railway cars.

CONCLUSION

For all the reasons discussed above, the "diversity" that is typically established through racial preferences in admissions cannot be celebrated. It has far greater costs than benefits. By heightening racial consciousness on campus, encouraging students to think of themselves in terms of intellectually superior and intellectually inferior racial groups, undermining self-confidence and reinforcing paralyzing doubts about the abilities of those preferentially treated, telegraphing to black and Latino students that their race or ethnicity can make up for substandard performance in high school and college, and encouraging the growth of protective, self-segregating groups on campus that are inhibited from reaching out in openness and friendship across color lines, racial preference policies have caused and continue to cause great harm to students of all races.

On balance, these policies have been a disaster for race relations on campuses and in other areas of American life, and they should be struck down as a clear violation of the Equal Protection Clause. As Justice Douglas and Justice Thomas warned in their dissents in ***Defunis***, 416 U.S. at 331-45 (Douglas, J., dissenting), and ***Grutter***, 539 U.S. at 349-87 (Thomas, J., concurring in part and dissenting in part), respectively, what is touted as benign discrimination can often be more insidious and reek more havoc than more overtly malicious discrimination. Given the research discussed herein, it is clear that there is no compelling state interest in educational diversity when it is achieved through racial preferences. Indeed, there is substantial evidence that such preferences cause great harm to those that the preferences are intended to benefit and to all others on college campuses. Experience should have taught us that, in the educational sphere as elsewhere, there is no such thing as benign racial discrimination.

For the foregoing reasons, the Court should reverse the ruling of the Fifth Circuit, should overrule its decision in *Grutter*, and should hold that the use of race as a factor in college and university admissions is constitutionally impermissible.

Respectfully submitted,

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No. 11-345

In the
SUPREME COURT OF THE UNITED STATES

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF 38 CURRENT MEMBERS OF THE TEXAS STATE SENATE AND HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici[1] are 38 current members of the legislature of the State of Texas, members of the State Senate and House of Representatives who together reflect Texas's broad diversity, including its geographic and growing racial and ethnic diversity. They submit this brief in support of respondents, the University of Texas – our State's flagship institution of higher education and the alma mater of many of the State's most important leaders, including many members of the legislature – in furtherance of their responsibility to ensure that the citizens of Texas have equal access to higher education and unfettered pathways to leadership in the State. They also do so in recognition of their sworn obligation to advance the interests of all the people of Texas and to adopt bold solutions to the problems that affect their lives. *Amici* wholly endorse the holistic, individualized admissions system at issue in this appeal. They maintain that it – together with the Top Ten Percent Law (House Bill 588) enacted by the legislature in 1997 that accounts for the vast majority of student admissions under the University's blended program – represents a proper and constitutional response to the changing demographics of our State and the challenges facing higher education in the 21st Century.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici Curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amici Curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

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Senator Juan "Chuy" Hinojosa (McAllen, District 20) served as a member of the Texas House of Representatives from 1981 to 1991 and from 1997 to 2002 and has been a member of the Texas Senate since 2002.

Senator José Rodríguez (El Paso, District 29) has served as a member of the Texas Senate since 2011.

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Senator Kirk Watson (Austin, District 14) has served as a member of the Texas Senate since 2007.

Senator Royce West (Dallas, District 23) has served as a member of the Texas Senate since 1993.

Senator John Whitmire (Houston, District 15) served as a member of the Texas House of

Representatives from 1973 to 1982 and has served as a member of the Texas Senate since 1983.

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Representative Carol Alvarado (Houston, District 145) has served as a member of the Texas House of Representatives since 2009.

Representative Rafael Anchia (Dallas, District 103) was elected to the Texas House of Representatives in 2004.

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Representative Garnet F. Coleman (Houston, District 147) has served as a member of the Texas House of Representatives since 1991.

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Representative Joe Deshotel (Port Arthur, District 22) was elected to the Texas House of Representatives in 1998.

Representative Dawnna Dukes (Austin, District 46) has served as a member of the Texas House of Representatives since 1995.

Representative Harold V. Dutton, Jr. (Houston, District 142) has served as a member of the Texas House of Representatives since 1984.

Representative Joe Farias (San Antonio, District 118) has served as a member of the Texas House of Representatives since 2007.

Representative Jessica Farrar (Houston, District 148) was elected to the Texas House of Representatives in 1994.

Representative Helen Giddings (Dallas, District 109) has served as a member of the Texas House of Representatives since 1993.

Representative Naomi Gonzalez (El Paso, District 76) has served as a member of the Texas House of Representatives since 2011.

Representative Donna Howard (Austin, District 48) has served as a member of the Texas House of Representatives since 2006.

Representative Eric Johnson (Dallas, District 100) was elected to the Texas House of Representatives in 2010.

Representative Armando "Mando" Martinez (Welasco, District 39) has served as a member of the Texas House of Representatives since 2005.

Representative Ruth Jones McClendon (San Antonio, District 120) was elected to the Texas House of Representatives in 1996.

Representative Jose Menendez (San Antonio, District 124) was elected to the Texas House of Representatives in 2000.

Representative Elliott Naishtat (Austin, District 49) was elected to the Texas House of Representatives in 1990.

Representative Rene O. Oliveira (Brownsville, District 37) was elected to the Texas House of Representatives in 1981.

Representative Joe C. Pickett (El Paso, District 79) has served as a member of the Texas House of Representatives since 1995.

Representative Ron Reynolds (Missouri City, District 27) has served as a member of the Texas House of Representatives since 2011.

Representative Eddie Rodriguez (Houston, District 51) was elected to the Texas House or Representatives in 2002.

Representative Mark Strama (Austin, District 50) has served as a member of the Texas House of Representatives since 2005.

Representative Senfronia Thompson (Houston, District 141) has served as a member of the Texas House of Representatives since 1973.

Representative Sylvester Turner (Houston, District 139) was elected to the Texas House of Representatives in 1988.

Representative Marc Veasey (Fort Worth, District 95) was elected to the Texas House of Representatives in 2004.

Representative Hubert Vo (Houston, District 149) has served as a member of the Texas House of Representatives since 2005.

Representative Armando Walle (Houston, District 140) was elected to the Texas House of Representatives in 2008.

SUMMARY OF ARGUMENT

The principle that "states [have] the final decision on the bulk of day-to-day matters," Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1034 (1977), is fundamental to our federal system. States and localities are "laboratories of experimentation" capable of generating solutions for the nation's most pressing problems. *United States v. Lopez*, 514 U.S. 549, 581-82 (1995) (Kennedy, J., concurring). Nowhere is such experimentation and innovation more necessary than in public education, an area of critical importance. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (underscoring "the overriding importance of preparing students for work and citizenship").

In respect of its higher education admissions, Texas has taken thoughtful and considered steps to address the realities of race and 21st Century higher education, in a state that is rapidly growing and increasingly diverse. These are formidable challenges acknowledged by this Court in its 2003 decision in *Grutter*, which held that "diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." 539 U.S. at 322, 325. The University of Texas ("UT") – our state's flagship university – has, since 2004, utilized a hybrid admissions system designed to ensure that all students enrolled there receive the benefits of a diverse education. That admissions system – adopted after years of experimentation, collaboration, and study on the part of the state legislature and educators – consists of two parts that work in concert with one another.

The first component of UT's admissions system, the Top Ten Percent Law – which was enacted 15 years ago in the wake of the U.S. Court of Appeals for the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932, 957 (5th Cir. 1996) – mandates that "Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university [including University of Texas]." Pet'r's App. 19a (citing Tex. Educ. Code § 51.803 (1997)). The vast majority of the entering class is admitted under the Top Ten Percent Law. For example, in 2008, when petitioner applied to the University, 81 percent of the entering class gained admission under this provision. Pet'r's App. 26a.

The second component of UT's admissions program affects applicants who, like petitioner, are not admitted through the operation of the Top Ten Percent Law. Since *Hopwood*, these students' applications have been reviewed through a holistic, individualized process that permits educators to consider both an Academic Index ("AI") composed of grades and test scores and a Personal Achievement Index ("PAI") that evaluates leadership, student honors, prior work history, community involvement and extracurricular activities, socioeconomic status and other unique factors and accomplishments. Beginning with the admissions cycle for the 2005 freshman class, educators are permitted to consider race as one of many factors under the holistic, individualized review process that comprises part of the University of Texas's overall admissions system. The holistic program adopted by UT tracks closely and is functionally identical to the plan approved by this Court in *Grutter*. Pet'r's App. 71a.

Notwithstanding *Grutter*, petitioner challenges the constitutionality of UT's admissions program because race plays *any* role at all in the holistic, individualized and comprehensive process of applicant review utilized by admissions officials. She asks this Court either to ignore the settled law of *Grutter* to find that the Top Ten Percent Law somehow precludes supplementation by a *Grutter* type process or, in the alternative, to overrule *Grutter* so that UT's program can be struck down. *Amici* respectfully submit that this Court should decline this invitation. Texas and its educational institutions have engaged in years of good-faith experimentation with a race-neutral system which has proven inadequate to achieve the compelling interests in diversity sought to be attained. Given this, Texas' use of a multi-variable process which includes consideration of race and ethnicity among a range of other factors is both constitutional and fully consistent with this Court's precedents. Accepting petitioner's argument would run the risk of preventing Texas and other states "from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

Grutter requires state institutions of higher education to investigate "workable race-neutral alternatives that will achieve the diversity the university seeks" before resorting to any program that relies upon race. 539 U.S. at 339. This fact is fully acknowledged by UT and its leaders, all dedicated public servants who work closely with *amici* and other state legislators. Texas and UT officials spent seven years experimenting with the race-neutral Top Ten Percent Law before the judgment to reconsider the use of race as one factor in admissions was ever made. But UT rightfully resists petitioner's ill-conceived argument that use of a race-neutral strategy that achieves some moderate results necessarily precludes the subsequent consideration of race and ethnicity in higher education permitted by *Grutter*. In this case, government officials have made an evidence-based determination that the compelling educational benefits offered by a broadly diverse student body have not been achieved using the Top Ten Percent Law exclusively. Petitioner's argument to preclude them from applying additional criteria to bridge this gap not only has no foundation in this Court's precedents but is expressly contrary to them.

Petitioner asks this Court to force states into a permanent choice between the two tracks – one race-neutral, the other race-conscious. In the real world, states and their leaders, including *amici* and other Texas legislators, do not have the luxury of putting their higher education systems on autopilot, blind to demographic changes and pressures that exist and affect education on the ground. Charged with educating students who will go on to be future Presidents, military leaders, or business giants, *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), states – and especially their flagship public universities – have the obligation to address such pressures and to develop solutions that respond to circumstances in real time as they develop, "where the best solution is [often] far from clear." *Grutter*, 539 U.S. at 342 (quoting *Lopez,* 514 U.S. at 581 (Kennedy, J., concurring)). UT did that in this case – no more and no less. It altered its admissions program only after nearly a year of study and seven years of experience with race-neutral alternatives showed that UT students were not receiving the full benefits of educational diversity. By retaining its primary reliance on the Top Ten Percent Law, UT has implemented an admissions program that deploys race in the most "modest" way. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). That officials have taken note of the demographic changes affecting institutions of higher education in Texas does not change this basic fact. *Amici* are justifiably proud of the University's status as one of the premier educational institutions in the nation and, indeed, the world. But the University is equally important because of the role it plays in the State as an engine of educational opportunity. Thus, the University's officials – as well as *amici* and other state legislators – have an obligation to be aware of demographics so that we can ensure, as we must, that visibly open pathways to leadership and opportunity exist for all Texas citizens. *See Grutter*, 539 U.S. at 332. Indeed, the very future of our State and our Nation "depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 324 (internal citations omitted). This Court's precedents rightfully express deep skepticism of government decision making based solely on race. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995). We cannot and should not return to the days when African Americans like Heman Sweatt were excluded from the University of Texas and other institutions of higher education merely because of their race. *Sweatt*, 339 U.S. at 631. That shameful legacy of exclusion is a necessary backdrop to UT's active efforts to achieve the educational benefits of diversity. States and localities are not obligated, as *Grutter* acknowledges, to ignore the current situation or to settle for an educational program that lacks the diversity necessary for students to maximize their potential inside and outside of the university. *Grutter*, 539 U.S. at 328-30. In our federal system, states are still invested with primary responsibility for judgments pertaining to the education and training that our future leaders receive. *Id.* at 325.

The longstanding principles of strict scrutiny, which this Court reaffirmed in *Grutter*, not the scheme petitioner proposes, provide appropriate direction on how to tread the fine line that the Constitution maps out in the area of race. As the Court of Appeals held in its decision in this case, the blended admissions program employed by UT fully comports with those requirements, Pet'r's App. 3a, which impose meaningful and constitutionally required constraints on government uses of race and ethnicity as admission criteria, *id.* at 5a. The UT admissions standards are not a process that has been unilaterally imposed by a university administrator but rather they reflect a unique, bi-partisan, multi-racial process in which legislators, the Board of Regents, and educators worked together to advance important State educational priorities. That is the essence of federalism and of participatory democracy. This Court should thus affirm the lower court decision and uphold as constitutional UT's admissions policy – over which Texas legislators exercise continuing oversight – to ensure that UT continues to expand opportunities for students of all races, and to promote inclusion and access more generally.

ARGUMENT

I. THIS COURT'S PRECEDENTS ENCOURAGE THE CREATIVE SOLUTIONS AND STATE EXPERIMENTATION REFLECTED IN THE CHALLENGED UNIVERSITY OF TEXAS ADMISSIONS PROGRAM.

This Court has long affirmed and celebrated the role of states as "laboratories of experimentation" in our federal system. *Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring); *see also Grutter*, 539 U.S. at 342; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973). The states' ability to craft innovative solutions celebrated by the late Judge Friendly, Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1034 (1977), is most pronounced in areas where states carry out traditional functions critical to our democracy and national priorities. Education stands as one of the areas in which states and localities have been understood to possess special competencies. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) ("education is perhaps the most important function of state and local governments"); *Grutter*, 539 U.S. at 331 ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship"); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (emphasizing "the importance of education in maintaining our basic institutions"); *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process"); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 50 ("No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education"); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values"). Addressing matters of race and inequality has increasingly become another such area. *See, e.g., Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (emphasizing innovative strategies that government might deploy to bring "together students of diverse backgrounds and races").

The admissions program challenged in this case underscores Justice Brandeis's important observation that it "is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386-87 (1932) (Brandeis, J., dissenting). It represents the State of Texas's effort to develop creative and innovative solutions to address the complex educational and demographic realities of 21st Century higher education as they present themselves within our jurisdiction. *Amici*, many of whom voted for the Top Ten Percent Law, are proud of that statute and the diversity – including geographic diversity – that it has helped to promote in Texas institutions of higher education. They recognize, however, that the changing demographics of Texas are such that the Top Ten Percent Law cannot accomplish all that is needed to ensure that UT students, who will graduate and possibly one day become state legislators themselves, receive the full benefits of a broadly diverse educational program and environment.

The challenged individualized review process has its roots in what, since 1997, has been an ongoing, iterative, and very particular series of initiatives designed to address enrollment at the University of Texas – the State's flagship institution and the proving ground for its future public and private sector leaders. The relevant starting point for this case is the United States Court of Appeals for the Fifth Circuit's 1996 decision in *Hopwood*, 78 F.3d 932. Following *Hopwood*, UT was required to abandon race-conscious admissions. *Id.* at 957.

In anticipation of a dramatic change in the profile of UT applicants, officials at that institution adopted various race-neutral strategies which they hoped would maintain diversity among UT's student body. In particular, UT determined to pair its Academic Index (AI) – a still utilized element of the admissions process that reflects a computation based on an applicant's high school grade point, rank, and standardized test scores – with an individualized, "holistic review" that sought to "identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores." Pet'r's App. 121a. Neither this change, nor several other race-neutral initiatives adopted by UT to boost minority enrollment – including targeted recruitment and outreach and scholarship programs – forestalled the adverse changes feared. *Id.* at 121a-122a. The number of African American and Latino students who matriculated as UT freshman still dropped precipitously. *Id.*

Later in 1997, the Texas state legislature responded to *Hopwood* and the changes in the student body at UT with the Top Ten Percent Law, House Bill 588, codified as Tex. Educ. Code § 51.803 (1997). Enacted by a bipartisan, multi-racial, and geographically diverse majority of the legislature, including many of the *amici*, that statute effectively sets initial admissions standards at UT and other institutions by mandating that "Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university [including UT]," Pet'r's App. 19a (citing Tex. Educ. Code § 51.803 (1997); *see also Statewide Higher Educational Admissions Policy*, HB 588, House Research Organization Bill Analysis (April 15, 1997)[2] at 1. The purpose of this racially-neutral plan was two-fold: to ensure meaningful diversity at institutions such as UT and to "ensure a highly qualified pool of students," Pet'r's App. 123a (citation omitted), while expanding the range of high schools sending students to UT, *id.* at 57a. Ultimately, the Top Ten Percent Law had some success in diversifying the class racially and substantial success in diversifying it geographically, *id.* at 19a-20a, 57a, but, in the judgment of multiple stakeholders in Texas, it failed fully to address the lack of meaningful diversity on campus to the prejudice of the learning environment, *id.* at 23a.

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[2] http://www.hro.house.state.tx.us/pdf/ba75r/hb0588.pdf#navpanes=0 (last visited Aug. 10, 2012).

Petitioner casts the individualized and holistic admissions process – in which race was one of many factors considered in reviewing applicants like her who did not rank in the top ten percent of their high school class – as the ill-conceived brain child of a lone group of administrators acting without factual support. Pet'r's Br. 5, 34. But she misunderstands the place of the holistic review system in UT's admissions process. Since 2004, UT has included race and ethnicity, along with a range of other factors – including "demonstrated leadership qualities, awards and honors, work experience and involvement in extracurricular activities and community services," as well as "special circumstances" such as "the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school" – in an applicant's PAI, which, in turn, is considered along with grades, test scores and essays in reviewing applicants who are not admitted through the Top Ten Percent Law. Pet'r's App. 27a-28a. The overall admissions system, including the individualized program of review that considers race and ethnicity as one of many factors, is properly understood as the result of a collaborative, multi-pronged effort on the part of state legislative and educational officials, building upon the Top Ten Percent Law, to ensure open access and equity in one of the largest institutions of higher education in the country.

In June 2003, this Court changed controlling constitutional law with its decision in *Grutter*, 539 U.S. 306, which overruled *Hopwood* and held that a compelling governmental interest exists for considering race as one of many factors in a system of holistic review to achieve the educational benefits of diversity. The legislature, significantly, did not act to repeal the Top Ten Percent Law. In August of 2003, the Board of Regents – which exercises the delegated authority to make educational decisions for the University of Texas[3] – did, however, authorize the University of Texas to examine "whether to consider an applicant's race and ethnicity in admissions in accordance with the standards enunciated in *Grutter*." Pet'r's App. 21a (internal citations omitted). Pursuant to this authorization, the University of Texas undertook a nearly year-long, deliberative review of its admissions process to determine whether race and ethnicity should be integrated into the admission process, *id.* at 23a, designed to determine whether the "University was enrolling a critical mass of underrepresented minorities," *id.* at 21a. Those studies found that "UT had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity," *id.* at 23a, and also concluded minority students felt isolated and that a majority of students felt "there was insufficient minority representation in classrooms for the full benefits of diversity to occur," *id.* at 22a (internal citations omitted). In June 2004, after nearly a year of study and nearly seven years of experience with race-neutral admissions policies, UT officials approved a revised policy that would, consistent with *Grutter*, permit the consideration of race and ethnicity as one of many factors in a holistic system of review designed to supplement the Top Ten Percent Law and more fully secure the educational benefits of diversity found lacking in the two commissioned studies. Importantly, UT's post-*Grutter* holistic review program is widely thought to have increased the overall percentage of highly qualified underrepresented minority students. Pet'r's App. 22a-24a.

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[3] Tex. Educ. Code § 65.11 (West 2011) (vesting the governance of the University of Texas system "in a board of nine regents appointed by the governor with the advice and consent of the Senate"). The scope of governance includes, among other things, the authority to determine degree and course offerings and set the number of students admitted to any course or department, appoint faculty, administer financial gifts, and promulgate rules and regulations for the management of the university system. *Id* § 65.31.

The Texas legislature, which has historically been highly deferential to the Board of Regents to which it has delegated authority in higher education matters, had no occasion formally to ratify the hybrid admissions policy that resulted from UT's decision to consider race and ethnicity as factors under its holistic review process. The legislature has, however, affirmed that judgment by not taking legislative action against it in 2004 and by recently enacting legislation that directly relies upon the operation of the holistic, individualized review process. In 2009, the Texas state legislature amended the Top Ten Percent Law by capping the number of students who could be admitted to the University of Texas at Austin under that program at 75% of the entering freshman class, effective Fall 2011. *Id.* at 19a n.56 (citing Tex. Educ. Code § 51.803(a-1)). This amendment is hereinafter referred to as the "Cap Statute." The Cap Statute, which responds to University of Texas officials' concerns that they lacked admissions flexibility in an era of demographic growth, contains provisions indicating that if the use of race in the individualized review process for students not admitted through the Top Ten Percent Law is subsequently invalidated, the 75% cap would be lifted and students would be admitted to the University of Texas at Austin almost entirely under the Top Ten Percent Law.[4] In effect, the Cap Statute recognized and ratified *ex post* the admissions framework established by the adoption of UT's post-*Grutter* race-conscious holistic review. *See Limit on Top Ten Percent Automatic Admissions Policy*, SB 175, House Research Organization Bill Analysis (May 20, 2009)[5] at 6. Indeed, section 7 of the Cap Statute makes it plain that the legislature intended to "continue and facilitate progress in general academic teaching institutions in this state with regard to the racial, ethnic, demographic, geographic, and rural/urban diversity of the student bodies of those institutions in undergraduate, graduate, and professional education" and expressly did not want to "preven[t] a[ny] general academic teaching institution in this state from engaging in appropriate individualized holistic review, consistent with that purpose, for the admission of students who are not entitled to automatic admission . . . ."[6]

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[4] Tex. Educ. Code § 51.803(k) (West 2011).

[5] http://www.hro.house.state.tx.us/pdf/ba81r/sb0175.pdf#navpanes=0 (last visited Aug. 10, 2012).

In sum, *amici* respectfully submit that petitioner's efforts to discredit the processes surrounding the adoption and operation of UT's individualized, holistic admissions program should be rejected. The collaborative legislative and educational efforts reflected in UT's current admissions scheme evince the kind of careful consideration and experimentation by states that is encouraged by this Court's precedents. *See Lopez*, 514 U.S. at 581-82 (recognizing states and localities as important "laboratories of experimentation"). There is no reason to reconsider the "proper respect for state functions" typically accorded jurisdictions like Texas in our federal system, where it is understood that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways," *Younger v. Harris*, 401 U.S. 37, 44 (1971). UT's admissions policy offers an innovative model for addressing the practical challenges of building a diverse learning environment at institutions of higher education in the 21st Century and, as discussed below, fully comports with the *Grutter* precedent to which its adoption responded.

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[6] 2009 Tex. Sess. Law Serv., 19 (West).

II. EXPERIMENTATION WITH RACE-NEUTRAL ALTERNATIVES DOES NOT PRECLUDE A STATE FROM ALSO ADOPTING RACE-CONSCIOUS STRATEGIES THAT SATISFY STRICT SCRUTINY.

Petitioner does not challenge the Top Ten Percent Law, which results in the bulk of UT admissions. *See* Pet'r's App. 20a. Indeed, she essentially concedes the constitutionality of the Top Ten Percent Law that has informed admissions to Texas universities since 1997. Pet'r's Br. 35; Pet. for Cert. 21. Petitioner objects only to the additional admissions overlay established by the post-*Grutter* holistic program that applies to applicants not qualifying for admission under the Top Ten Percent Law. Pet'r's Br. 26. Specifically, petitioner contends that, because of the existence of the Top Ten Percent Law, UT's "holistic" system of individualized applicant review cannot be deemed constitutional, even if it comports fully with the binding precedent established by *Grutter*. Pet. for Cert. 34.

In effect, petitioner suggests that virtually any attempt to pair a race-neutral admissions program with one that considers race and ethnicity as one of many factors designed to achieve the educational benefits of diversity renders the resulting hybrid program constitutionally infirm. This Court's precedents certainly require state institutions of higher education first to investigate "workable race-neutral alternatives that will achieve the diversity the university seeks" before resorting to any program that relies upon race. *Grutter*, 539 U.S. at

339. But they do not support the novel position advanced by petitioner. There is no foundation in this Court's precedents for petitioner's contention that adoption of a race-neutral admissions plan that has achieved some success in creating diversity in the student body necessarily precludes the subsequent consideration of race and ethnicity in higher education permitted by *Grutter*, especially where, as here, government officials have made a good-faith determination grounded in evidence that the compelling educational benefits offered by a broadly diverse student body have not been achieved using solely the race-neutral system.

A. This Court's Precedents Do Not Preclude UT's Simultaneous Use of Race-Neutral and Race-Conscious Strategies.

The exhortation that states explore viable race-neutral alternatives to utilize race as a consideration in a program's operation has, rightfully, become a regular coda in this Court's race cases. *See, e.g., Johnson v. California,* 543 U.S. 499, 522-23 (2005) (holding policy unconstitutional "[w]hen there has been no serious, good faith consideration of race-neutral alternatives . . . and when obvious, easy alternatives are available") (internal citation omitted); *Grutter*, 539 U.S. at 339 (holding that "[n]arrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives"); *United States v. Paradise*, 480 U.S. 149, 171 (1987) (explaining that "[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including . . . the efficacy of alternative remedies"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6 (1986) (holding that narrow tailoring "require[s] consideration" of "lawful alternative[s] and less restrictive means"). It reflects an understanding of the "sorry history of both private and public [racial] discrimination in this country," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989), and the threat that such discrimination poses to our democracy. This Court, however, has made it clear that the Constitution does not require the adoption of race-neutral alternatives unlikely to achieve the compelling educational interests served by institutions of higher education. *Grutter*, 539 U.S. at 339 ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.").

In Texas, we understand all too well the importance of the imperative to minimize unnecessary, and potentially discriminatory uses of race. The invidious policies of racial segregation invalidated in *Sweatt*, 339 U.S. 629, still cast a shadow here. In 2003, when *Grutter* held that achieving the educational benefits of a broadly diverse student body constitutes a compelling governmental interest under the Fourteenth Amendment's Equal Protection Clause, 539 U.S. at 328, Texas legislators and education officials, as previously noted, did not move immediately to repeal the Top Ten Percent Law. Instead, a careful assessment of higher education priorities ensued in which institutions such as UT assessed how well, given their particular circumstances, they were serving the compelling interests recognized in *Grutter*. Pet'r's App. 21a-25a. After nearly seven years of experience with the race-neutral Top Ten Percent Plan and nearly a year of study and evaluation of its educational programs, UT officials made the sound educational judgment in 2004 that, while that plan provided an adequate foundation for admissions efforts at their institution, a holistic, individualized system of review that included limited consideration of race and ethnicity, among the many other factors included therein, was necessary to ensure that all students at UT received the compelling educational benefits of diversity. Pet'r's App. 23a-25a.

In order to accept petitioner's contention that UT acted improperly in adopting a holistic, individualized review program in addition to the race-neutral Top Ten Percent Plan adopted by the legislature, one must essentially conceive of this Court's cases as creating two distinct, never-intersecting tracks for government decision making when it comes to addressing realities of race in their jurisdictions. On this theory, a state must commit itself in the first instance to a particular course of action and never supplement or depart from it, even when the limits of its effectiveness become apparent or when modification would be in the public interest. In effect, a state that has considered and found helpful, but not sufficient, certain race-neutral alternatives must never utilize even those race-conscious strategies whose use would comport with strict scrutiny and better achieve the compelling interests sought. Conversely, on petitioner's view, a state that has determined, in the absence of workable race-neutral alternatives for its jurisdiction, to consider race in the first instance must do so as much as possible or risk running afoul of the Fourteenth Amendment.

The limitations of petitioner's proposed approach are immediately apparent. It would hamstring states in carrying out their essential functions, *Lopez*, 514 U.S. at 580 (Kennedy, J. concurring), chill experimentation, and plainly discourage the consideration of the very race-neutral alternatives that the Court has required as a precursor to race-conscious methods. *See Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (discussing range of possible race-neutral alternatives that could be utilized by school districts). It risks undermining the important goal of minimizing uses of race that the Court's precedents reflect. Resp'ts' Br. 20.

Even more, petitioner's argument rests on a complete misreading of the Court's precedents. No case requires states to make the sort of Solomonic choice urged. If anything, this Court's precedents recognize that, while states must give serious consideration to the adoption of race-neutral alternatives, *Grutter*, 539 U.S. at 339, resort to race-conscious policies may sometimes be appropriate. *See id.* at 327 ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied"). Indeed, sound policy should reward rather than seek to limit a state that employs race-neutral alternatives and then decides, based upon that experience, that more is required to achieve its goals of creating a diverse learning environment to produce a vibrant future community of Texas leaders. Where a state finds the use of race necessary to serve compelling interests, petitioner would ask this Court to apply the unspoken guidelines of her imaginary, pre-fabricated tracks in evaluating that choice.

But this Court's cases are crystal clear. Strict scrutiny applies to the determination of whether UT's educational judgment to overlay the otherwise race-neutral Top Ten Percent Plan with a program of holistic, individualized review that considers race and ethnicity as one of many factors comports with constitutional requirements, not the strange Hobson's choice proposed by petitioner. *See Grutter*, 539 U.S. at 326 ("We apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool") (internal citation omitted); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("It is by now well established that all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized") (internal citation omitted); *Adarand Constructors*, 515 U.S. at 230 (holding that "[t]he application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury"). *Grutter* directs how matters unique to the higher education context should be evaluated under that rigorous method of review. 539 U.S. at 327, 333-43.

B. Petitioner Misapprehends the Top Ten Percent Law's Objectives and the Unique Educational Context in which UT's Admissions Plan Operates.

Counterintuitively, petitioner charges UT with using race both too little and too much. Pet'r's Br. 8-11. In doing so, petitioner badly misapprehends the objectives of the Top Ten Percent Law and the unique challenges confronting higher education in the State of Texas. The reality of the context in which legislators and higher education officials operate has direct relevance here. *See Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause").

In effect, petitioner urges this Court to consider the impact of the Top Ten Percent Law in determining whether UT had a compelling need to apply its holistic, individualized review program, but then to discount that impact when assessing UT's compliance with even traditional narrow tailoring rules. But she cannot have it both ways. The modest use of race about which petitioner complains in the operation of UT's holistic, individualized review system is a direct function of the Top Ten Percent Law's proper operation, not proof the program fails strict scrutiny. UT does not utilize race more because the Texas legislature, in enacting and then retaining the Top Ten Percent Law post-*Grutter*, sought first to explore and adopt, where possible, race-neutral alternatives. Neither the Texas legislature nor UT should be penalized for that experimentation.

If anything, the legislators and educators who share responsibility for UT's current admissions program deserve praise for identifying a way of minimizing the need to consider race in its admissions decisions, while maximizing the compelling educational benefits of diversity through a holistic, individualized review program, as strict scrutiny requires. *See Grutter*, 539 U.S. at 340-43. The way to assess that program's impact is not, as petitioner intimates, merely to count the heads of the minority students whose admission it facilitates - a proposal that, ironically, smacks of the racial balancing of which petitioner accuses UT. Instead, *Grutter* requires an investigation into how well and carefully UT's admissions program works to advance the compelling interest in achieving the educational benefits of diversity. *Grutter*, 539 U.S. at 334-41; *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978); *Wygant*, 476 U.S. at 280.[7]

Texas officials, importantly, do not operate in the vacuum that petitioner seems to imagine. Legislators must carry out their functions and develop innovative strategies to balance often competing priorities based on facts as they exist on the ground at any given time. Indeed, the legislative sponsors of the Top Ten Percent Law were clearly conscious of the "changing needs of the state's changing population" in drafting that statute. *Statewide Higher Educational Admissions Policy*, HB 588, House Research Organization Bill Analysis (Apr. 15, 1997) at 3. Likewise, UT "prepares students for work[,] . . . citizenship," and leadership in the state's public and private institutions in a complex, constantly shifting environment that, in the fifteen years since the Top Ten Percent Plan's adoption, has only become more demographically varied and will become even more so in the future. Susan Combs, Texas Comptroller of Public Accounts, *Window on State Government, Demographic Change* in Education.[8]

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[7] Significantly, not even petitioner disputes the tremendous value of the education UT provides or the extent to which it, in ensuring that students have the opportunity to meet and engage with colleagues from a wide range of backgrounds inside the classroom and out, prepares "students for work and citizenship." *Grutter*, 539 U.S. at 331 (citing *Plyler*, 457 U.S. at 221). Respondents' brief demonstrates that, while the consideration of race under its individualized system of review is modest, the impact that it has on the educational benefits that students receive inside and outside of the classroom is profound. Resp'ts' Br. 14-15.

Statistics show that Texas' racial and ethnic composition is changing dramatically. For example, "in 1980, the Anglo population accounted for 65.7 percent of the state's total population, but by 2006 its share had declined to 48.3 percent. The Hispanic population, by contrast, accounted for 21 percent of the state's population in 1980 and 35.7 percent in 2006. The black population share declined slightly over the same period, from 11.9 percent in 1980 to 11.4 percent in 2006. The share attributable to the "Other"' category, including persons of Asian and Native American descent, rose from 1.4 percent in 1980 to 4.6 percent in 2006." *Id.* These demographics have significant implications not only for UT but for "all Texas elementary, secondary and postsecondary educational institutions" which are facing a "more racially and ethnically diverse student body." *Id.* This, in short, is the complex, polyglot world that UT is preparing its student to lead.

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[8] http://www.window.state.tx.us/specialrpt/workforce/demo.php (last visited Aug. 10, 2012).

Petitioner's suggestion that one should look to enrollment levels from the period *prior* to the adoption of the Top Ten Percent Plan to determine the constitutionality of admissions efforts today is baseless.[9] The Constitution simply does not require government officials to ignore the demographic realities and dynamic diversity of the jurisdictions in which they carry out their responsibilities. *See Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (encouraging consideration of race-neutral strategies for addressing the need for diversity that take account of the realities of race on the ground without utilizing racial classifications). Petitioner's contention that mere awareness of demographic conditions constitutes racial balancing simply makes no sense in 21st Century Texas, where people from all over the country and the world come to make their future. The University of Texas is of vital importance to the State and has an obligation to "provide superior and comprehensive educational opportunities and to contribute to the advancement of society." Resp'ts' Br. 5 (citation omitted). *Amici* respectfully submit that, to ensure that visibly open pathways to leadership and world-class education are open for all Texans, there must be at least some acknowledgment of the need for diversity in the learning environment and the potential barriers to creating access to that environment in this State.

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[9] Likewise, *amici* respectfully submit that this Court should not assume, as petitioner does, that the compelling governmental interests in the educational benefits of diversity had been achieved by UT in 1996. Indeed, respondents make it plain that UT-based educators were of the opinion that the benefits of diversity had not fully been achieved at that time. Resp'ts' Br. 21.

Under *Grutter* and other precedents, the relevant inquiry in determining whether UT has used race too much is not whether officials appreciate the demographics and educational realities of the Texas communities from which UT primarily draws its student body. Rather, it is whether the use of race as part of the admissions criteria is so significant as to amount to racial quotas or a guarantee of "a specified percentage of the student body . . . to be members of selected ethnic groups." *See Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 315). As Chief Justice Roberts recognized in his plurality opinion in *Parents Involved*, ensuring that an institution engages in "individualized consideration [of applicants] in the context of a race-conscious admissions program is what is "paramount" in the higher education context. 551 U.S. at 723. The record below demonstrates that UT admissions officials neither use racial quotas nor even consider demographic information when conducting the holistic reviews of applicant files required under UT's admissions programs. *See* Resp'ts' Br. 21. The Court of Appeals' judgment that UT's admissions program satisfies this and other requirements of strict scrutiny, Pet'r's App. 71a, should thus not be disturbed.

III. THE REALITIES OF 21st CENTURY EDUCATION AND RACE REQUIRE THAT STATES BE PERMITTED TO PURSUE INNOVATIVE STRATEGIES TO MEET COMPELLING NEEDS WITHIN THE LIMITS OF STRICT SCRUTINY.

Texans can be proud that a great deal has changed in our State and Nation since *Sweatt v. Painter* was decided. But, as *Grutter* attests, the realities of race and higher education in the 21st Century still make the adoption of innovative strategies necessary to ensure that our universities, as well as other important public and private institutions, reflect the broad diversity that is America. *See Grutter*, 539 U.S. at 330-32. States like Texas need the room to experiment with and adopt innovative programs designed to address the realities of higher education and the challenges to creating a diverse learning environment in order to develop the leaders of a multi-cultural Texas of the future. *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *see also Statewide Higher Educational Admissions Policy*, HB 588, House Research Organization Bill Analysis (Apr. 15, 1997) at 4 (acknowledging, *inter alia*, that the Top Ten Percent Plan could achieve a certain level of diversity because of the persistence of racial segregation in many regions of the state).

Petitioner asks this Court to invalidate UT's admissions policy, the product of almost fifteen years of experimentation and collaboration on the part of state legislators and educators. In its stead, she proposes locking in place the Top Ten Percent Plan as the sole admissions criterion, which has significant merits but does not fully achieve the legitimate goals of Texas higher education. In reality, the doctrinal approach that she advances would ultimately require states and localities across the country to "cope with the difficult problems they face . . . deprived of one means they may find necessary." *Parents Involved,* 551 U.S. at 866 (Breyer, J., dissenting). "Our federalism" insists upon a less constrained and more robust role for states and localities in addressing issues as critical as education and race. *Younger,* 401 U.S. at 44. Indeed, it is premised on the "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*

History tells us that, especially where race is concerned, silver bullets and easy answers will unfortunately be hard to find. *See Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring) (noting that states and localities necessarily "perform their role as laboratories for experimentation to devise various solutions [in situations] where the best solution is far from clear"). Instead of the rigid, two-track approach for which petitioner advocates, states must have the latitude to contend not with an idealized set of facts, but with the facts – e.g., socio-economic, geographical, residential, racial and ethnic, and educational – as they exist on the ground in the jurisdictions in which they carry out their important functions. *Id.* Just as Texas legislators and educators came to the collective judgment that the demographic realities of our State's residential neighborhoods and public elementary and secondary schools limit their ability to achieve the benefits of diversity through race-neutral means alone, officials responsible for higher education in California or Montana must have the room to devise solutions that will work with their unique citizenry and systems of higher education. "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." *Grutter*, 539 U.S. at 332.

In urging that the Court uphold the University's admissions process, *amici*, importantly, do not ask this Court to write a blank check for states seeking to experiment with a range of solutions – race-neutral, as well as race-conscious – in grappling with the challenges facing higher education in the 21st Century. Instead, *amici* argue that the requirements of strict scrutiny reaffirmed in *Grutter* place meaningful constraints on government entities and that those constraints have been fully honored here. They ensure that we will never return to a world in which the access of a candidate like Heman Sweatt to a state's flagship institution of higher education depends on race alone. They also ensure that UT will not be precluded from having access to the rich diversity of talent and experience in this State. UT's admissions program reflects not racial balancing, but the careful balancing of priorities and resources committed to producing the future leaders of Texas and elsewhere, and should be upheld as constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals upholding the constitutionality of the University of Texas' undergraduate admissions policy should be affirmed.

Dated: August 13, 2012

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AMICUS
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RECORD
AND
BRIEFS

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF 28 UNDERGRADUATE AND GRADUATE STUDENT ORGANIZATIONS WITHIN THE UNIVERSITY OF CALIFORNIA IN SUPPORT OF RESPONDENTS

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AMICI CURIAE 28 UNDERGRADUATE AND GRADUATE STUDENT ORGANIZATIONS WITHIN THE UNIVERSITY OF CALIFORNIA[*]

Asian Pacific American Law Journal, UCLA

Berkeley Journal of African-American Law and Policy, UC Berkeley

Berkeley Journal of Gender, Law & Justice, UC Berkeley

Berkeley Law Foundation – Student Leadership Team, UC Berkeley

Black Law Students Association, UC Davis

Black Law Students Association, UC Hastings

Boalt Hall Student Association, UC Berkeley

Chicana/o Latina/o Law Review, UCLA

Coalition for Diversity at UC Davis School of Law

Diversity Action Committee, Student Body Association of UCLA School of Law

Education & Law Society at UCLA

Filipino Law Students Association, UC Davis

Hastings Race and Poverty Law Journal, UC Hastings

La Raza Law Students Association, UC Berkeley

La Raza Law Students Association, UC Hastings

La Raza Law Students Association, UCLA

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[*] The missions and interests of the *Amici Curiae* ("*Amici*") who are signatories to this brief are set out in the accompanying Appendix.

Lambda Law Students Association, UC Davis

Law Students of African Descent, UC Berkeley

Middle Eastern Law Students Association, UC Hastings

Men of Color Alliance, UC Berkeley

National Lawyers' Guild – Berkeley Law Chapter

National Lawyers' Guild – UCLA School of Law Chapter

Native American Law Students Association, UC Hastings

Pilipino American Law Society, UC Hastings

RAZA Recruitment and Retention Center, UCLA

Students for Economic and Environmental Justice, UC Berkeley

Students Helping Assure Racial Equity, Justice and Diversity, UCLA School of Law

Women of Color Collective, UC Berkeley

QUESTION PRESENTED

Whether the University of Texas at Austin's use of race in undergraduate admissions decisions is lawful under the Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).

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University of Texas at Austin, *Proposal to Consider Race and Ethnicity in Admissions* (2004)..27, 28

INTEREST OF *AMICI CURIAE*[1]

Amici represent numerous graduate and undergraduate student-run organizations that operate within the University of California educational system ("UC system" or "UC"). They reflect a broad cross-section of students who populate the campuses of such well-known universities as the University of California, Berkeley (including the Berkeley School of Law), the University of California, Davis, the University of California, Los Angeles ("UCLA"), and the University of California, Hastings College of the Law.

Many of the *Amici* actively seek ways to ensure that the State of California provides and promotes educational, professional, and social opportunities for individuals of all races, genders, ethnicities, religions, and nationalities who seek to enroll in the State's university system, particularly underrepresented racial minorities. Other of the *Amici* focus upon addressing legal and policy issues that affect specific classes of students who reflect the State of California's broad multicultural citizenry. All of the *Amici* share as a common goal that the educational experience of all students within the UC system, whatever their background, be enriched by the diversity of individuals enrolled within the system.

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[1] Pursuant to Rule 37.6, *Amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *Amici*, their members, and their counsel have made any monetary contribution to the preparation and submission of this brief. This brief is filed with the parties' written consent, copies of which are on file with the Clerk.

Because of their status as UC students, *Amici* are uniquely positioned to offer insights into why the University of Texas at Austin's admissions policies are constitutional under this Court's precedent, including *Grutter v. Bollinger*, 539 U.S. 306 (2003). All of the *Amici* have had their educational experiences directly impacted by the 1996 ballot initiative known as "Proposition 209," which amended California's constitution and was interpreted to prohibit the State's undergraduate and graduate universities from considering race, ethnicity, or gender as any part of the admissions process. *Amici* have experienced the full range of adverse consequences that flow from such a prohibition.

Amici thus have a strong interest in ensuring that this Court's decision in *Grutter* is reaffirmed and applied so that the admissions policies of the University of Texas at Austin are not impaired in the same way that Proposition 209 has impaired and harmed the educational experiences of *Amici* and the competitiveness of the State of California as a whole.

SUMMARY OF ARGUMENT

Nearly ten years ago, this Court cited California's experiment under the strictures of Proposition 209 in noting that race-conscious admissions policies should be periodically evaluated to determine if they "are still necessary to achieve student body diversity." *Grutter*, 539 U.S. at 342 (2003). Far from demonstrating that the time has come for limited consideration of race in the admissions process to be abandoned, Proposition 209 has vindicated the reasoned position of Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 315 (1978), affirmed by this Court in *Grutter*, that ensuring a diverse student body is a compelling state interest and that it is therefore both proper and necessary for race and ethnicity to be weighed as one of many elements in the admissions process. *Grutter*, 539 U.S. at 342 (citing *Bakke*, 438 U.S. at 315 (Powell, J.)).

Empirical evidence shows that since its enactment, Proposition 209 has severely undermined UC's constitutionally sound state interest in creating a truly diverse student body. The UC system's race-neutral admissions policies have significantly decreased the number of African American, Latino, and American Indian students at UC schools, impoverishing the educational experiences of UC students and creating campuses that are less hospitable to those underrepresented minority students[2] who do choose to enroll, while greatly diminishing their paths to leadership roles in society. This in turn has created a downward spiral, as many highly qualified minority students who are admitted to UC's elite schools spurn these offers in favor of private universities with much more diverse student bodies. The resulting "brain drain" harms not just *Amici* and other UC students but the State as a whole. These negative effects have occurred despite a wide array of race-neutral steps that UC administrators have taken to maintain diversity, steps that in significant ways mirror those attempted by the University of Texas at Austin prior to adoption of its current plan.

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[2] "[U]nderrepresented minority" or "URM" is defined by the University of California historically as pertaining to groups that have "collectively achieved eligibility for the University . . . at a rate below 12.5 percent." These include African Americans, American Indians, and Chicano/Latinos. Univ. of Cal. Office of the President, Student Academic Servs., *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies* 1 n.3 (2003).

California's experience under Proposition 209 counsels for caution in evaluating whether the University of Texas at Austin's policies satisfy constitutional scrutiny. Proposition 209 offers a window into understanding the harms that the University of Texas's current admissions policies seek to *prevent*. As it advised states and campuses throughout the land to do in *Grutter*, this Court today should continue to scrutinize and take heed from the experiences of the University of California.

ARGUMENT

I. POST-PROPOSITION 209 EXPERIENCES AT THE UNIVERSITY OF CALIFORNIA DEMONSTRATE WHY EQUAL PROTECTION SHOULD NOT BE INTERPRETED TO BAR CONSIDERATION OF RACIAL AND ETHNIC DIVERSITY AS A FACTOR IN ADMISSIONS.

In issuing the *Bakke* opinion in 1978, this Court ruled that states have "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Bakke*, 438

U.S. at 320 (Powell, J.). On the basis of that decision, many universities and colleges, including those within the state of California, continued to consider a student's race as one of many factors in college admissions.

In 1996, however, California voters passed Proposition 209, a state constitutional amendment that prohibited preferential treatment on the basis of race, sex, and ethnicity in public employment, public contracting, and public education, including the UC system.[3] In response, UC abandoned any consideration of race or ethnicity in its admissions process. Since that time, the UC system has served as a laboratory for evaluating the effects of admissions policies that allow consideration of virtually every facet of a student's background, but which are barred by state law from considering the student's race or ethnicity as part of that background. In fact, this Court in *Grutter* cited California as one state which was "engaged in experimenting" with race-neutral approaches from which other state universities might "draw on the most promising aspects of these race-neutral alternatives as they develop." *Grutter*, 539 U.S. at 342. Well over a decade into this "experiment," however, what the California experience demonstrates is that tying the hands of university administrators and faculty in this fashion has significant adverse effects for students who do enroll and for the State as a whole. Thus, to the extent that the Court thought it appropriate to look to California's race-neutral alternatives as they were developing in 2003, the Court should now consider the results, which paint a bleak picture for the ability to further the compelling interest of fostering diversity on UC campuses or achieving the broader goal for the nation's schools "to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J, concurring).

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[3] Cal. Const. art. I, § 31; *see also* Jim Sidanius et al., *The Diversity Challenge: Social Identity and Intergroup Relations on the College Campus* 42 (2008). The Regents of the University of California had actually adopted a similar ban on consideration of race or ethnicity in UC admissions (Resolution SP-1) a year earlier, in 1995. *See id.* That resolution has since been repealed. Regents of the Univ. of Cal., *Future Admissions, Employment, and Contracting Policies—Resolution Rescinding SP-1 and SP-2* (2001), http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf. For ease of reference, *Amici* here refer generally to Proposition 209, noting where relevant the earlier UC-specific ban.

A. The California Experience Under Proposition 209 Indicates that Race-Neutral Policies Alone Have Failed to Create a Diverse Student Body.

Fourteen years after Proposition 209 began impacting student admissions, the University of California continues to struggle to achieve a truly diverse student body, particularly at its most selective campuses. Despite an extensive array of race-neutral approaches, the UC system has experienced "substantial declines" in underrepresented minority student enrollment.[4]

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[4] Though the UC system has seen a substantial decline in enrollment among African American, Latino, and American

Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies, *supra* note 2, at 28. For example, African American enrollment dropped dramatically at the most selective campuses—UC Berkeley and UCLA—in the wake of Proposition 209.[5] At UC Berkeley from 1997 to 1998, African American enrollment dropped from 7.8 to 3.6% of the freshman class. *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2010*, *supra* note 4, at 2. Similarly, at UCLA, African American enrollment dropped by almost 30% from 5.6 to 3.5% of the freshman class during the same period. *Id.* at 5. To date, on

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Indian students, in 2010, Asian American student made up over 30% of freshman enrollees. Univ. of Cal. Office of the President, Student Affairs, Admissions, *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2010* 1 (2011), http://www.ucop.edu/news/factsheets/flowfrc_10.pdf. While *Amici* applaud the robust attendance of Asian American students in the UC system, this Court in *Grutter* recognized that the benefits of diversity are further enhanced "when students have the greatest possible variety of backgrounds." *Grutter*, 539 U.S. at 330 (internal quotation marks omitted).

[5] *See* William C. Kidder, *Review Essay, Silence, Segregation, and Student Activism at Boalt Hall*, 91 CALIF. L. REV. 1167, 1173 (2003) (noting the "staggeringly low" levels of minority representation in the student body at Boalt Hall after passage of Proposition 209); Amy DeVaudreuil, *Review Essay, Silence at the California Law Review*, 91 CALIF. L. REV. 1183, 1197-1200 (2003) (regarding minority representation on the law review). UC Berkeley, like UCLA, is "hyper-selective" and is only able to admit approximately one quarter of eligible applicants within a very accomplished applicant pool. José L. Santos et al., *Is "Race-Neutral" Really Race-Neutral?: Disparate Impact Towards Underrepresented Minorities in Post-209 UC System Admissions*, 81 J. Higher Educ. 605, 610 (2010).

average, African American enrollment has not recovered to pre-Proposition 209 levels. *Id.* At UC Berkeley, it has hovered between approximately 3 and 4%, far below the pre-Proposition 209 levels. *Id.* at 2.

Latino enrollment similarly decreased precipitously following the adoption of Proposition 209. At UC Berkeley from 1997 to 1998, Latino/Chicano enrollment fell from 14.5 to 7.9% of the freshman class—a 45% decline. *Id.* Latino/Chicano enrollment today remains low at the most selective campuses. For example, despite the significant increases in the number of Latino/Chicano high school graduates in California, Latino/Chicano enrollment at UC Berkeley remains below pre-Proposition 209 levels, at 12-13%. *Id.* This fact is all the more startling given the dramatic demographic shifts that have occurred in the State over the past decades. For example, the percentage of Latino high school graduates has nearly doubled over the past two decades, from 23% in 1990 to 44% in 2010. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case* 27-28 (2012), http://ssrn.com/abstract=2123653 ("Kidder 2012"). Yet, despite making up almost half of all high school graduates in California, Latino students comprise less than one-fourth of UC incoming freshmen and an even smaller portion of enrollees at the more selective UC campuses.[6]

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[6] *Amici* note California's demographic trends not to suggest that UC enrollment must mirror the state's diversity in lockstep, but rather to place the declines in Latino enrollment in context. Some of Petitioner's *amici* "tend to obfuscate this

Often overlooked, American Indian enrollment also remains far below pre-Proposition 209 levels. California is home to a significant portion of the American Indian population; nearly 1 out of every 6 American Indians is a California resident. Cruz Reynoso & William C. Kidder, *Tribal Membership and State Law Affirmative Action Bans: Can Membership in a Federally Recognized American Indian Tribe Be a Plus Factor in Admissions at Public Universities in California and Washington?*, 27 CHICANO-LATINO L. REV. 29, 30 (2008). In 1995, UC Berkeley, UCLA, and UC Davis each enrolled American Indian students in far greater numbers than the years following Proposition 209 (56, 42, and 45 respectively).[7] *Id.* By 2005, these numbers had decreased dramatically to 11 American Indian students at UC Berkeley, 17 at UCLA, and 18 students at UC Davis—a decline of 74% across the three schools. *Id.* As of 2010, American Indian enrollment at UC Berkeley and UCLA still remained almost 50% lower than pre-Proposition 209 levels. *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2010*, *supra* note 4, at 2, 5. All told, there were fewer American Indian freshmen in the UC system in each and every year under Proposition 209 (1998-2010) compared to 1995, even though the overall freshmen class rose from approximately 22,000 in 1995 to a peak of 34,500 in 2008. *Id.* at 1.

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important demographic driver of enrollment change when touting Prop 209." Kidder 2012, *supra*, at 27.

[7] The year 1995 was the "peak" of American Indian enrollment prior to SP-1 and Proposition 209.

By any measure, prohibition of the consideration of race and ethnicity in UC admissions has resulted in a dramatic decline in the number of African American, Latino, and American Indian students at UC, a state of affairs that does not bode well for the system envisioned by Petitioner.[8]

B. Strictly Race-Neutral Policies Have Had a Particularly Negative Effect on Diversity at the University of California's Most Selective Schools.

A particularly disturbing effect of Proposition 209 has been its tendency to promote, as opposed to alleviate, the imbalance in enrollment among underrepresented minorities at different UC campuses, with declines in the number of African American, Latino, and American Indian students particularly pronounced at UC's most selective schools, UC Berkeley and UCLA.

The gap between the racial and ethnic composition of California high school graduates and the makeup of the UC Berkeley student body is now greater than every flagship state public university except five, all of which are located in the Deep South[9] and have historical legacies of *de jure* segregation.[10] Furthermore, those underrepresented minorities who are enrolled in the UC system are much more likely to attend less selective schools within the system, such as UC Riverside and UC Merced.[11] The disparity in student body composition between UC campuses increased dramatically following the implementation of Proposition 209, suggesting that despite increasing URM numbers across the university system, the UC system's race-neutral policies are resulting in a statewide university system that is becoming more imbalanced (and therefore also arguably more segregated).[12]

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[8] Similar trends have also become apparent in UC's professional schools. Immediately following the passage of Proposition 209, the number of African American applicants dropped dramatically at the most selective UC law schools. Kidder 2012, *supra*, at 25; DeVaudreuil, *supra* note 5, at 1197-1200. Between 1996 and 1998, African American applicants to Berkeley Law and UCLA School of Law dropped by over two-fifths, and significant drops occurred at UC Davis and UC Hastings as well. Kidder 2012, *supra*, at 25. Nearly fifteen years later, despite robust outreach efforts and increasingly diverse state demographics, applications by African Americans to UC law schools have remained below pre-Proposition 209 levels. *Id*.

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[9] Education Trust, *Opportunity Adrift: Our Flagship Universities Are Straying from Their Public Mission* 18 (2010). The more segregated institutions are the University of Alabama, the University of Georgia, Louisiana State University and Agricultural & Mechanical College, the University of Mississippi Main Campus, and the University of South Carolina-Columbia. *Id.*

[10] *See, e.g., Meredith v. Fair*, 298 F.2d 696, 701 (5th Cir. 1962).

[11] UC Riverside only recently stopped being able to accept all eligible UC candidates, and UC Merced is able to admit all eligible applicants. Santos, *supra*, note 5. However, UC Merced is still several times smaller than any of the other eight UC general campuses.

[12] Kidder, *supra* note 5, at 1173; DeVaudreuil, *supra* note 5, at 1197-2000. *See also* Ryan Fortson, *Affirmative Action, the Bell Curve, and Law School Admissions*, 24 SEATTLE U. L. REV. 1087, 1114-16 (2000-2001) (discussing the decreasing numbers of applications and admission of students of color compared to the increase of applications from white students).

Moreover, this imbalance in enrollments in the UC system undermines the ability to achieve a truly diverse set of university students and thus the ability to train a set of leaders from every race and ethnicity in the community. As aptly noted by this Court in *Grutter*, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 332. Yet in California, by allowing its university system to become so deeply segregated, the pathway for underrepresented minorities to become leaders in the community has become much more difficult. While the percentage of underrepresented minorities in the UC system overall has marginally increased since its low point immediately following Proposition 209 taking effect, those students are not benefiting from the prestige and networks available to graduates of the top state institutions. And for those who do attend the top schools, the *de minimis* representation of minority viewpoints that exists in the university fails to provide the "exposure to widely diverse people, cultures, ideas, and viewpoints" that this Court in *Grutter* recognized is necessary to develop "the skills needed in today's increasingly global marketplace." *Id.* at 330. Thus, it is not enough that underrepresented minorities merely be placed *somewhere* in the UC system to support the claim that the system overall is sufficiently diverse, when a closer look shows that underrepresented minorities are directed away from the most selective campuses where both they and their fellow students would benefit from a more diverse student body.

C. UC's Race-Neutral Policies Have Not Succeeded in Remediating the Adverse Effects of Proposition 209.

Significant declines in the number of African American, Latino, and American Indian students occurred in the UC system despite the implementation of a number of race-neutral policies aimed at maintaining diversity. *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies*, *supra* note 2, at 2. For example, the Eligibility in the Local Context program guaranteed California students from the top 4% of their high schools admission to a UC school. *Id.* at 10. In addition, the Dual Admissions Program allowed top-performing high school students to gain eligibility to the UC system by first attending a community college. *Id.* at 12. A third program implemented Comprehensive Review for freshman applicants, offering a holistic evaluation of students on a wide range of criteria. *Id.* at 12-13. The University of California also expanded its outreach programs targeting students from low-income families, from families with little or no previous higher education experience, and from educationally disadvantaged schools. *Id.* at 23-25.

Despite a concerted effort to offer several pathways to college, UC's programs—those of one of the largest state university systems in the country, operating under the strict race-neutral regime of Proposition 209—did not have an appreciable impact on campus diversity. Admissions of educationally disadvantaged students increased little under Eligibility in the Local Context because "virtually all of these students achieved at a level that made them UC-eligible" without the program. *Id.* at 25 (emphasis omitted). And the Dual Admissions Program led to only slight increases in the number of URM students transferring to the UC system, raising the proportion just 0.6%, from 18.6% to 19.2% of all transferees, from 1995 to 2002. *Id.* at 26.

The experience of UC in seeking to maintain access for low-income students is particularly revealing. While critics of race-conscious admissions policies suggest that socioeconomic considerations could result in greater campus diversity, data from UC does not support this theory. By all available measures, UC enrolls low-income students at rates that far outstrip most private universities and comparable public universities. Over 30% of UC undergraduates in recent years qualified as "low income" under the federal Pell Grant standard; this is twice as many low-income students as peer members of the Association of American Universities. *See* Univ. of Cal., *2011 Accountability Report, Undergraduate Pell Grant Recipients, UC and Comparison Institutions, 2008-09,* http://universityofcalifornia.edu/accountability/index/3.5.1. These numbers are in part a result of UC's provision of generous "gift aid" (grants and scholarships) on the basis of need, again at levels far higher than its peer institutions. *See* Univ. of Cal., *2011 Accountability Report, Per Capita Gift Aid for New Freshmen, UC Campuses and Public AAU Institutions, 2008-09,* http://universityofcalifornia.edu/accountability/index/3.4.

Yet even with such significant steps to attract low-income students, UC's most elite campuses remain unable to attract meaningful proportions of URM students. Kidder 2012, *supra*, at 49. While higher percentages of URMs admitted to UC are from low-income families, *id.* at 48-49, this has not translated to appreciably greater levels of campus diversity. *See id.* at 49 ("[I]s UC's set of comparatively optimal conditions for enrollment of low-income students enough to offset race-specific barriers associated with Prop 209? The answer, unfortunately, is that it cannot."). In fact, given the extent of UC's measures to attract low-income students, "the UC experience approximates an upper-bound limit on the extent to which an ensemble of class-based efforts can have as a byproduct a racially diverse undergraduate student body in the face of an affirmative action ban." *Id.*

Though both the UC and UT systems have engaged in considerable race-neutral efforts in their admissions programs, this Court requires only that universities give "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. By the time the Court promulgated this standard, the UC system was already several years into its Proposition 209-mandated experiment with workable race-neutral approaches—and they were not working. Similarly, the University of Texas, in the wake of *Grutter*, experimented with its Top 10% Law, and only after a lengthy good-faith effort did it make the carefully deliberated decision to supplement that effort and begin to consider race as one of many competing factors.

Nearly a decade after *Grutter*, the good-faith efforts in the UC and UT systems and their results severely undermine Petitioner's position, and the Court should reject the notion that further experimentation would somehow yield a different result. As California's experience under Proposition 209 demonstrates, race-neutral policies alone are insufficient to sustain, and, in fact, severely hinder efforts to achieve a diverse student body. The results of California's "experiment" demonstrate that a race-neutral mandate like Proposition 209 produces constitutional injury, instead of a constitutional solution.

D. The California Experience Under Proposition 209 Provides Further Evidence that Increased Campus Diversity Helps Promote a Positive Learning Environment and that Lack of Diversity Deters Highly Qualified Students from Enrolling.

Data that is now available from UC and elsewhere around the country demonstrates the many and varied negative effects that flow from a lack of diversity. Studies at UC and peer institutions show that, beyond mere numbers, increased underrepresented minority enrollment leads to a better racial climate and draws highly qualified applicants to campuses. The flipside, as experienced by UC in the wake of Proposition 209, is a decrease in racial tolerance on campuses and an increase in the flight of highly qualified underrepresented minority candidates to more diverse private institutions.

1. Data from the University of California and Other Institutions Indicates that Increased Diversity Creates a Healthy Racial Climate.

Among the benefits of a diverse college campus is a more racially tolerant climate. Extensive literature illustrates the importance of a healthy racial climate on campus and the negative effects that affirmative action bans have had on minority students. *See, e.g.*, Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1198-99 (2010) (finding that minority students at schools that banned affirmative action encountered more hostility and felt more internal and external stigma than minority students at schools with affirmative action); Victor B. Saenz et al., *Factors Influencing Position Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 RES. HIGHER EDUC. 1, 36 (2007) (finding that the presence of diverse peers helps enhance students' democratic skills and ability to negotiate differences); Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER EDUC. 529, 530 (2004) (finding that cross-racial interaction has positive effects on students' intellectual, social and civic development); Sidanius, et al., *supra* note 3, at 196-97 (noting that a landmark social sciences study of UCLA students who enrolled in the fall of 1997, who were evaluated through their graduation four to five years later, reflected that "students who had more interethnic friends and dates in college were less biased in favor of their ingroup and less anxious interacting with members of different ethnic groups at the end of college"; moreover, "[t]hese effects hold even when controlling for other factors that make people more likely to have positive ethnic attitudes at the end of college (such as having positive ethnic attitudes at the beginning of college and having more interethnic contact prior to college entry")).

Data from UC and other institutions further demonstrates the need for a diverse student body to ensure a racially tolerant learning environment. For example, across the UC system, only 62.2% of African American students and 77.2% of Latinos reported feeling that students of their race are respected on campus. Kidder 2012, *supra*, at 6.[13] By comparison, 72.3% of African American and 89.9% of Latino students at UT Austin reported feeling respected on campus. *Id.* Another university, which employs affirmative action, reports higher levels of African American and Latino students feeling respected, 75 and 79.6% respectively, compared to UC. *Id.*

Furthermore, studies show that affirmative action bans lead to increased negative experiences for minority students. For example, a study by Deirdre Bowen found that students attending schools with affirmative action bans were nearly twice as likely to experience overt racism compared to students who attended schools that permitted affirmative action. Bowen, *supra*, at 1221. Moreover, Bowen found that students in more diverse classrooms were "least likely to: (1) encounter overt racism from faculty and students; (2) have their qualifications questioned; (3) feel pressure to succeed because of race; and (4) feel faculty have lower expectations of them." *Id.* at 1243. These same students were also "most likely to: (1) believe that neither faculty nor students thought minority students got into college because of affirmative action; (2) say they fit into the college population . . .; (3) rate their ability to succeed as high; and (4) feel encouraged to speak about their career aspirations." *Id.*

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[13] UC data is based on student responses to the University of California Undergraduate Experience Survey (UCUES). UT Austin and the second university data are based on student responses to the Student Experience in Research University survey (SERU). UCUES and SERU are identical surveys administered to all undergraduates. Kidder 2012, *supra*, at 4-5 & n.12.

2. Data Indicates that Highly Qualified URM Applicants Reject the University of California in Favor of Private Universities with Affirmative Action.

Data further indicates that Proposition 209 has had a strong "chilling" effect on URM enrollment with highly qualified URM applicants spurning the University of California to go elsewhere. URM students in the top third[14] of the University of

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[14] Top third refers to students offered admission to the University of California possessing academic credentials among the top one-third of all students offered admission to the UC system. This top third of students will have the best enrollment choices within the UC system and at other

California's freshman admits are increasingly more likely than non-URM students to choose a private selective university over a UC school. Kidder 2012, *supra*, at 20. In 2008, 34.4% of URM students in that cohort opted to attend a selective private university compared to 18.9% of non-URM admits—a 15.5 percentage point difference. *Id.* This is a dramatic increase from 1998 when 16.3% of URM students in the top third of the admit pool decided to attend a selective private school. *Id.* Even among students in the middle third of UC's freshman admit pool, URM admits are more likely, albeit less than their top-third peers, to decline a UC offer in favor of a selective private institution than non-URM admits. *Id.*

In particular, the "no show" rate is noticeably high for highly qualified African American students. Over half of African American admits in the top third of UC's 2005 freshman admit pool chose to attend a private selective university while only 26.1% of African American admits in this same group opted to attend a UC school. Susan A. Wilbur, *Investigating the College Destinations of University of California Freshman Admits, in* EQUAL OPPORTUNITY IN HIGHER EDUCATION: THE PAST AND FUTURE OF CALIFORNIA'S PROPOSITION 209, 63, 72 (Eric Grodsky & Michal Kurlaender eds., 2010).[15] Overall, during a decade under Proposition 209,

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institutions such as elite private universities. Kidder 2012, *supra*, at 12.

[15] Of the remaining 25%, 1.9% enrolled in California State University and 3.8% enrolled in a private non-selective university. For 17.5% of the admits, their college destination was unknown. *Id.* at 72.

African Americans in the top third of the admit pool were twice as likely as UC admits overall to enroll at a private selective institution with affirmative action. Kidder 2012, *supra*, at 17-18. In fact, since Proposition 209, among UC Berkeley, UC Davis, UC San Diego, and UC Santa Barbara, there were twelve instances where *not a single one* of the African Americans in the top third of the admit pool enrolled at those campuses. *Id.* at 15.

As the State of California's efforts to train a diverse group of leaders continues to suffer, "private selective institutions have been the main beneficiary of UC's loss of top underrepresented minority admits" after Proposition 209. Saul Geiser & Kyra Caspary, *"No Show" Study: College Destinations of University of California Applicants and Admits Who Did Not Enroll, 1997-2002*, 2 EDUC. POL. 396, 400-01 (2005). In fact, almost half of the African American admits who declined a UC offer in 2005 enrolled at Stanford University, Harvard University, University of Southern California, or New York University. Wilbur, *supra*, at 75. The loss of these top URM admits, many of whom will go on to become the next generation of leaders, weakens UC's position as a prestigious public university that is able to prepare its students for the complexities of "today's increasingly global marketplace." *Grutter*, 539 U.S. at 330.

As the data demonstrates, highly qualified underrepresented minority admits spurned UC admission offers in greater proportions after Proposition 209. Importantly, these highly qualified students opted to attend selective private universities with affirmative action policies—the very institutions Petitioner's and other *amici* contend URM students shun to avoid the "stigma" of affirmative action. *See, e.g.*, Br. Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party 29.

"[N]umerous studies show that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Grutter*, 539 U.S. at 330 (internal quotation marks omitted). And, as noted above, campus diversity also correlates with a more racially tolerant climate. California's experience under Proposition 209 indicates that minority students are keenly aware of these benefits and have been "voting with their feet" in rejecting UC offers of admissions in favor of more diverse institutions. *See* Robert T. Teranishi & Kamilah Briscoe, *Contextualizing Race: African American College Choice in an Evolving Affirmative Action Era*, 77 J. NEGRO EDUC. 15, 23 (2008) (finding that after Proposition 209 African American high school students in California felt unwelcome at the University of California and responded by altering their college search process to include campuses perceived to be "more welcoming and non-threatening"). In fact, the UC Regents specifically recognized this chilling effect when they rescinded SP-1 (the precursor to Proposition 209) in 2001, citing the fact that the resolution caused some "individuals [to] perceive that the University does not welcome their enrollment at its campuses." *Future Admissions, Employment, and Contracting Policies—Resolution Rescinding SP-1 and SP-2*, *supra* note 3, at 1. This brain drain affects not only the remaining students who do enroll at UC, but also the State as a whole, as many of these highly qualified individuals leave California in favor of more hospitable out-of-state institutions. Indeed, as one underrepresented minority graduate of UC Berkeley who was admitted prior to Proposition 209 reflected, Berkeley can "survive but not thrive without diversity."[16]

E. The California Experience Under Proposition 209 Shows that Race-Neutral Policies Do Not Lead to Better Outcomes for URM Students.

Proposition 209 has not led to improved outcomes for URM students, as claimed by some of Petitioner's *amici*. To the contrary, University of California data indicates that Proposition 209 may have actually retarded URM achievement. For example, Petitioner's *amici* point to improved retention and graduation rates of URMs following Proposition 209, as if to imply a causal link. Yet research shows sharp increases between 1994 and 1997, the period before Proposition 209 took effect, in the two-year persistence rates[17] of URM students system-wide and URM students at "elite" schools. Tongshan Chang & Heather Rose, *A Portrait of Underrepresented Minorities at the University of California, 1994-2008*, *in* EQUAL OPPORTUNITY IN HIGHER EDUCATION: THE PAST AND FUTURE OF CALIFORNIA'S PROPOSITION 209, 83, 97 (Eric Grodsky & Michal Kurlaender eds., 2010). However, after Proposition 209 took effect, from 1998 to 2007, the two-year persistence rate for URM students at UC Berkeley and UCLA continued to increase but at a slower rate. *Id.* By contrast, the two-year persistence rate for URM students system-wide plateaued for several years and then declined after Proposition 209. *Id.*

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[16] Grace Carroll et al., *Those Who Got in the Door: The University of California-Berkeley's Affirmative Action Success Story*, 69 J. NEGRO EDUC. 128, 140 (2000) (qualitative study of African American, Chicano/Latino, and Filipino students at UC Berkeley in the 1980s and 1990s).

[17] "Persistence rate" is the percentage of students who continue in school over a given period of time. Thus, two-year persistence rate is the percentage of students who continue in school over the course of two years.

Similarly, the six-year graduation rate[18] for both URM students system-wide and at UC Berkeley and UCLA increased significantly from 1994 to 1997. *Id.* at 98. The graduation rates for both URM groups continued to rise from 1998 to 2003, after Proposition 209 took effect, but at a slower rate. *Id.* In fact, "about two-thirds of the [URM student] graduation rate improvement occurred *before*" Proposition 209 went into effect. *Id.* at 99 (emphasis added).

While it is impossible to say whether URM retention and graduation rates would have continued to improve at the same rate but for Proposition 209, this data refutes the notion that race-neutral admissions policies led to dramatic improvement in URM graduation and retention rates. Indeed, "[a] longer view shows that Proposition 209 added little to the momentum URM students already had going back at least to 1995." *Id.* at 99.

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[18] "Graduation rate" refers to the percentage of students who graduate within a given period of time. Hence, a six-year graduate rate is the percentage of students who graduate within six years.

Similarly, some of Petitioner's and other *amici* suggest that race-neutral approaches actually benefit URMs because URMs are better "matched" to less selective institutions. *See, e.g.*, Br. Amici Curiae for Sander & Taylor 5. However, numerous studies have found that URM students graduate at higher rates when they attend selective institutions. *See, e.g.*, Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 SOC. EDUC. 294, 309 (2005) (rebutting the "mismatch" hypothesis by finding that minorities' likelihood of graduation increased as selectivity of institution attended rose); Tatiana Melguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities*, 49 RES. HIGHER EDUC. 214, 217 (2008) (finding that minority students who were admitted to highly selective institutions under affirmative action policies were more likely to graduate). Notably, a study by Mario Small and Christopher Winship found that selectivity of college was the *only* factor that had a statistically significant effect on African American graduation rates. Mario L. Small & Christopher Winship, *Black Students' Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences*, 36 SOC. SCI. RES. 1257, 1272 (2007). Small and Winship determined that not only did selectivity increase the probability of graduation for African American students, it helped African American students more than white students. *Id.*

Ultimately, higher graduation rates of URM students from selective institutions lead to higher returns in the labor market. A study by Mark C. Long looking at cohorts of students from the 1970s to the 1990s found "increasing labor market returns to both years of education and college quality." Mark C. Long, *Changes in the Returns to Education and College Quality*, 29 ECON. EDUC. REV. 338, 346 (2010). Attending a higher quality college increases the likelihood of graduating and increases earning power, particularly among African Americans and Latinos. *Id.* It follows that an admissions system that prohibits the consideration of race and ethnicity—like that in the University of California—leads to harms far beyond a less diverse campus, with the student body, the community, and the State's economy also bearing the brunt of such policies.

F. Data from the California Experience Under Proposition 209 Supports the University of Texas' Conclusion that Race-Conscious Measures Are a Necessary Supplement If Diversity Is to Be Achieved.

The race-neutral policies that the University of California implemented in the wake of Proposition 209 in significant ways mirror those that the University of Texas has tried. The results in California, as outlined above, strongly support UT's conclusion that race-conscious measures are a necessary supplement if campus diversity is to be achieved.

Following the Fifth Circuit Court of Appeal's decision in *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996), which banned affirmative action programs until this Court's decision in *Grutter*, UT implemented three race neutral programs "to achieve racial and ethnic diversity:" the Texas "Top 10% Law," holistic evaluation of individual applications, and the Longhorn Opportunity Scholarships program,[19] the latter of which awarded scholarships to students in economically disadvantaged and underserved communities. The Top 10% Law, which is somewhat analogous to UC's Eligibility in the Local Context program, guarantees the top 10% of each Texas high school class admission to a Texas state-funded university.

As the UC system experienced after Proposition 209, race-neutral measures at UT failed to compensate for the student body diversity lost after the ban on affirmative action. UT Austin noted that with the implementation of holistic review for freshman applications, African American and Latino freshmen declined in numbers and percentages. UT Proposal at 30. Although the Top 10% Law increased Latino student enrollment at UT Austin, African American student enrollment remained below the number prior to *Hopwood*, only increasing by nine students the year the law took effect. *Id.* Finally, while the Longhorn Opportunity Scholarships program did contribute somewhat to diversity at UT Austin, the increase in actual numbers of minorities was achieved by enlarging the entering class size, which the University noted was unsustainable because it was "already the largest single-campus institution of higher education in the United States." *Id.* at 31-32. Despite these efforts to compensate for the ban on race-conscious measures, UT still had more classrooms with no or only one African American or Latino student in the Fall of 2002 than there had been in the Fall of 1996. *Id.* at 33.

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[19] University of Texas at Austin, *Proposal to Consider Race and Ethnicity in* Admissions 23 (2004), http://www.utexas.edu/student/admissions/about/admission_proposal.pdf (the "UT Proposal").

After the Court's 2003 decision in *Grutter*, abrogating *Hopwood*, UT implemented a policy intended to comply with *Grutter* while allowing UT to continue to prepare a diverse set of leaders,[20] based in part on UT's concern that "racial and ethnic minority group members continue to be underrepresented in many of the occupations that require a college degree."[21] Proponents of the new race-conscious measures noted that "[t]he use of race-neutral policies and programs [following the *Hopwood* decision] has not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin." UT Proposal at 25.

The University of Texas has far surpassed the standard set by the University of Michigan Law School in *Grutter* in terms of its serious good-faith consideration of workable race-neutral alternatives. For five years, the University of Texas implemented a race-neutral percentage plan before coming to the reasoned and research-supported conclusion that this program could not produce the levels of diversity necessary to achieve educational benefits.[22] Following this Court's 2003 decision in *Grutter*, the University of Texas made the considered determination that the Top 10% Law, while making significant progress, could not produce campus diversity without being supplemented by a race-conscious program allowing for individualized evaluations. The University of Texas has amply demonstrated its effort to use race-neutral alternatives without resorting to race-conscious evaluations. Upon determining that race-conscious measures were necessary, UT left the Top 10% Law in place and simply added a race-conscious supplement.

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[20] UT Proposal at 1.

[21] *Id.*

California's experience under Proposition 209 offers further confirmation that UT's assessment was correct: that limited race-conscious measures are a necessary supplement to further the compelling interest in creating a diverse student body.

CONCLUSION

Equal protection is not synonymous with neutrality. The empirical evidence presented here reflects not only that race-neutral policies fail to produce a diverse student body, but in fact have a negative effect on enrollment of underrepresented minorities while undermining the learning environment for those students who remain.

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[22] The State of Texas established the race-neutral "Top 10%" Law that went into effect in 1998. By 2003, the program was well-established and considerable empirical evidence regarding its successes and failures were available.

Though the Court in *Grutter* required only good-faith consideration of race-neutral alternatives in pursuit of a diverse student body, the University of California, by virtue of Proposition 209, was already and continues to be engaged in efforts that far exceed good faith, yet those efforts are simply not enough. Good faith would not require a menu of plans and pathways and exhaustive research, but of necessity that is precisely what the University of California has done. Neither the Petitioner nor this Court need speculate as to what a state university system would look like under the Petitioner's ideal. Based on the University of California example, the Petitioner and the Court can reasonably anticipate a university system that is more segregated, where pathways to leadership for underrepresented minorities are severely narrowed, and where racial isolation and hostility are more prevalent.

Taken together, the data and the policy implications that can be derived from the University of California's experience under Proposition 209 demonstrate that racial and ethnic diversity are necessary components of a thoughtful admissions plan. *Amici* urge the Court to once again look to the University of California to understand the limits of relying upon good-faith race-neutral efforts alone and to reject Petitioner's efforts to potentially impose those failed restrictions throughout the land.

Respectfully submitted,

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APPENDIX

Organization Name	Organization Mission
Asian Pacific American Law Journal, UCLA	The Asian Pacific American Law Journal (APALJ) focuses exclusively on the legal, social and political issues affecting Asian Pacific American communities. APALJ plays an important role by providing a forum for legal scholars, practitioners and students to communicate about emerging concerns and by disseminating these writings to the general population. We work hard to reach out to the community and initiate discourse on APA issues. APALJ members are involved in the entire journal publication process including selection, substantive editing, and cite-checking of all articles and comments. In addition to publishing law journals, APALJ hosts symposiums and live-speaker series.
Berkeley Journal of African-American Law and Policy, UC Berkeley	*BJALP* is dedicated to addressing legal and policy issues that affect the African-American community and people of color in general. *BJALP* deals with such matters as constitutional law, criminal

Organization Name	**Organization Mission**
	justice, civil rights, African-American participation in the political process, the death penalty, fair housing, economic development in the African-American community, African and Caribbean immigration to the United States, health issues that affect African Americans, as well as issues affecting Africa and the African Diaspora.
Berkeley Journal of Gender, Law & Justice, UC Berkeley	The *Berkeley Journal of Gender, Law & Justice*, a continuation of *Berkeley Women's Law Journal*, was founded in 1984 by a group of students at the University of California, Berkeley School of Law who came together with a vision of "preserving our voices of diversity and maintaining our commitment to social change within the often-stifling confines of a law school environment."
Berkeley Law Foundation - Student Leadership Team, UC Berkeley	The Berkeley Law Foundation (BLF) is an income-sharing organization comprised of Boalt students and alumni who are dedicated to providing legal services to historically under-served communities. Started in 1976 by Boalt students, BLF was

Organization Name	Organization Mission
	the first organization of its kind in the nation. The BLF's primary goal is funding public interest law through summer fellowships for current Boalt students and year-long fellowships for law graduates and new attorneys from around the country. Our grants enable the recipients to work on innovative and critical projects that provide desperately needed legal services to communities all around the nation. Besides providing crucial funding for legal services, BLF works to ensure diversity in legal education and the profession. To this end, BLF created the Phoenix Fellowship, which provides several outstanding Boalt students of color funding to do public interest legal work.
Black Law Students Association, UC Davis	UC Davis BLSA is dedicated to increasing the number of lawyers to serve the unique problems and needs of the Black community. UC Davis BLSA works to recruit and retain the number of Black law students at King Hall; to

Organization Name	Organization Mission
	encourage and foster professional competence; and to create a positive force of change within our community. To fulfill these goals, UC Davis BLSA sponsors several programs and outreach events. We work in conjunction with various student groups, the King Hall Outreach Office, and professional organizations to create a supportive community for students of color at King Hall.
Black Law Students Association, UC Hastings	To articulate and promote the professional needs and goals of Black law students; to foster and encourage professional competence; to provide an environment which will promote unity and camaraderie; to bring about change within the legal system in order to make it responsive to the needs of the Black community; to create and maintain active relationships between BLSA and the larger law student community; and to cultivate relationships with Black law students and Black attorneys.
Boalt Hall Student	The Boalt Hall Student Association (BHSA), the law

Organization Name	Organization Mission
Association, UC Berkeley	school's student government organization, is composed of all registered law students. BHSA organizes activities of general law school interest and helps new students adjust to life at Boalt Hall by sponsoring social, athletic and law-related events. The BHSA council represents student interests in curriculum planning, admissions policy, faculty hiring, administration of the library, professional placement, and many other areas; the council also appoints student representatives to faculty-student committees. In addition, BHSA allocates funds to each of the student groups at Boalt Hall.
Chicana/o Latina/o Law Review, UCLA	Over the last 30 years, the Chicana/o-Latina/o Law Review (CLLR) has provided an essential forum for the discussion of central issues affecting the Latino community that "mainstream" law journals continue to ignore. In publishing Volume One, the Review introduced to the nation the first legal journal that recognized how common law, statutes, legislative

Organization Name	Organization Mission
	policy, and politically popular propositions impact the Latino community. Since 1972, the Review has established a reputation for publishing strong scholarly work on affirmative action and education, Spanish and Mexican land grants, environmental justice, language rights, and immigration reform. The United States Court of Appeals for the Ninth Circuit, United States District Court for the Middle District of Pennsylvania, Nevada Supreme Court and New Jersey Superior Court have cited the Review as persuasive authority.
Coalition for Diversity at UC Davis School of Law	The Coalition for Diversity exists to increase the numbers of traditionally underrepresented students at King Hall through recruitment efforts that include pre-law workshops, mentorship programs, and admitted student receptions. The Coalition also works towards retention by collaborating with student groups and administration in creating a diversity-friendly environment where all identities are valued and able to develop.

Organization Name	Organization Mission
	Our overall mission is to create an atmosphere of solidarity at King Hall in a way that improves the quality of education and diversity of the legal field. All are welcome to join.
Diversity Action Committee, Student Body Association of UCLA School of Law	The Diversity Action Committee (DAC) will be responsible for actively identifying diversity-related issues, problems, or concerns affecting the UCLA Law School Community, and the broader UCLA community, and developing action plans, implementing strategies or interventions to resolve such problems, issues, or concerns, and to inform and educate the UCLAW community. For the purposes of this section, "diversity-related issues, problems, or concerns" means any issues, problems, or concerns that arise from conditions affecting historically under-represented groups, including, but not limited to discrimination, oppression, malice, mistreatment, disproportional treatment, and/or hostility towards any member of the UCLA Law School Community,

Organization Name	Organization Mission
	whether intentional or unintentional, that affects race, gender, disability, creed, religion, national origin, sexual orientation, familial status or political affiliation. Because diversity-related issues, problems, and concerns are often the result of institutional, structural and systemic realties, rather than intentional actions, this definition is in no way intended to limit the scope of "diversity-related issues, problems, or concerns" to those that are the direct result of intentional discrimination, mistreatment, or other expression of animus. Nor is this definition intended to be exclusive of other issues, problems, or concerns which are deemed by the DAC, the SBA Representative Council, the SBA Executive Board, other members of the Law School Community to require the attention of the DAC. (From the SBA Bylaws.)
Education & Law Society at UCLA	The mission of the Education and Law Society (Ed Law) is to strengthen UCLA Law students' commitment to achieving

Organization Name	Organization Mission
	educational equity by providing: (1) resources for coursework, advocacy, research, and careers related to education and the law; (2) forums for discussing educational issues with legal practitioners, professors, and colleagues; and (3) volunteer opportunities that directly impact students in underserved areas.
Filipino Law Students Association, UC Davis	The purpose of the Filipino Law Students Association is to educate the Law School community and UC Davis about legal issues affecting Filipinos and Filipino Americans.
Hastings Race and Poverty Law Journal, UC Hastings	The *Hastings Race and Poverty Law Journal* is committed to promoting and inspiring discourse in the legal community regarding issues of race, poverty, social justice, and the law. This Journal is committed to addressing disparities in the legal system. We will create an avenue for compelling dialogue on the subject of the growing marginalization of racial minorities and the economically disadvantaged. It is our hope that the legal theories addressed

Organization Name	Organization Mission
	in this Journal will prove useful in remedying the structural inequalities facing our communities.
La Raza Law Students Association, UC Berkeley	La Raza Law Students Association seeks to empower Latina/o students. By studying law with conocimiento, we learn how to shape the law to enhance our diverse communities' cultural, economic, political, social, and spiritual vitality. La Raza Law Students Association facilitates members' diverse legal interests by maintaining an inclusive environment where members can engage deeply their studies and each other. We develop and enact projects that provide opportunities for members to develop their leadership abilities and to serve local Latina/o communities like the Fruitvale District in Oakland. Drawing upon el poder de la comunidad, La Raza Law Students Association manifests solidarity with other progressive individuals and organizations who seek to transform social conditions in the United States y

Organization Name	**Organization Mission**
	el mundo. Together we realize the bright hope de la humanidad. Por La Raza habla el espiritu.
La Raza Law Students Association, UC Hastings	La Raza is an inter-ethnic, multi-cultural law student organization dedicated to promoting diversity in the classroom and the legal profession. Though individually we have different backgrounds and perspectives, collectively we share the same vision of success for Latin@s in the legal community.
La Raza Law Students Association, UCLA	La Raza's primary focus is to recruit, support, and graduate Raza students. We advocate for training that prepares students to meet the needs of the legally underserved, particularly in the Latino/a community. La Raza provides academic support for Raza students, serves as an organizing force around Raza political issues, and creates a social atmosphere that promotes Raza culture and experience.
Lambda Law Students Association, UC	The King Hall Lambda Law Students Association is composed of lesbian, gay, bisexual, transgender (LGBT) and allied

Organization Name	**Organization Mission**
Davis	students, faculty and staff at King Hall. Lambda's mission is community, education and activism. To that end, Lambda sponsors events that raise awareness of LGBT legal issues on campus and in the community. The group also provides a supportive space for LGBT students at King Hall through academic and professional support programs and a variety of social opportunities. Lambda additionally strives to attract and retain LGBT law students.
Law Students of African Descent, UC Berkeley	Finding its roots in the African American Association of the early 1960s, Law Students of African Descent (LSAD) is now at the heart of the Black community at Berkeley School of Law. The purpose of the organization is to articulate and promote the needs of Black law students at Boalt. With this purpose in mind, our mission is threefold: (1) To facilitate the successful completion of the Juris Doctor program at Boalt Hall for every

Organization Name	Organization Mission
	Black student at Boalt; (2) To solidify LSAD's place in Boalt Hall as an institution; and (3) To promote LSAD's influence and social responsibility through conscious advocacy and community outreach. In the wake of Proposition 209, LSAD actively participates in the recruitment and retention of Black law students. Additionally, as an active member of the National Black Law Students Association, LSAD is committed to forming lasting relationships with its Black alumni, members of the Black legal community, and the Black community as a whole.
Middle Eastern Law Students Association, UC Hastings	To facilitate awareness of Middle Eastern issues and promote the interests of Middle Eastern law students.
Men of Color Alliance, UC Berkeley	The Men of Color Alliance (MOCA) provides a supportive space for African American, Asian & Pacific Islander American, Latino, Native American, and other people who identify as men of color at

Organization Name	Organization Mission
	Berkeley Law. Through cultural, social, professional, educational and/or community service programs, MOCA will create a community to support these men of color, thereby enriching their educational experience at Berkeley Law School. The organization aims to provide a community for men of color to matriculate into and succeed at Berkeley Law. MOCA also serves as a support and mentorship network, linking current students to each other and to Berkeley Law alumni.
National Lawyers' Guild - Berkeley Law Chapter	The National Lawyers Guild is an organization dedicated to uniting lawyers and legal workers in the fight for civil rights and social justice. Guild attorneys, law students, legal workers, and jailhouse lawyers share a progressive social and political perspective that is reflected in the preamble to the Guild's constitution, which holds that human rights are more sacred than property rights.
National Lawyers' Guild – UCLA School of	The National Lawyers Guild is an organization dedicated to uniting lawyers and legal

Organization Name	Organization Mission
Law Chapter	workers in the fight for civil rights and social justice. Guild attorneys, law students, legal workers, and jailhouse lawyers share a progressive social and political perspective that is reflected in the preamble to the Guild's constitution, which holds that human rights are more sacred than property rights.
Native American Law Students Association, UC Hastings	To provide students with opportunities to learn about Native American affairs; to promote awareness to Native American culture; to provide supportive resources for members' participation in cultural and community related activities; to make professional connections within these fields; and to bring together students who share similar interests and goals.
Pilipino American Law Society, UC Hastings	To address legal and social issues relevant to the Pilipino-American community. We welcome all individuals, regardless of ethnic background, who are interested in Pilipino-American issues and increasing cultural diversity in the legal profession.

Organization Name	**Organization Mission**
RAZA Recruitment and Retention Center, UCLA	Since its establishment in 1976, in conjunction with the efforts and dedication of student volunteers and interns, the RAZA Recruitment and Retention Center continues its mission of proactively increasing the status of the Raza community professionally, socially, and politically, both on and off campus.
Students for Economic and Environmental Justice, UC Berkeley	Law Students for Environmental & Economic Justice (SEEJ) is dedicated to the just distribution of environmental benefits to, and the amelioration of environmental harms concentrated in, communities of color and low-income communities. We are committed to the strategic use of legal tools to strengthen grassroots organizing and to build community power.
Students Helping Assure Racial Equity, Justice and Diversity (S.H.A.R.E.J.D.)	Students Helping Assure Racial Equity, Justice & Diversity, S.H.A.R.E. J.D., is a coalition of student groups dedicated to increasing diversity at the UCLA School of Law. As part of our efforts we are collecting testimonials from affected

Organization Name	**Organization Mission**
	individuals detailing their experiences at the law school. We are particularly interested in comments you have heard, how you have been perceived, the degree to which you felt a part of the community, and your general experiences at UCLA School of Law.
Women of Color Collective, UC Berkeley	The Women of Color Collective (WOCC) provides a supportive space for African American, Asian & Pacific Islander American, Latina, Native American, and other women and trans people of color at Berkeley Law. Through cultural, social, professional, educational and community service programs, the WOCC will advance the needs of women and trans people of color, thereby enriching the educational experience at Berkeley Law.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF U.S. SENATORS HARRY REID, TOM HARKIN, RICHARD J. DURBIN, CHARLES E. SCHUMER, PATTY MURRAY, CARL LEVIN, JOHN F. KERRY, BARBARA A. MIKULSKI, DIANNE FEINSTEIN, BARBARA BOXER, JACK REED, MARY L. LANDRIEU, FRANK R. LAUTENBERG, BENJAMIN L. CARDIN, BERNARD SANDERS, CHRISTOPHER A. COONS, AND RICHARD BLUMENTHAL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici, United States Senators representing different parts of the country, some of whom submitted an *amicus* brief to this Court in connection with *Grutter v. Bollinger*, 539 U.S. 306 (2003), submit this Brief to urge the Court not to depart from the settled principle that institutions of higher education have a compelling interest in the educational benefits of diversity.[1] This Court has held that such institutions may, without offending the Constitution, adopt policies that consider race as one of a number of factors in determining which academically qualified applicants to admit.

As members of the legislative branch of government charged with responsibility for "enforc[ing], by appropriate legislation" the mandates of the United States Constitution prohibiting discrimination, *see* U.S. Const. amends. XIII § 2, XIV § 5, we have a unique perspective on the issues now before the Court. *Amici* have devoted substantial attention to the critical concerns implicated by the Court's decisions in this area, and we have worked to forge consensus on measures aimed at broadening educational opportunity and promoting inclusion.

This Brief aims to bring to the Court's attention the actions, assessments and judgments of the legislative branch of the federal government concerning the questions raised in this case.

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[1] Pursuant to Rule 37.6, *amici curiae* certify that this Brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this Brief. Letters from the parties consenting to the filing of this Brief are on file with the Clerk pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

This Court has long recognized the intrinsic value of a diverse student population. Ample empirical evidence both before and after *Grutter* confirms the paramount importance of policies that promote racial diversity in higher education. Admissions policies aimed at promoting diversity have strengthened all aspects of our society, including our nation's economy and democratic institutions. Such policies go to the core functions of higher education – broadening the minds of youth, preparing them to exercise their civic rights, and providing them with pathways to leadership that will protect America's national security and promote the nation's global competitiveness. As this Court has long recognized, "nothing less than the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Grutter*, 539 U.S. at 324 (citation omitted).

As shown below, there is no reason for the Court to abandon time-tested precedent that recognizes the compelling interest that colleges and universities have in obtaining the educational benefits of a diverse student population. In this critical context, the standards articulated by this Court have proved intelligible to educators, legislators, and courts alike.

Further, in the nine years since this Court addressed the issue of race-conscious university admissions policies in *Grutter*, the legal and factual bases for that decision have not eroded. Both Congress and the Executive have affirmed that the Court's holding that diversity in the student population of schools of higher education is a compelling national interest is *correct* as a matter of fundamental policy. This conclusion has been subscribed to by members of both political parties, and has prevailed across administrations with different political philosophies. It has been expressed through numerous legislative acts; through passage of other laws that can only be understood as implementing that conclusion; and through longstanding, congressionally endorsed Executive interpretation.

These measures reflect a broader congressional judgment that advancing diversity and inclusion in colleges and universities is necessary to reach our fundamental national goals. In reviewing the University of Texas's admissions policies, this Court should not lightly set aside determinations of the branch of government elected by the people and vested by the Constitution with responsibility for identifying measures to secure the constitutional rights of all Americans.

Notwithstanding Petitioner's claim to the contrary, *see* Pet. Br. 26, congressional actions illustrate that the benefits of diversity are not simply "inward facing." Rather, Congress has consistently stressed the importance of promoting a pathway to leadership for students of all races. As this Court recognized in *Grutter*, such open and accessible pathways to leadership are a critical benefit of diversity in the nation's colleges and universities: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332. Only by ensuring that "all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America" can we foster confidence in the openness and integrity of those institutions and of our society. *Id.* at 332-333. Congress's – and the public's – continued support of our nation's higher education institutions is premised in part on this commitment to access and inclusion for all students.

ARGUMENT

I. Diversity in higher education is a compelling state interest that warrants continued constitutional protection.

A. The Court's repeated recognition that there is a compelling state interest in promoting diversity in higher education is constitutionally sound and valid.

First in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and then as more fully articulated in *Grutter*, this Court settled the tension regarding higher education admissions policies between conflicting legal and constitutional imperatives driven by a reprehensible past and a dream for a future where racial inequality no longer divides Americans. More recently, those holdings were reiterated by the Court in *Parents Involved in Community Schools v. Seattle School District, No. 1*, 551 U.S. 701, 722-723 (2007).

The standards set by those decisions are well understood by educators, legislators, and the courts. Race-conscious admissions policies are strictly scrutinized, and only those that are narrowly tailored to achieve the compelling interest in a diverse student body will pass constitutional muster. Thus, while admissions policies that focus principally on race or use quotas are proscribed, *see Grutter*, 539 U.S. at 334, institutions that pursue the educational benefits of diversity may consider race among various factors for deciding which academically qualified applicants should be admitted. *See Parents Involved*, 551 U.S. at 722 ("The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual.").

A central tenet of this Court's teachings in this area is the discretion vested in educators. Those with expertise retain substantial discretion to craft an admissions policy that best meets the needs of any given institution, in light of that institution's mission and details specific to it. *See Grutter*, 539 U.S. at 328 ("Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.").

This Court has recognized that the Fourteenth Amendment did not intend to foreclose government consideration of race *per se*. *See Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause. ... Not every decision influenced by race is equally objectionable"; *id.* ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."). The Fourteenth Amendment's Framers understood and acted on this flexibility. *See* Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 430-431 (1997) (discussing enactment of explicitly race-conscious statutes by the Reconstruction Congress); Andrew Kull, *The Color-Blind Constitution* 67 (1992) (citing evidence that the Thirty-ninth Congress rejected proposed "color-blindness" language in the Fourteenth Amendment).

Finally, members of the Court have made clear that policies aimed at inclusion do not pose the same constitutional hazards as those that seek exclusion or separation. *See Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995) (affirming that strict scrutiny does not ignore the "difference between an engine of oppression and an effort to foster equality in society") (internal citations omitted).

B. The benefits of diversity in higher education are well-established and undeniable.

No clear change of circumstances has occurred in the nine years since *Grutter* was decided that would justify abrogating *stare decisis* and overruling *Grutter*, much less Justice Powell's decisive opinion more than three decades previously in *Bakke*. To the contrary, an ever-mounting body of empirical and social science research demonstrates that students and the nation as a whole benefit from admissions policies that promote student diversity. Post-*Grutter* studies affirm that student body diversity can strongly and positively affect learning, both in and out of the classroom.[2] Other studies show that a racially diverse environment promotes attitudes that increase racial harmony[3] and improve the classroom experience,[4] and provide lifelong benefits in increased leadership and civic engagement.[5] Contrary to some claims, minority students clearly benefit from race-conscious admissions policies.[6] This post-*Grutter* research affirms that the Court's decision properly recognized that diversity in higher education is a compelling state interest and that the same considerations are true today.

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[2] *See, e.g.*, Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. Issues 595, 600-607 (2005) (longitudinal study of over 4,400 students at nine public universities, finding that diversity improves analytical problem-solving skills, complex thinking skills, socio-cognitive skills, and democratic sensibilities); Nicholas Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. Educ. Res. 4, 20 (2010) (meta-analysis of twenty-three studies, finding positive gains in cognitive development).

[3] *See* Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751, 766-768 (2006) (analysis of 500 studies, finding that positive intergroup contact reduces prejudice).

[4] *See* Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 Mich. J. Race & L. 63, 97-103 (2011) (post-*Grutter* study of 500 University Michigan Law School students, finding that greater diversity led to improved learning, open minds, engaging classroom conversations, greater participation by minority students, and less tokenism).

[5] *See, e.g.*, Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 Rev. Educ. Res. 29, 46 (2011) (meta-analysis of twenty-seven studies, concluding that college diversity experiences positively correlate with increased civic engagement); Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society: Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615, 641-643 (2008) (finding that post-college leadership skills substantially relate to student body diversity

All of these benefits from diversity in higher education, be they narrowly pedagogical ("inward," in Petitioner's parlance, *see* Pet. Br. 26) or more generalized ("outward," in her terms), are valid compelling interests. Of the three distinct educational objectives served by diversity in higher education recognized in *Grutter*, only one focuses on the educational experience itself: increased perspectives ("classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of

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and cross-racial interaction during college); Nicholas A. Bowman, et al., *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J.C. Student Dev. 729, 737 (2011) (longitudinal study finding that diversity experiences are positively related to personal growth, purpose in life, recognition of racism, and volunteering behavior).

[6] *See, e.g.*, Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1217-1233 (2010) (finding that in states that bar race-conscious admissions, three-fourths of students felt pressure to prove themselves due to their race and nearly one-half reported having their qualifications questioned, while in schools with race-conscious admissions, less than half of the students felt pressured to prove themselves due to race and only one-quarter reported having had their qualifications questioned); Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 Calif. L. Rev. 1299 (2008) (findings for elite law schools).

backgrounds"). *See Grutter*, 539 U.S. at 330. The others, professionalism (*see id.*, student body diversity better prepares students as professionals), and civic engagement (*see id.* at 332, "effective participation by members of all racial and ethnic groups in the civic life of our Nation") are valid state interests as well. The cognizable compelling benefits of diversity therefore go far beyond the classroom.

These aims are important. Today's workforce and our nation's civic life are increasingly diverse. Those who have been exposed to, learned from, taught, and formed friendships with individuals unlike themselves, and have thus gained an understanding of "diverse people, cultures, ideas and viewpoints" (*id.* at 330), are better prepared to enter and excel in an increasingly global professional arena. Similarly, increasing civic engagement by minority citizens is a significant national goal given the country's ongoing struggle with the impact of segregation and discrimination. *Cf. Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) ("[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions"). Having individuals in positions of government and corporate leadership who have substantial ties to otherwise isolated minority communities has helped assure that our government responds to all its citizens, regardless of race. Quite apart from the tens of thousands of individuals whose life experiences have been radically changed by the approval of limited, race-sensitive admissions policies, and the innumerable others (classmates, children, neighbors and institutions) who can be shown to have benefited, in the absence of such policies, the Nation will lose a critical tool in the struggle to overcome both racial separation and the mistrust it engenders.

Despite affirmative action's success in fostering integration, there is far to go, especially for a nation that rightly prides itself on expanding the notion of liberty. As Justice Kennedy stated:

> Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

Parents Involved, 551 U.S. at 787. As discussed in the next section of this Brief, the legislative branch has acted with that history and promise in mind.

II. Because of the compelling national interests served, Congress and the Executive Branch consistently have endorsed diversity in higher education.

For more than two generations, federal education law and policy have recognized the critical educational importance of having students from diverse backgrounds and the harm that occurs when diversity is absent. *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (rejecting the notion that a racially segregated law school could provide an "equal" education, as a "law school ... cannot be effective in isolation from the individuals and institutions with which the law interacts"). In his 1970 message proposing the Emergency School Aid Act ("ESAA"), Pub. L. No. 92-318, Title VII, §§ 701-720, 86 Stat. 235, 354-371 (1972) (repealed 1978), President Nixon stated:

> This Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education – not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

H.R. Rep. No. 92-576, at 3 (1971). Congress concurred, declaring that "racially integrated education improves the quality of education for all children." *Id.* at 10. Congress recognized both that "[e]ducation in an integrated environment, in which children are exposed to diverse backgrounds, is beneficial to both [minority and nonminority children]," S. Rep. No. 92-61, at 7 (1971), and that "[w]hether or not it is deliberate, racial, ethnic, and socio-economic separation in our schools and school systems [has] serious and often irreparable adverse effects on the education of all children, be they from deprived or from advantaged backgrounds." *Id.* at 6. Although the ESAA was subsequently repealed, Congress has remained committed to the importance of student-body diversity in policies affecting education at all levels. *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. 107-110, § 5301(a)(4)(A), 115 Stat. 1425, 1806 (2002) (codified at 20 U.S.C.

§ 7231(a)(4)(A)) (finding that "[i]t is in the best interests of the United States ... to continue the Federal Government's support of ... local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds").

Specifically in the context of higher education, ever since *Bakke*, Congress and the Executive Branch have treated as settled law the notion that having a diverse student body in the nation's institutions of higher learning is a compelling national interest and that policies that are narrowly tailored to achieve that goal do not offend either Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment.

After Justice Powell's pronouncement on diversity in *Bakke*, Congress twice passed significant amendments to Title VI – both signed into law by President Reagan – without seeking to limit the ability of colleges and universities to use race-conscious measures to obtain the educational benefits of diversity. In the Rehabilitation Act Amendments of 1986, for example, Congress abrogated the States' Eleventh Amendment immunity under Title VI and other statutes. *See* Pub. L. No. 99-506, Title X, § 1003, 100 Stat. 1807, 1845 (codified at 42 U.S.C. § 2000d-7). Congress was quite familiar with the *Bakke* decision and should be presumed to have considered it when Congress amended Title VI. *See McCarthy v. Bronson*, 500 U.S. 136, 140 (1991); *Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993). By contrast, when Congress has disapproved of judicial interpretation of a federal civil rights statute, it has not been reticent about amending the law. *See, e.g.*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 42 U.S.C. § 2000d-4a *et seq.*) (amending

Title VI and related statutes in response to *Grove City College v. Bell,* 465 U.S. 555 (1984)); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (codified at 42 U.S.C. § 2000e-5(e)(3)(A)) (amending Title VII in response to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); *Landgraf v. U.S.I. Film Prods.*, 511 U.S. 244, 250-251 (1994) (noting that the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, responded to nine Supreme Court decisions construing federal employment discrimination statutes)); *see also, e.g.*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-3554 (codified at 42 U.S.C. § 12101 *et. seq.*) (amending the Americans with Disabilities Act in response to *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 534 U.S. 184 (2002)).

When this Court reiterated in *Grutter* that the state has a compelling interest in achieving student-body diversity, many members of Congress voiced their endorsement. For example, Senator Richard Durbin spoke for many when he stated that, "[t]he Court's decision [in *Grutter*] reaffirms the compelling interest in racial and ethnic diversity-universities may continue to include race as one factor among many when selecting its students. Diversity programs promote the integration and full participation of all groups in our society." 149 Cong. Rec. S8432-02, S8432-33 (daily ed. June 24, 2003) (statement of Sen. Durbin).

Since 2003, Congress has enacted significant pieces of legislation recognizing the state's compelling interest in student body diversity and has sought to reduce racial isolation and to promote inclusion and access to educational opportunities in higher educational institutions. For instance, the College Cost Reduction and Access Act, Pub. L. No. 110-84, § 802, 121 Stat. 784, 817-818 (2007) (codified at 20 U.S.C. § 1067q), provided funds to "increase the number of Hispanic and other low income students attaining degrees in the field of science, technology, engineering or mathematics." 20 U.S.C. § 1067q(b)(2)(B). Additionally, in 2008, Congress passed the Higher Education Opportunity Act, Pub. L. No. 110-315, § 502, 122 Stat. 3078, 3331 (2008) (codified at 20 U.S.C. § 1101 *et. seq.*), a reauthorization of the Higher Education Act, in which it established many programs to encourage diversity in higher education, such as Promoting Postbaccalaureate Opportunities for Hispanic Americans. In addition to the establishment of new programs, the Higher Education Opportunity Act called for a study of minority male academic achievement and a study of bias in standardized tests. *See* Pub. L. No. 110-315, §§ 1109-1110, 122 Stat. 3078, 3495-3496 (2008) (codified at 20 U.S.C. § 9709 note (Study of Minority Male Academic Achievement / Study on Bias in Standardized Tests)). The Higher Education Opportunity Act also enacted a new requirement for institutions to report information on student body diversity to prospective and enrolled students, including the percentage of the student body who self-identified as a member of a major racial or ethnic group. *See id.* at § 488, 122 Stat. at 3293-3294 (codified at 20 U.S.C. § 1092(a)(1)(Q)). In his floor statement, Representative Danny Davis remarked on the bill: "I am happy that the bill emphasizes the need to support populations that are underrepresented in higher education...These provisions will help ensure that the higher education community better reflects the diversity of our Nation." 154 Cong. Rec. H7658-03, 7663 (daily ed. July 31, 2008) (Statement of Rep. Davis). Representative George Miller summarized the goal of the Higher Education Opportunity Act in increasing accessibility to higher education in his remarks, saying: "In America, a college degree has always been the ticket to [the] middle class. More and more, our future depends upon our ability to produce well-educated and skilled workers to take the jobs of the 21st century." 154 Cong. Rec. H7658-03, 7658 (daily ed. July 31, 2008) (statement of Rep. Miller).

Congress' enactment of legislation in other related areas demonstrates its understanding of the compelling national interest in diversity. For example, in 1979, Congress vested the National Science Foundation with responsibility for "efforts which provide support for ... ethnic minorities." S. Rep. No. 96-49, at 52 (1979). The Excellence in Mathematics, Science, and Engineering Education Act of 1990, Pub. L. No. 101-589, 104 Stat. 2881 (repealed 1994), undertook to "increase the number and diversity of individuals entering and completing graduate and doctoral programs[.]" S. Rep No. 101-412, at 4138 (1990). That Act also called upon the National Science Foundation to give "priority consideration to increasing the participation of women and minority students" in awarding fellowships. *Id.*; *see also* Pub. L. No. 107-368, § 10, 116 Stat. 3034, 3049 (2002) (codified at 41 U.S.C. § 1862n-1) (statute directing that scholarship funds be awarded upon consideration of factors including individual applicants' race); Pub. L. No. 107-110, Title I, § 1504, 115 Stat. 1425, 1598-1599 (2002) (codified at 20 U.S.C. § 6494) (same). In the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2651 (codified at 20 U.S.C. § 1400(c)(13)(B)), Congress sought to increase the participation of minorities in the teaching profession, finding that the inclusion of minority individuals in the area of special education was "essential to obtain greater success in the education of minority children with disabilities." More recently, the Food Conservation and Energy Act of 2008 authorized grants to increase participation by women and underrepresented minorities in rural areas in the fields of science, technology, engineering, and mathematics ("STEM"), Pub. L. No. 110-234, § 7204(a)(1)(D)(49), 122 Stat. 923, 1237 (codified at 7 U.S.C. § 5925), and, in the Coast Guard Authorization Act of 2010, Congress included a provision that seeks to increase minority representation at the Coast Guard Academy by allowing factors such as sex, race, color and religious beliefs of the applicants to be considered. Pub. L. No. 111-281, § 903(b)(4), 124 Stat. 2905, 3011 (codified at 14 U.S.C. § 182). Congress also emphasized the value of diversity in the America COMPETES Reauthorization Act of 2010, Pub. L. No. 111-358, § 202, 124 Stat. 3982 (2011) (codified at 51 U.S.C. § 40901 note ("NASA's Contribution to Education")), in which it directed NASA to develop and maintain "programs and activities designed to increase student interest and participation in STEM, including from minority and underrepresented groups."

Congress also has enacted laws recognizing that promoting diversity in higher education is integral to achieving workforce diversity in important fields such as law, diplomacy, science, and nursing. *See*, *e.g.*, Pub. L. No. 105-244, Title VII, § 721(a), 112 Stat. 1581, 1794 (1998) (codified at 20 U.S.C. § 1136) (establishing the Thurgood Marshall Legal Opportunity Program to assist "low-income, minority, or disadvantaged college students" with law studies); Pub. L. No. 102-325, Title VI, § 621, 106 Stat.

448, 734 (1992) (codified at 20 U.S.C. § 1131) (establishing the Minority Foreign Service Professional Development Program to "significantly increase the numbers of African American and other underrepresented minorities in the international service"); H.R. Rep. No. 106-645, at 164 (2000) (funding program to "increase the number of minority students who pursue advanced degrees and careers" in science fields); H.R. Rep. No. 107-229, at 30 (2001) (funding "nursing workforce diversity" program to "increase nursing education opportunities for individuals who are from disadvantaged backgrounds, including racial and ethnic minorities"); *see also* Charles C. Moskos & John Sibley Butler, *All That We Can Be: Black Leadership & Racial Integration the Army Way* (1996) (discussing efforts to promote integration and minority group advancement in the military).

In 2008, Congress reauthorized and expanded the Thurgood Marshall Legal Opportunity Program and the Minority Foreign Service Professional Development Program through the Higher Education Opportunity Act, Pub. L. No. 110-315, §§ 704, 612, 122 Stat. 3078, 3347, 3339-3340 (2008) (codified at 20 U.S.C. §§ 1136, 1131). The Higher Education Opportunity Act also created the Patsy T. Mink Fellowship Program "to assist highly qualified minorities and women to acquire the doctoral degree or the highest possible degree available, in academic areas in which such individuals are underrepresented for the purpose of enabling such individuals to enter the higher education professoriate." Pub. L. No. 110-315, § 807, 122 Stat. 3078, 3392-3396 (2008) (codified at 20 U.S.C. § 1161g).

Congress also has enacted much legislation that makes higher education affordable and within the reach of many students who otherwise could not participate in the American dream. These programs are premised on the assumption that higher educational institutions are open and accessible to minority students. For instance, Congress has devoted significant resources to federal college affordability in part with the understanding that there would be a diverse group of recipients. *See* Higher Education Opportunity Act, Pub. L. No. 110-315, § 401, Title IV, 122 Stat. 3078, 3188-3190 (2008) (codified at 20 U.S.C. § 1070a) (increasing maximum allowable PELL grants, making PELL grants available for year-round study and expanding eligibility requirements to include part-time students).[7] These programs give practical effect to this Court's statement in *Grutter* that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized. *Grutter*, 539 U.S. at 332.

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[7] In expressing support for this legislation, Senator Tom Harkin explained:

> While this legislation seeks to ensure increased access and success for all students, we intend for the Secretary to work with States to address the unique access issues faced by underserved communities, including: low-income individuals, individuals with disabilities, homeless and foster care youth, disconnected youth, nontraditional students, members of groups that are traditionally underrepresented in higher education, individuals with limited English proficiency, veterans, including those just returning from active duty, and dislocated workers.

156 Cong. Rec. S1923-1908, 1984 (daily ed. Mar. 24, 2010) (statement of Sen. Harkin).

This record of legislation represents Congress's agreement with the Court's reasoning in *Grutter* that "student body diversity promotes learning outcomes,... better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Grutter*, 539 U.S. at 330 (internal quotation marks omitted). Congress agrees with the Court that our Nation's schools "must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America." *Id.* at 333.

The Executive branch has strictly adhered to this diversity principle. In 1979, shortly after *Bakke*, the Department of Education reviewed its Title VI regulations and concluded that it would interpret the regulations consistent with Justice Powell's opinion. The Department affirmed this understanding in 1991, stating that, under its regulations, "[a] college should have substantial discretion to weigh many factors - including race - in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures." Notice of Proposed Policy Guidance, 56 Fed. Reg. 64,548, 64,548 (Dec. 10, 1991). It advised colleges and universities that they could continue to "consider race as one factor among several when awarding scholarships designed to help create the kind of campus educational environment that results from having a student population with a variety of experiences, opinions, backgrounds, and cultures." *Id.*; *see also* 59 Fed. Reg. 8,756, 8,761-8,762 (Feb. 23, 1994) (noting that "[t]he Court in *Bakke* indicated that race or national origin could be used in making admissions decisions to further the compelling interest of a diverse student body even though the effect might be to deny admission to some students who did not receive a competitive 'plus' based on race or ethnicity"). More recently, the Bush and the Obama Administrations have issued guidances implementing the *Grutter* standards for using race as a factor in higher education admissions policy. *See* U.S. Dep't of Educ., Office for Civil Rights, The Use of Race in Postsecondary Student Admissions (2008) (withdrawn and replaced); U.S. Dep't of Justice, Civil Rights Div. & U.S. Dep't of Educ., Office for Civil Rights, Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (2011), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html.

Most recently, the U.S. Department of Education identified school diversity as a priority goal for its competitive funding programs. Its "Notice of final supplemental priorities and definitions for discretionary grant programs," 75 Fed. Reg. 78,486, 78,508 (Dec. 15, 2010), lists sixteen new funding priorities, including "projects that are designed to promote student diversity, including racial and ethnic diversity, or avoid racial isolation." *See also* 74 Fed. Reg. 36,174, 36,175 (July 22, 2009) (providing competitive grants to local educational agencies to procure "technical assistance in preparing, adopting, or modifying, and implementing student assignment plans to avoid racial isolation and resegregation in the Nation's schools, and to facilitate student diversity, within the parameters of current law").

III. Congress and the executive branch have a constitutionally prescribed role in helping identify compelling national interests.

As described above, Congress has enacted numerous laws and funded numerous programs consistent with this Court's pronouncement that race-conscious admissions policies that are narrowly tailored to achieve a diverse student-body serve a compelling national interest. Congress has overseen the Executive's adherence to these principles and has twice amended Title VI in full awareness of this Court's rulings. Literally decades worth of legislation was enacted and billions of dollars in funds were appropriated to colleges and universities based on the understanding that this issue was settled and that admissions policies that consider race as but one factor in order to achieve a diverse student body and ensure an open and accessible pathway to leadership for students of all races are legal.

The question whether an interest is "compelling" as opposed to merely "important" should not be resolved by this Court in isolation from the considered judgments and acts of other branches of government on the same subject. In determining whether a government interest is "compelling" under other constitutional provisions, this Court has looked to prevailing practice. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002) (First Amendment); *Burson v. Freeman*, 504 U.S. 191, 215-216 (1992) (Scalia, J., concurring in judgment) (First Amendment); *see also Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (Due Process Clause). Indeed, this Court has looked to prevailing legislative understanding in determining the meaning not only of doctrinal terms such as "compelling interest," but also constitutional text such as "Due Process of Law" and "Cruel and Unusual Punishment." *See, e.g., Burnham v. Superior Court,* 495 U.S. 604, 619 (1990) (plurality opinion); *Coker v. Georgia,* 433 U.S. 584, 592-596 (1980). Although the Court has not yet decided how best to ascertain constitutionally relevant societal judgment, *see, e.g., Atkins v. Virginia,* 536 U.S. 304 (2002), it generally holds that "statutes passed by society's elected representatives," *Stanford v. Kentucky,* 492 U.S. 361, 370 (1989), are the "clearest and most reliable objective evidence." *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989).

In considering the benefits of diversity and the impact of race-neutral admissions policies, the Court should give considerable weight not only to the considered judgments of educators, but also to those of the political branches, which, under the tripartite constitutional scheme, share responsibility for answering these empirical questions. Indeed, determining which policies will help achieve the "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement," *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), is a task that the Constitution explicitly entrusts to Congress in the first instance. *See* U.S. Const. amend. XIV § 5.

While Petitioner would require "a strong basis in evidence" before a college or university admissions procedure could take into account an applicant's race, *see* Pet. Br. 31-32, her backwards-looking corrective policy, imported from the remedial context, *see Croson,* 488 U.S. at 500, is unworkable and unwise. This Court has long deferred to educators and sanctioned their choice of race-conscious admissions policies, not because those policies can make up for the past, but because the Court has respected the expertise of these educators to determine how best to create a positive educational environment for their students. *See Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."). Congress and the Executive branch have acted with that principle in mind. Adopting Petitioner's more restrictive standard would elevate the Court's judgment over educators' expertise as to the educational value of diversity. We respectfully submit that curtailing the discretion of educators in this way is not a sound framework for selecting students for the colleges and universities of the 21st century.

CONCLUSION

This Court should adhere to longstanding and settled precedent that permits educators to consider race as one factor among many when they make admissions decisions, as long as their admissions policies are narrowly tailored to achieve the compelling state interest in student-body diversity. To do otherwise would substitute the judgment of this Court for that of educators with expert knowledge about the needs of students and the requirements of a learning environment, and would undermine laws that Congress enacted to reflect and support the compelling interest in higher education student body diversity.

Because we firmly believe that the Court has properly and correctly recognized this principle in its earlier decisions, we ask that the Court reconfirm its prior holdings and affirm the judgments below.

Respectfully submitted,

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Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus United Negro College Fund ("UNCF") was founded in 1944 to increase educational opportunities for African Americans. It is currently the Nation's oldest and most successful African American educational association and its steadfast commitment to higher education cannot be overstated. UNCF is most often associated with the slogan for its public awareness campaigns – "A Mind Is A Terrible Thing To Waste®" – which serves as a stark reminder of the consequences of failing to meet the educational needs of a significant portion of the population.

UNCF's founding purpose was to raise general operating funds for its member colleges and universities to lower tuition costs.[2] UNCF has been enormously successful in this regard. Since its founding, UNCF has raised nearly $3.3 billion to support its member colleges and universities, and tuition and fees at UNCF members are at least 30% lower than comparable institutions.

Over time, UNCF has expanded its mission to more than 450 programs at a variety of public and private colleges and universities throughout the United States, offering scholarship programs, mentoring, summer enrichment, curriculum and faculty development, and leadership development. For example, UNCF administers Ph.D. fellowships, which increase the number of African Americans with doctoral degrees, and a Corporate Scholars Program, which is a combination of scholarship, work experience and mentoring within corporate America. UNCF also has partnered with various corporations to offer scholarships to minority students. To date, UNCF has helped more than 400,000 students earn undergraduate and graduate degrees.

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[1] The parties have filed letters, pursuant to Supreme Court Rule 37.3(a), consenting to the blanket filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no person or entity, other than UNCF, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] To become a member of UNCF, an institution must be a historically black, private, accredited, four-year college or university in the United States, founded prior to 1945, and operated solely for educational or scientific purposes. There are currently thirty-eight UNCF members in eleven southern states and Ohio.

In 1999, UNCF was honored to become the administrator of the Gates Millennium Scholars Program, which was founded by Bill and Melinda Gates. The program's twenty-year goal is to provide 20,000 African American, Hispanic, Native American and Asian American students, who show academic promise and significant unmet financial needs along with demonstrated leadership, with the opportunity to attend undergraduate, graduate and professional schools.[3] Between the 2000 and 2010 academic years, the Gates Millennium Scholars Program funded more than 16,000 scholars and awarded more than $600 million toward higher education costs.[4]

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[3] Press Release, Bill & Melinda Gates Foundation, Gates Millennium Scholars Program to Announce Inaugural Class of Gates Millennium Scholars (June 1, 2000), http://www.gatesfoundation.org/press-releases/Pages/inaugural-class-of-gates-millennium-scholars-000601.aspx.

[4] The Gates Millennium Scholars, About GMS: The Gates Millennium Scholars Program, http://www.gmsp.org/publicweb/aboutus.aspx (last visited Aug. 8, 2012).

Throughout its history, UNCF has enjoyed widespread support by Americans of all races and backgrounds. Significantly, it has been honored by a tradition of support from Presidents of the United States, beginning with President Franklin D. Roosevelt, who supported the first annual fundraising campaign;[5] President John F. Kennedy, who donated his Pulitzer Prize funds awarded for his book, *Profiles in Courage*, to UNCF;[6] President George H.W. Bush, who hosted the reception to help UNCF launch its most ambitious capital campaign in 1990;[7] Presidents Bill Clinton and George W. Bush, who helped raise $3.8 million to support the rebuilding efforts of several UNCF-member colleges and universities along the Gulf Coast that were destroyed by Hurricane Katrina;[8] and President Barack Obama, who donated to UNCF part of the $1.4 million he received in conjunction with his 2009 Nobel Peace Prize.[9]

UNCF has sought to remain active before this Court when significant issues relating to education have arisen. UNCF filed an *amicus curiae* brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003), urging this Court to sustain the constitutionality of the University of Michigan Law School's consideration of race in making admissions decisions. More recently, UNCF also joined an *amicus curiae* brief in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), encouraging this Court to sustain the constitutionality of two local school boards' efforts to integrate their public schools.

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[5] 2 ABC-CLIO, PHILANTHROPY IN AMERICA: A COMPREHENSIVE HISTORICAL ENCYCLOPEDIA 480 (Dwight F. Burlingame ed., 2004).

[6] *Id.*

[7] *Id.*

[8] *Former Presidents Bush and Clinton Honored at UNCF's 63rd Anniversary Dinner for Their Philanthropic Work*, PR Newswire, Mar. 10, 2007, http://www.prnewswire.com/news-releases/former-presidents-bush-and-clinton-honored-at-uncfs-63rd-anniversary-dinner-for-their-philanthropic-work-51665102.html.

[9] Brian Montopoli, *Obama Donates Nobel Prize Money to 10 Charities*, CBS News, Mar. 11, 2010, http://www.cbsnews.com/8301-503544_162-20000311-503544.html.

Given the historical mission of UNCF and its role over the past 68 years in promoting access to higher education for African American and other minority students, UNCF has a strong interest in the proper resolution of the questions presented in this case.

SUMMARY OF ARGUMENT

As this Court has consistently recognized, education plays a unique role in the future of our great Nation. In *Brown v. Board of Education*, the Court noted that education "is the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). In *Plyler v. Doe*, 457 U.S. 202 (1982), this Court referred to "the pivotal role of education in sustaining our political and cultural heritage." *Plyler*, 457 U.S. at 221. Most recently, in *Grutter*, this Court applied these principles to higher education, writing: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332.

The Court's statements acknowledging the critical role of education in democracy, which is grounded in voting and community involvement, are supported by objective facts. In the 2008 U.S. presidential election, there was a 32 percentage point gap between the voting rates of graduates of four-year colleges and high school graduates in the 25-44 age group, with college graduates being the more likely to vote.[10] In 2009, college graduates were more likely to volunteer in the community than high school graduates.[11]

Education is also a key driver of personal income. Median earnings of bachelor's degree recipients working full-time in 2008 were $55,700, $21,900 more than median earnings of high school graduates.[12] Over a lifetime, a typical college graduate earns 66% more than the typical high school graduate.[13] Moreover, top-ranked public universities like the University of Texas at Austin (UT) are uniquely situated to play a role in increasing educational opportunities. In 2007-2008, 37.5% of incoming college freshmen matriculated at a public four year university, while only 16.5% matriculated at a private nonprofit four year university.[14]

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[10] Sandy Baum, Jennifer Ma & Kathleen Payea, *Education Pays 2010: The Benefits of Higher Education for Individuals and Society*, at 33 (College Board Advocacy & Policy Ctr. Trends in Higher Educ. Series, 2010) (hereinafter "*Education Pays*"), *available at* http://trends.collegeboard.org/downloads/Education_Pays_2010.pdf.

[11] *Id.* at 32.

[12] *Education Pays*, *supra* note 10, at 11.

[13] *Id.* at 12.

[14] *Almanac of Higher Education 2011: Who are the Undergraduates?*, CHRONICLE OF HIGHER EDUC., Aug. 26, 2011, at 36.

It is against this background of national importance that this Court must consider any attempts to roll back the progress of minorities and the progress of our Country under the guise of "equal" treatment. The *Grutter* Court, in holding that the University of Michigan's race-conscious admissions policy was narrowly tailored to achieve the compelling interest of diversity, expressed its hope that the need for affirmative action would one day end, writing:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved.

Grutter, 539 U.S. at 343 (citation omitted). UNCF shares the *Grutter* Court's belief that student body diversity will, sometime soon, occur naturally without the need for race-conscious admission policies. However, as fully demonstrated below, because of the effects of centuries of slavery, segregation, discrimination and unequal opportunity based on race, that day is not today. And for the betterment of our Nation, race-conscious admissions in higher education remain necessary to further the compelling state interest of student body diversity.[15]

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[15] Campus diversity is not the only compelling government interest that can withstand strict scrutiny to support race-conscious decision making in higher education. In *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), four Justices found that the government may have a compelling interest

ARGUMENT

IT IS NOT IN THE NATION'S INTEREST TO END RACE-CONSCIOUS ADMISSIONS IN HIGHER EDUCATION

A. THE EFFECTS OF STATE-SPONSORED DISCRIMINATION ARE NOT MERE HISTORICAL FOOTNOTES

It is impossible to evaluate colleges and universities' compelling interest in student body diversity without recognizing the primary reasons that diversity does not occur naturally. There has been a long history of state-sponsored and private segregation and discrimination in the United States against African Americans, Native Americans, Hispanics and Asian Americans. This segregation and discrimination has, in turn, limited educational and employment opportunities for these groups.

1. A Brief History of State-Sponsored Discrimination Against African Americans

For the first one hundred years of this Nation's existence, the vast majority of African Americans were

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in using race "to remedy disadvantages cast on minorities by past racial prejudice." *Id.* at 325 (joint opinion of Brennan, White, Marshall and Blackmun, JJ., concurring in judgment in part and dissenting in part). UNCF agrees that, in addition to campus diversity, remediation is also a compelling interest. Moreover, *Grutter* does not foreclose remediation for past discrimination as a compelling government interest for race-conscious decision making in higher education. *Grutter*, 539 U.S. at 328.

barred, by law, from educational institutions throughout the United States. At the time of the Civil War, 92% of the population of African Americans in this country were enslaved. Under many then-existing laws, they were legally prohibited from obtaining any type of education.[16]

It was not until the 1870s that a true public primary school system and, to a lesser extent, a secondary school system for African Americans began to develop in the South. Those systems were almost entirely segregated and remained so for nearly a century.[17] As late as 1934, only 39 public secondary schools for African Americans in the South were accredited, including only two in Alabama, one in South Carolina, and none in Mississippi, which had the largest percentage of African-American citizens of any State.[18] In the 1940s, per-pupil spending on education in the South for African-American children averaged about one-third of that for white students and the school year was one to three months shorter.[19]

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[16] JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 138-166 (8th Ed. 2000); HENRY N. DREWRY & HUMPHREY DOERMANN, STAND AND PROSPER: PRIVATE BLACK COLLEGES AND THEIR STUDENTS 13-15, 23 (2001).

[17] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 365-368 (1988); FRANKLIN & MOSS, *supra* note 16, at 445-55.

[18] DREWRY & DOERMANN, *supra* note 16, at 72.

[19] SUSAN T. HILL, THE TRADITIONALLY BLACK INSTITUTIONS OF HIGHER EDUCATION 1860-1982 11 (1985); S. EDUC. FOUND., REDEEMING THE AMERICAN PROMISE: REPORT OF THE PANEL ON EDUCATIONAL OPPORTUNITY AND POSTSECONDARY DESEGREGATION (1995), *available at* http://www.southerneducation.org/getattachment/fb3092fa-160f-424e-9a25-b386ad0826e7/Redeeming-the-American-Promise-Full-Report.aspx.

Finally, in 1954, this Court declared in *Brown v. Board of Education*, 347 U.S. 483 (1954), that segregated schools were inherently unequal, and thus racial segregation and discrimination in education could no longer be defended against constitutional challenge as "separate but equal." *Id.* at 495. Unfortunately, transforming that decree into reality has proved difficult at all levels. *See United States v. Fordice*, 505 U.S. 717, 729, 732-33 (1992) (holding that a State must take affirmative steps to eradicate prior de jure segregation, and "that the adoption and implementation of race-neutral policies alone [do not] suffice to demonstrate that the State has completely abandoned its prior dual system"); *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413, 414 (1956) (per curiam) (applying *Brown* to higher education and holding that an African-American law school applicant was "entitled to prompt admission under the rules and regulations applicable to other qualified candidates"); *Lucy v. Adams*, 350 U.S. 1, 1-2 (1955) (per curiam) (restraining the University of Alabama from denying admission to petitioners based solely on race); *Meredith v. Fair*, 305 F.2d 343, 344, 346 (5th Cir. 1962) (ordering injunction where plaintiff was denied admission to University of Mississippi solely based on his race).

2. Lingering Effects of Discrimination: Inferior Primary and Secondary Schools

In the 58 years since *Brown*, the educational system in America has undergone a remarkable transformation. Notwithstanding the laudable progress made to date, large numbers of minority school children, especially African-American youngsters in large urban and smaller rural school settings, remain stuck in poorly-funded, racially segregated schools.[20] In 2009, 74% of African-American children and 78% of Latino children attended schools in which minorities made up a majority of the student body.[21]

Moreover, significant achievement gaps between minority and white students persist, ranging between 15 and 30 percentage points.[22] At the current rate of progress, the gap still could easily take decades to close.[23] Unfortunately, the schools with the most limited resources, the least experienced and most poorly paid teachers and the parents least able to advocate effectively for their children, are the same ones attended by minority and low-income families. It is a simple fact that a low-income, less well-prepared student has the least chance of gaining access to college.[24]

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[20] *See* LAURA LIPPMAN, SHELLEY BURNS & EDITH MCARTHUR, NAT'L CTR. FOR EDUC. STATISTICS, URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY v-xii, 75-80 (1996), *available at* http://nces.ed.gov/pubs/96184all.pdf.

[21] NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2011 168, tble. 102 (2012), *available at* http://nces.ed.gov/pubs2012/2012001.pdf.

[22] NANCY KOBER, NAOMI CHUDOWSKY & VICTOR CHUDWOSKY, CTR. ON EDUC. POLICY, STATE TEST SCORE TRENDS THROUGH 2008-2009, PART 2: SLOW AND UNEVEN PROGRESS IN NARROWING GAPS 4 (2010), *available at* http://www.cep-dc.org/displayDocument.cfm?DocumentID=334. The term "achievement gap" refers to the disparity in academic performance as measured by standardized test scores, grades, high school graduation rates and post-secondary enrollment and completion rates.

[23] *Id.*

While many African-American children who attended the substandard segregated schools of the 1950s have seen their children not only attend integrated primary and secondary schools, but also have the opportunity to attend colleges and universities, as late as 2007, virtually half of the African-American freshmen matriculated at U.S. colleges and universities were first-generation college students.[25] By stark contrast, in that same year, 87% of white college students had at least one relative who attended college.[26] Even when they do attend college, African Americans are overrepresented in public two-year universities and underrepresented in public doctorate-granting institutions.[27]

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[24] *See* CHILDREN'S DEFENSE FUND, PROGRESS AND PERIL: BLACK CHILDREN IN AMERICA 27-28, 79-97 (1993), *available at* http://diglib.lib.utk.edu/cdf/data/0116_000050_000286/0116_000050_000286.pdf).

[25] Inst. for Higher Educ. Policy, *Mini Brief: A Snapshot of African Americans in Higher Education* (Feb. 25, 2010), *available at* http://www.ihep.org/assets/files/publications/a-f/BLACK_HISTORY_MONTH_2010_MINI_BRIEF.pdf; 1 MICHAEL T. NETTLES & LAURA W. PERNA, THE AFRICAN AMERICAN EDUCATION DATA BOOK 265 tbl. 5 (1997).

[26] Victor B. Saenz, Sylvia Hurtado, Doug Barrera, De'Sha Wolf & Fanny Yeung, *First in My Family: A Profile of First-Generation College Students at Four-Year Institutions Since 1971*, at 1, 11 & tbl. 1 (2007), *available at* http://heri.ucla.edu/PDFs/pubs/TFS/Special/Monographs/FirstInMyFamily.pdf.

[27] *Almanac of Higher Education 2011: Enrollment by Race of Students and Type of Institution*, CHRONICLE OF HIGHER EDUC., Aug. 26, 2011, at 44.

3. Lingering Effects of Discrimination: Underrepresentation in Government And Military Leadership Positions

Equal access to opportunity remains a largely unrealized aspiration, as illustrated by minority underrepresentation in key leadership roles in the government and the military.

At all levels of government, the proportion of minority elected officials trails far behind minorities' share of the electorate. In Congress, 85% of lawmakers are white and African Americans do not hold a single Senate seat.[28] African Americans and Latinos comprise fewer than 10% of all state senators and hold only three governorships.[29] Overall, African Americans and Latinos hold only 3%[30]

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[28] Congressional Demographics: Ethnicity, Congress.com, http://www.congress.org/congressorg/directory/demographics.tt?catid=ethnic (last visited Aug. 8, 2012).

[29] Directory of Latino Elected Officials, NALEO Educational Fund, http://www.naleo.org/directory.html (last visited Aug. 8, 2012); David A. Bositis, *Resegregation in Southern Politics?*, Research Brief, Joint Ctr. for Political & Econ. Studies (Nov. 2011), *available at* http://www.jointcenter.org/sites/default/files/upload/research/files/Resegregation%20in%20Southern%20Politics.pdf.

[30] Currently, 5,850 Latinos serve in elected offices nationwide. *Id.* In addition, approximately 10,500 African Americans serve in elected office at all levels of government. National Roster of Black Elected Officials, Fact Sheet at 1, Joint Center for Political and Economic Studies (Nov. 2011), *available at* http://www.jointcenter.org/sites/default/files/upload/research/files/National%20Roster%20of%20Black%20Elected%20Officials%20Fact%20Sheet.pdf. During its last count of popularly

of elected offices in the United States.[31] At present, not a single Native American judge sits on the federal bench.[32] In total, minorities currently make up only approximately 12% of state judiciaries.[33]

Racial and ethnic representation disparities also exist in U.S. military leadership. Despite the widespread recognition that diverse military leadership is critical to U.S. national security,[34] only 16% of all officers were African American or Latino in 2006.[35] At the highest levels

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elected officials, the Census Bureau determined that the 85,006 governments in the United Sates had 513,200 elected officials. 1992 Census of Government – Popularly Elected Officials, Bureau of the Census (1995) *available at* http://www.census.gov/prod/2/gov/gc/gc92_1_2.pdf.

[31] Fed. Judicial Ctr., Judges of the United States Courts: Biographical Directory of Federal Judges, http://www.fjc.gov/public/home.nsf/hisj (last visited Aug. 8, 2012).

[32] *Id.* (follow "Diversity on the Bench" hyperlink).

[33] ABA, Standing Committee on Judicial Independence: National Database on Judicial Diversity in State Courts, http://apps.americanbar.org/abanet/jd/display/national.cfm (last visited Aug. 8, 2012).

[34] *See* Brief for Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

[35] NELSON LIM, JEFFERSON P. MARQUIS, KIMBERLY CURRY HALL, DAVID SCHULKER & XIAOHUI ZHUO, RAND CORP., OFFICER CLASSIFICATION AND THE FUTURE OF DIVERSITY AMONG SENIOR MILITARY LEADERS: A CASE STUDY OF THE ARMY ROTC 2 (2009), *available at* http://www.rand.org/pubs/technical_reports/2009/RAND_TR731.pdf.

of leadership,[36] African Americans and Latinos officers comprised 4% and 1%, respectively.[37] By contrast, African-Americans and Latinos make up 24% and 7%, respectively, of the lower-level, enlisted military ranks.[38]

4. Lingering Effects of Discrimination: Underrepresentation in Key Private Sector Leadership Positions

This lack of representation extends beyond the public sector. The dearth of diversity persists in the boardrooms and among the executive ranks of the nation's leading companies, even though more diverse corporate boards, on average, are linked with better stock performance and greater profitability.[39] Of the 5,463 corporate board seats available in 2011 on *Fortune 500* corporate boards, minorities only held approximately 10%.[40] More specifically, African Americans held 4.6% of board seats

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[36] The equivalent of an Army Brigadier General (O-5 rank) and above.

[37] Lim, *supra* note 35, at 2.

[38] *Id.*

[39] David A. Carter, Frank D'Souza, Betty J. Simkins & W. Gary Simpson, *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18 Corp. Governance 396, 410-11 (2010); Amy J. Hillman, Albert A. Cannella, Jr., & Ira C. Harris, *Women and Racial Minorities in the Boardroom: How Do Directors Differ?*, 28 J. Mgmt., 747 (2002).

[40] Alliance for Bd. Diversity, Missing Pieces: Women and Minorities on *Fortune* 500 Boards 9 app. 2 (2011), *available at* http://theabd.org/Missing_Pieces_Women_and_Minorities_on_Fortune_500_Boards.pdf.

Asian and Pacific Islanders held 2.1% of board seats, and Latinos held 3% of board seats.[41] Further, minorities were virtually locked out of board leadership roles, as whites held 97% of board chair positions.[42] In 2011, *Fortune 500* Chief Executive Officers included only seven African Americans[43] and six Latinos.[44]

5. Lingering Effects of Discrimination: Underrepresentation in Academia

A diverse faculty provides all students with the opportunity to directly participate in a multicultural learning environment and minority students with visible role models.[45] The mission of cultivating an understanding and appreciation for diversity remains especially important for professional schools, whose graduates will ultimately interact with and serve a diverse population. Unfortunately, despite the acknowledged value of diversity in higher education, major diversity gaps persist in academic institutions.

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[41] *Id.*

[42] *Id.* at 10 app 3.

[43] Richard L. Zweigenhaft & G. William Domhoff, The New CEOs: Women, African American, Latino, and Asian American Leaders of Fortune 500 Companies 38 tbl. 3.1 (2011).

[44] *Id.* at 54 tbl. 4.1 (2011).

[45] *See* E. Thomas Sullivan, The Importance of a Diverse Faculty, University of Minnesota Symposium: Recruiting, Retaining, and Advancing Faculty of Color (Nov. 19, 2004), http://www.academic.umn.edu/img/assets/12261/nov19ets.pdf.

Across all higher education faculty, minorities account for approximately 18% of faculty.[46] Specifically, African Americans are 5.4% of faculty, Latinos are 3.8% of faculty and Native Americans and Native Alaskans are .5% of faculty.[47] For the top twenty-five national universities listed in U.S. News & World Report's 2012 rankings of Best Colleges, African Americans and Latinos comprise 3.1% and 2.8% of faculty, respectively.[48]

Faculty diversity woes plague the nation's best graduate schools as well. Minorities account for approximately 15% of all ABA-accredited law school faculty.[49] Minority representation among faculty dwindles to a mere 11% for the top twenty-five law schools.[50] In 2008, African-American, Native American and Latino faculty were only 7.3% of medical school faculty at

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46. Nat'l Ctr. for Educ. Statistics, *supra* note 21.

47. *Id.*

48. Data were obtained using custom report of fall 2009 staff survey data from the U.S. Department of Education, National Center for Educational Statistics, Integrated Post Secondary Education Data Center, available at http://nces.ed.gov/ipeds/datacenter/.

49. ABA, Legal Education Statistics from ABA-Approved Law Schools, Law School Staff by Gender and Ethnicity (Mar. 6, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_staff_gender_ethn.authcheckdam.pdf.

50. Law Sch. Admission Council & ABA, ABA-LSAC Official Guide to ABA-Approved Law Schools (2012 ed. 2011), *available at* https://officialguide.lsac.org/release/OfficialGuide_Default. Rankings are by determined reference to the 2013 U.S. News and World Report graduate school rankings.

both elite medical schools[51] and nationwide.[52] Equally concerning is minority representation among U.S. business school faculty. African Americans, Latinos and Native Americans and Native Alaskans account for only 6.5% of all faculty at U.S. AACSB-accredited schools.[53] At the fifty best business programs, that representation falls to approximately 4.8%.[54] African Americans, Latinos and Native Americans comprise 2.36%, 2.26% and 0.17%, respectively.[55]

6. Lingering Effects of Discrimination: Underrepresentation in White-Collar Jobs

Minorities are also noticeably absent from traditional white-collar jobs. African-American, Latino, Native American and Alaska Native physicians made up only

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[51] Elite medical schools are the top twenty-five medical research schools as determined by reference to 2013 U.S. News and World Report graduate school rankings.

[52] ASS'N OF AM. MED. COLLS., STRIVING TOWARD EXCELLENCE: FACULTY DIVERSITY IN MEDICAL EDUCATION 3 fig. 1 (2009), *available at* https://members.aamc.org/eweb/upload/Striving%20Towards%20Excellect%20Faculty%20Diversity%20in%20Med%20Ed.pdf.

[53] ASS'N TO ADVANCE COLLEGIATE SCH. OF BUS. (AACSB), BUSINESS SCHOOL DATA TRENDS AND 2012 LIST OF ACCREDITED SCHOOLS 31 (2012), *available at* http://www.aacsb.edu/publications/businesseducation/2012-Data-Trends.pdf.

[54] ASS'N TO ADVANCE COLLEGIATE SCH. OF BUS. (AACSB), FACULTY ETHNICITY – TOP 50 SCHOOLS (2012) (on file with author). Rankings are determined by reference to the 2013 U.S. News and World Report graduate school rankings.

[55] *Id.*

9.2% of all physicians in 2010.[56] Approximately 12% of all attorneys are racial or ethnic minorities.[57] Minorities are also underrepresented in the accounting profession, constituting only 8% of Certified Public Accountants in 2008.[58]

This underrepresentation among white-collar jobs accounts for a significant loss of income. For example, in 2010, 30.3% of whites were college graduates, compared to 19.8% of African Americans and 13.9% of Latinos.[59] That same year, the average African American family median income was $22,552 lower than that of non-Hispanic white families.[60]

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[56] AMA, PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE US (2012).

[57] ABA, Lawyer Demographics, http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf (last visited Aug. 8, 2012).

[58] Louis Grumet, MINORITIES IN THE ACCOUNTING PROFESSION: MUCH REMAINS TO BE DONE, CPA J., Jan. 1, 2008, at 7, *available at* http://www.nysscpa.org/cpajournal/2008/108/perspectives/p7.htm.

[59] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, tbl. 229 (Educational Attainment by Race and Hispanic Origin: 1970 to 2010), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0229.pdf.

[60] CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, INCOME POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 6 tbl. 1 (2011), *available at* http://www.census.gov/prod/2011pubs/p60-239.pdf.

It is against this backdrop of discrimination and its tangible lingering effects – which cannot relegate to a mere footnote in our history – that race-conscious decision making in higher education must be reviewed.

B. THE RAMIFICATIONS OF ELIMINATING RACE-CONSCIOUS DECISION MAKING IN HIGHER EDUCATION ARE SIGNIFICANT

1. Eliminating Race-Conscious Decision Making Will Decrease Student Body Diversity

Recent studies indicate that state prohibitions on race-conscious admissions preferences would widen the minority educational attainment gap in higher education, resulting in significant decreases in minority representation in both undergraduate and graduate programs, especially elite ones.[61] Where the use of race-conscious decisions is flatly prohibited in admissions, underrepresented minorities are less likely to obtain an undergraduate degree from a selective institution.[62] One 2010 study suggested that banning affirmative action at a selective public institution would decrease African American enrollment from 5.79% to 4.05% (a 30% decline), decrease Hispanic enrollment from 7.38% to 5.35% (a 27.5% decline) and decrease Native American enrollment from 0.51% to 0.04% (a 92% decline).[63]

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[61] Currently seven states – Arizona, California, Florida, Michigan, Nebraska, New Hampshire and Washington – prohibit the use of affirmative action in admissions.

[62] Peter Hinrichs, The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities (Oct. 28, 2010), *available at* http://www.georgetown.edu/faculty/plh24/hinrichs_aff_action.pdf. This study defined a "selective institution" as one that ranked in the top 50 on the 1995 U.S. News and World Report rankings.

Affirmative action bans have a similar impact on graduate education. The bans in Texas, California, Florida and Washington reduced overall first-year minority graduate enrollment by 12%.[64] Science and engineering programs are among the hardest hit, with decreases in the proportion of underrepresented minority students in engineering and natural sciences graduate programs of 26% and 19%, respectively.[65] Selective institutions of law and medicine experienced similar reductions in minority enrollment rates.[66]

The share of underrepresented minorities at top public institutions also has declined in most states that have banned affirmative action in post-secondary education. The University of California system was banned from using race conscious admissions beginning in 1998 and its top public institutions immediately experienced a sharp

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63. *Id.*

64. LILIANA M. GARCES, CIVIL RIGHTS PROJECT THE IMPACT OF AFFIRMATIVE ACTION BANS IN GRADUATE EDUCATION 4 (2012), *available at* http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-impact-of-affirmative-action-bans-in-graduate-education/ (follow "The Impact of Affirmative Action Bans in Graduate Education" hyperlink under "Related Documents" inset).

65. *Id.*

66. *Id.*

decline in black student admissions.[67] The University of California at Berkeley saw underrepresented minority student share of admissions fall from 26.3% to 14.4% and the University of California at Los Angeles saw underrepresented minority student share of admissions fall from 22.2% to 15.7%.[68] Top public schools in Texas also experienced declines in student minority enrollment following bans on affirmative action.[69] By one estimate, the end of affirmative action in Texas in 1996 lowered the Hispanic admission rate by 15% and the black admission rate by 30% at Texas A&M in 1997 as compared to 1995.[70] UT-Austin's decline continued after 1997, with estimates that the black and Hispanic admission rates fell 5-7% relative to whites and Asians between 1995 and 1997.[71]

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[67] David Card & Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 INDUS. & LAB. REL. REV. 416, 420-21 (2005) [hereinafter *Evidence from California and Texas*] (noting that the "halting of affirmative action had an immediate impact on minority admissions at the University of California" and that the admission rates for black applicants fell from 45-55% between 1995-1997 to 20-25% between 1998-2001). In 2001, California adopted a "Top X Percent" rule, discussed *infra* Part C.1.

[68] Mark C. Long, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 PUB. ADMIN. REV. 315, 320 (2007).

[69] In Texas, affirmative action was banned following the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

[70] *Evidence from California and Texas*, *supra* note 67, at 422.

[71] *Id.*

Finally, even in those schools experiencing a rebound in minority representation following affirmative action bans, much of the rebound has been in absolute numbers, rather than increased share, and has been attributed to increasing numbers of minorities in the general population.[72]

Elimination of affirmative action has a dramatic effect on the number of minority students considering attending college. One study found that the elimination of affirmative action in Texas led to a statistically significant decline in the numbers of Hispanic and black students taking a college entrance exam.[73] The results continued to show a statistically significant decline, even accounting for the implementation of the Top Ten Percent Plan in Texas.[74]

Another study found that underrepresented minorities in California and Texas significantly lowered the number of entrance score reports (e.g. SATs and ACTs) they sent to in-state, public colleges following bans on affirmative action.[75] The study concludes that a student's probability

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72. Long, *supra* note 68, at 320-21. In a separate study, Mark C. Long and Marta Tienda conclude that the Top 10 percent Plan combined with varied weights for admissions "did not fully compensate for the effects of the *Hopwood* decision in lowering the odds of admission for Blacks and Hispanics." *Winners and Losers: Changes in Texas University Admissions Post-Hopwood*, 30 Educ. Evaluation & Pol'y Analysis 255, 268 (2008).

73. Lisa M. Dickson, *Does Ending Affirmative Action in College Admissions Lower the Percent of Minority Students Applying to College?* 25 Econ. Educ. Rev. 109, 114-16 (2006).

74. *Id.* at 116.

75. Mark C. Long, *College Applications and the Effect of Affirmative Action*, 121 J. Econometrics 319, 325 (2004).

of acceptance weighs heavily on the student's application decisions and that "minority applicants will substantially reduce the number of their score reports sent to top-tier colleges after the elimination of affirmative action policies."[76] Similarly, in Washington, the rates of admission of minority students to that state's top research schools decreased as a result of a drop in applications submitted by minority students.[77]

The lack of diversity at selective schools will negatively impact the other students on those campuses, as a number of studies show that the benefits to a diverse education extend to the entire student body.[78] Recent studies continue to provide evidence that diversity in a student body improves teamwork and leadership skills, reduces prejudice and promotes civic development.[79] These results hold true even for students who did not grow up in diverse settings. For instance, Professor Victor Saenz at the University of Texas showed in a 2010 paper that despite *de facto* segregation in many students' precollege environments, public universities that are more diverse can positively affect students' levels of interactions with diverse peers, which leads to academic benefits and helps to interrupt the "cycle of segregation." [80]

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[76] *Id.* at 340.

[77] *Id.*

[78] Faye J. Crosby, Aarti Iyer, Susan Clayton, & Roberta A. Downing, *Affirmative Action: Psychological Data and the Policy Debates*, 58 AM. PSYCHOLOGIST 93, 99 (2003) (discussing the benefits of a diverse undergraduate experience). There is also evidence that a diverse student body increases academic skills and cognitive functioning. *See* Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 AM. EDUC. RES. J., 322 (2008) (discussing improved learning and educational experiences from a racially diverse college where students are more likely to be engaged in cross-racial interaction); Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RES. 4 (2010) (linking diversity experiences with cognitive growth).

[79] *See* Nida Denson & Shirley Zhang, *The Impact of Student Experiences with Diversity on Developing Graduate Attributes*, 35 STUD. HIGHER EDUC. 529 (2010) (finding that diversity positively

2. Eliminating Race-Conscious Decision Making Will Have Negative Consequences for the Nation

According to the most recent figures from the United States Census, persons belonging to minority racial and ethnic groups constituted more than one-third of the population in 2010.[81] It is expected that, by 2042, non-Hispanic white Americans, historically the majority ethnic

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impacts skills necessary to work with others, such as problem solving and the ability to work as part of a team); Nisha Gottfredson et al., *The Effects of Educational Diversity in a National Sample of Law Students: Fitting Multilevel Latent Variable Models in Data With Categorical Indicators*, 44 MULTIVARIATE BEHAVIORAL RES. 305 (2009) (showing that increased contact with racially diverse peers reduces prejudice).

[80] Victor B. Saenz, *Breaking the Segregation Cycle: Examining Students' Precollege Racial Environments and College Diversity Experiences*, 34 REV. HIGHER EDUC. 1, 30-32 (2010).

[81] Amanda Paulson, *More Than Half of US Babies Now Minorities, US Census Reports*, CHRISTIAN SCIENCE MONITOR, May 17, 2012, *available at* http://www.csmonitor.com/USA/2012/0517/More-than-half-of-US-babies-now-minorities-US-Census-reports-video.

group in the United States, will become a minority.[82] In this nation's increasingly diverse and global society, it is not only important that people of differing backgrounds benefit from attending top schools, but it is also more important than ever that students of the nation's top schools be exposed to people of differing backgrounds: students at these top schools will be chief among the politicians, business executives and community leaders of their generation. They must be comfortable working with and understanding people of many different cultural backgrounds. But due to long standing racial and ethnic segregation in the nation's neighborhoods and primary and secondary schools, colleges and universities are often the first opportunity many of these future leaders will have to interact with those who are different from themselves before they enter the global labor force.[83]

Limitations on race-conscious decision making would have the deepest impact on students at the most selective schools, resulting in a cadre of national leaders who will have had little experience interacting with the many ethnic and racial groups in the United States today. As previously stated, an affirmative action ban would dramatically decrease minority enrollment at the nation's selective schools.[84] By way of example, California's ban shifted underrepresented minority students away from the more selective campuses in the University of California system and towards the less selective ones.[85]

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[82] Carol Morello & Ted Mellnik, *Census: Minority babies are now majority in United States*, WASH. POST, May 17, 2012, *available at* http://www.washingtonpost.com/local/census-minority-babies-are-now-majority-in-united-states/2012/05/16/gIQA1WY8UU_story.html.

[83] Saenz, *supra* note 80, at 5.

[84] Hinrichs, *supra* note 62, at 21.

But the elimination of—or imposition of a functionally unattainable standard on—race-conscious decision making also would cause the entire country to suffer. As the world continues to globalize, the need for a highly educated and diverse workforce increases. An education that does not provide opportunities for interaction with students of a variety of backgrounds is an inferior education in the wake of globalization. Justice Powell recognized this key need for diversity in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), stressing that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 312-13. Similarly, the *amicus* brief filed by leading businesses in *Grutter* emphasized the same point:

> In the practical experience of the *amici* businesses, the need for diversity in higher education is indeed compelling. Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from themselves. *Amici* need the talent and creativity of a workforce that is as diverse as the world around it.

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[85] *Id.* at 4.

Brief for *Amici Curiae* 65 Leading America Business in Support of Respondents at 5-6, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

What was true when Justice Powell penned *Bakke* and when these leading businesses urged the Court in *Grutter* to allow affirmative action is even more true today. Since *Bakke* and *Grutter* were decided, the world has continued to globalize, and the need for a diverse workforce is even more acute.[86] Employers continue to place a high value on candidates who can interact with and relate to a wide variety of people, and college presents a unique opportunity to nurture this comfort and understanding.[87] If American students come into contact with only those like them, they will be ill prepared to interact with an ever globalizing world. American businesses that depend on employees' diverse perspectives will likewise suffer.

Studies have shown that groups with diverse members performed better than homogenous groups. Diverse groups show improved outcomes because of the varying viewpoints brought to the table. Beyond the introduction of alternative perspectives, the "majority" group members also behave differently in a heterogeneous group.

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[86] *See* Scott E. Page, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2007).

[87] David Thomas, *Making Diversity Part of the Organization*, *in What do leaders need to understand about diversity?*, Q8: A PUBLICATION OF YALE SCH. OF MGMT., Winter 2011, at 90, 92, *available at* http://qn.som.yale.edu/sites/default/files/Q8.pdf ("[I]f our customer base is diverse, we need diversity in our workforce so that we can learn from our own diversity to make ourselves more effective at meeting the needs of our clients.").

Interestingly, studies have found that the better outcomes were driven by the mere presence of diverse members, and not necessarily because of new perspectives.[88] We will not reach our full potential as a nation if we resist heterogeneous groups.

3. Race-Conscious Decision Making Positively Impacts Today's Students and Future Generations

For minorities, attending an elite institution has an undeniable impact on career success. Students who graduate from the top-ranked public colleges earn at least 30% more than their counterparts who graduate from the bottom-ranked public colleges.[89]

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[88] A study simulated jury deliberations and found that "[w] hite jurors processed the trial information more systemically when they expected to deliberate with a heterogeneous group." Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Social Psychol. 597, 606-07 (2006), *available at* http://happy.cs.vt.edu/courses/diversity-F10/readings/Legal/2006-Summers-Racial%20Diversity%20and%20Group%20Decision%20Making.pdf. The author concluded the "present data suggest that racial heterogeneity can have observable decision-making benefits for groups as a whole and can also lead majority individuals to demonstrate improved performance." *Id.* at 608.

[89] Dominic J. Brewer, Eric R. Eide & Ronald G. Eherenberg, *Does it Pay to Attend an Elite Private College? Cross-Cohort Evidence on the Effects of College Type on Earnings*, 34 J. HUMAN RES. 104 (1999). Black and Hispanic students at selective colleges have higher retention and graduation rates than those at less selective schools. Kalena E. Cortes, *Do bans on affirmative action hurt minority students? Evidence from the Texas Top 10% Plan*, 29 ECON. OF EDUC. REV. 1110 (2010).

African American and Latino students as well as students from disadvantaged backgrounds experienced an earnings increase from attending an elite institution.[90] Minorities and disadvantaged students who attend elite institutions gain access to valuable networks and opportunities that ability alone could not have garnered them.[91] Mere attendance at an elite institution significantly factored into a student's career trajectory.[92]

Moreover, access to education transcends today's individual students. As parents' education increases, so does their child's likelihood of enrolling in post-secondary education.[93] Thus, race-conscious decision making impacts not only the career success of the individual admitted today but also the likelihood that future generations will attend, and benefit from, a strong post-secondary education.

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[90] Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables* (Nat'l Bureau of Econ. Research, Working Paper No. 7322, 1999) *available at* http://www.nber.org/papers/w7322.pdf.

[91] *Id.*

[92] David L. Chambers, Richard O. Lempert & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 502-03 (2000).

[93] National Center for Education Statistics, Students Whose Parents Did Not Go To College: Postsecondary Access, Persistence, and Attainment (2001), *available at* http://nces.ed.gov/pubs2001/2001126.pdf.

C. "TOP X PERCENT" LAWS ARE INADEQUATE

1. In States That Prohibit Race-Conscious Decision Making in Higher Education, The "Top X Percent" Laws Do Not Achieve the Compelling Interest of Student-Body Diversity

Multiple studies demonstrate that "Top X Percent" laws have failed to generate increases in the enrollment of underrepresented minority students at public universities.[94] Florida's policy guarantees admission to the top 20% of Florida public high school students to a university within the Florida state university system.[95] California's policy for several years guaranteed admission to a California university to students who were either in the top 4% of their high school's graduating class or the top 12.5% of the state admissions index (based on GPA and SAT/ACT scores).[96]

Unlike Texas, however, both Florida and California are "race neutral" states and cannot consider race as a factor in admissions decisions.[97] Generally, the result has been a reduction in the numbers of underrepresented minority students enrolled in the most selective state schools. For example, in California, the number of underrepresented minority students admitted to UC Berkeley dropped 58% between 1995 (the year that SP-1, implementing race neutrality, was adopted) and 1998 (the class for which SP-1 first took effect).[98] At UCLA, the number of admitted underrepresented minority students dropped 53% during that same period.[99] Whereas underrepresented minority students were close to 30% of UC Berkeley and UCLA admits prior to Prop. 209, after the ban, they made up only 12 and 13% of each school's respective admitted pools.[100] And UCLA's first-year class in 2006 included only 100

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[94] Long, *supra* note 68, at 322-23; Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. LAB. ECON. 113, 116 (2010) at 151-52.

[95] Fla. Admin. Code r. 6C-6.0029(c)(5) (2012).

[96] California now guarantees admission to a California university if the student is either within the top 9% of her high school's graduating class or within the top 9% of the state admissions index. THE REGENTS OF THE UNIV. OF CAL., MINUTES FOR THE REGENTS OF THE UNIV. OF CAL., Attach. 8 at C(2), (Feb. 5, 2009), *available at* http://www.universityofcalifornia.edu/regents/minutes/2009/board2.pdf.

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[97] California became race neutral as a result of both a University California admissions guideline known as SP-1 and the passage of Proposition 209 ("Prop. 209"). University of California Fact Sheet, "SP-1 and SP-2" (May 2001), *available at* http://www.ucop.edu/ucophome/commserv/factsheets/sp1and2.pdf (last visited Aug. 8, 2012). Florida became race neutral by executive order of the Governor. FLA. Exec. Order No. 99-281 (Nov. 9, 1999).

[98] Erica Perez, *Despite diversity efforts, UC minority enrollment down since Prop. 209*, CALIFORNIA WATCH (Feb. 24, 2012), *available at* http://californiawatch.org/dailyreport/despite-diversity-efforts-uc-minority-enrollment-down-prop-209-15031 (last visited Aug. 8, 2012). So-called "race-neutral" admissions policies following state bans on affirmative action have generally been demonstrated to result in reduced minority admission at flagship public universities. *See* Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. HUMAN RESOURCES 435, 447 (2012).

[99] Perez, *supra* note 98.

[100] *Id.*

African-American students—down from 221 who entered in 1997.[101]

In Florida, a study of enrollment data from 1994 to 2005 showed that the first class admitted to the flagship institution, the University of Florida, without affirmative action showed significant losses for African-American students.[102] For Hispanic students, enrollment shares at the Florida flagship stayed fairly flat after the affirmative action ban and during the implementation of the Talented Twenty program, despite a broader increase in Hispanic enrollment at statewide institutions of higher education.[103]

These results should not be surprising because logically "Top X Percent" laws only guarantee success in diversifying college entrant bodies if high schools are and remain segregated. Without segregation, "Top X Percent" plans guarantee only that those students with the highest GPAs or test scores are admitted to public universities. Much of the literature demonstrates that the Texas plan has little effect on admission of students in the top decile of their classes because most of those students would have been admitted even absent the plan.[104] Thus minority applicants who are admitted on the basis of their "Top Ten" qualifications would likely have been admitted even without the plan. To achieve unique diversity gains, the "Top Ten" plan must be paired with race-conscious, individualized review. And below the top two deciles, the Texas plan gives white students an advantage over African Americans and Hispanics in admissions decisions.[105] That is, for the students at or below the seventy-ninth percentile, white students simply have higher odds of being admitted than African Americans or Hispanics.

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[101] Michele S. Moses, John T. Yun, and Patricia Marin, *Affirmative Action's Fate: Are 20 More Years Enough*, 17 EDUCATION POLICY ANALYSIS ARCHIVES (17), at 10 (2009), *available at* http://epaa.asu.edu/epaa/v17n17/.

[102] *Id.* at 13-14.

[103] *Id.*

[104] *See* Long, *supra* note 68, at 324-25; Marta Tienda et al., *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action*, OFFICE OF

2. "Top X Percent" Laws Encourage Continued High School Segregation and Are an Inefficient Way to Achieve Diversity

"Top X Percent" laws also are inefficient because they incentivize strategic behavior that results in white students displacing minority students in the "Top X" pool. In Texas, researchers found that as many as 25% of students with motive and opportunity to increase their chances of being in the top 10% by moving to a different high school did so.[106] Moreover, "the net effect of strategic behavior is to slightly increase the representation of white students in the top ten percent pool" because strategic

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POPULATION RESEARCH AT PRINCETON UNIVERSITY WORKING PAPER No. 2003-01, at 32 (2003), *available at* http://opr.princeton.edu/papers/opr0301.pdf.

[105] Tienda et al., *supra* note 104 at 32-33.

[106] Julie Berry Cullen, Mark C. Long, and Randall Reback, *Jockeying for Position: Strategic High School Choice Under Texas' Top Ten Percent Plan*, (Nat'l Bureau of Econ. Research, Working Paper No. 16663 2011), *available at* http://www.nber.org/papers/w16663.pdf.

behavior by both white students and minority students tends to displace minority students.[107] Thus, the "Top X Percent" policies attract offsetting behavior that would reduce their effectiveness in the long run, making them a poor policy option to rely on for achieving diversity in higher education.

To achieve the admission of racially diverse classes in the long run at the university level, "Top X Percent" laws inherently encourage continued segregation in high schools—a perverse policy to institute or perpetuate solely on the grounds of ensuring the success of "Top X Percent" plans. To escape offsetting strategic behavior, they would also require the restriction of student mobility. This in turn could also have the adverse effect of entrenching homogeneity and disincentivizing intellectual curiosity at the secondary school level. As Justice Ginsburg explained in her *Gratz* dissent, percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting). UT should not be restricted to such an inefficient tool to achieve its goal of admitting racially diverse classes.

3. Consideration of Race is Necessary to Achieve Educational Diversity

Grutter recognized that achieving a diverse student body is a compelling interest. Here, UT's use of race in its admissions program is narrowly tailored to a compelling governmental interest. Thus, it passes constitutional muster under *Grutter*.

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[107] *Id.* at 23.

The Fifth Circuit began its analysis by recognizing *Grutter* as the applicable standard. It wrote: "*Grutter* held that the Equal Protection Clause did not prohibit a university's 'narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.'" *Fisher v. Univ. of Tex.*, 631 F.3d 213, 218 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012). The Fifth Circuit proceeded to faithfully apply this standard.

It held that, after *Grutter* blessed diversity as a compelling interest, UT seriously considered its alternatives. It did not immediately begin using race as a factor; rather, UT commissioned two studies to determine its minority representation and whether it was enrolling a critical mass of minority students. The studies involved examining classroom statistics and surveying undergraduates regarding their impressions of diversity at UT. These studies were incorporated into a June 2004 Proposal to Consider Race and Ethnicity in Admissions, which recommended that race be considered as a factor. *Id.* at 225-26. Thus, UT embarked on a thoughtful, yearlong process, action which is consistent with the heightened level of scrutiny this Court demands.

UT also gave "serious, good faith consideration of workable race neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. While the Top Ten Percent Program is facially race neutral, it is best suited only to ensure geographic diversity in admissions.[108] As the *Grutter* Court recognized, "Top X Percent" programs are not a workable alternative because they may hinder a university's flexibility in conducting individualized assessments of applicants. *Grutter*, 539 U.S. at 340. Further, as the Fifth Circuit discussed, the Top Ten Percent Program has resulted in the clustering of minority students in specific colleges and programs, such as social work and education, at UT. *Fisher*, 631 F.3d at 240. To achieve the benefits of diversity recognized in *Bakke* and *Grutter*, students need to interact with each other. The benefits of diversity cannot be realized when Hispanic students are in the College of Social Work and white students are in the College of Business Administration. *Id.*

The Texas plan is consistent with the *Grutter* approach because it does not rely on quotas or a special insulated evaluation process. *See Grutter*, 539 U.S. at 334-35 (use of race "as a 'plus' factor" consistent with narrow tailoring). As in *Grutter*, race is one factor the admissions committee may consider. If a Texas resident is not in the top 10% of his or her graduating high school class, his or her application is reviewed based on (1) the Academic Index, a mechanical formula based on standardized test scores and high school class rank and (2) the Personal Achievement Index, which considers two required essays, and a personal achievement score based on the entire file. Race becomes a factor only in the personal achievement score, which is one of three scores that goes into the Personal Achievement Index. *Fisher*, 631 F.3d at 227-28.

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[108] *See* Long, *supra* note 68, at 324 (noting that the Top Ten program increased the number of high schools sending at least one student to UT-Austin); Tienda et al., *supra* note 104, at 33.

As in *Grutter*, race is only one of many factors that goes into UT's holistic approach. In determining the personal achievement score, the admissions committee considers "an applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community services" as well as special circumstances, which can include socioeconomic status, family status, standardized test scores compared to the average of his or her high school and race. *Id.* at 228. Race is not dispositive, and there are not a specific number of spots reserved for minority students.

In evaluating UT's consideration of race as a factor, the Fifth Circuit applied strict scrutiny while recognizing the greater degree of deference this Court has traditionally accorded to academic institutions. This deference dulls none of the bite of strict scrutiny; the Fifth Circuit noted only that, "courts must afford a *measure* of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment." *Id.* at 233 (emphasis added). This approach is consistent with *Grutter*, where this Court recognized that "universities occupy a special niche in our constitutional tradition." *Grutter* at 329. *Grutter* engaged in narrow tailoring while noting that the "inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education." *Id.* at 333-34. *Grutter* acknowledged that the application of strict scrutiny is not necessarily inconsistent with the traditional deference to a university's academic decisions, as "[o]ur scrutiny of the interest asserted by the [university] is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Id.* at 328. Even absent this academic context, the Fifth Circuit correctly concluded that UT properly applied strict scrutiny.

CONCLUSION

For the reasons set forth above, colleges and universities should be permitted to make race-conscious admission decisions consistent with *Grutter*, and the judgment of the Court of Appeals for the Fifth Circuit in *Fisher v. University of Texas*, No. 09-50822, should be affirmed.

Respectfully submitted,

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AMICUS
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BRIEF

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No. 11-345

In the Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

V.

UNIVERSITY OF TEXAS AT AUSTIN, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF UNITED STATES STUDENT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The United States Student Association ("USSA"), the nation's oldest and largest student-run, student-led organization, is comprised of more than four million students with diverse backgrounds who are currently enrolled in American colleges and universities.[2] USSA submits this brief as *amicus curiae* in support of Respondents University of Texas at Austin, *et al.*, urging the Court to affirm the Fifth Circuit's judgment that the promotion of diversity in higher education is a compelling government interest and that the holistic admissions process used by the University of Texas at Austin ("UT"), which allows the consideration of race and ethnic origin as one of a multitude of factors in selecting a diverse study body, complies with the Equal Protection Clause.

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[1] Pursuant to Rule 37.3, *Amicus* states that all parties have consented to the filing of this *amicus curiae* brief. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus* and its counsel contributed monetarily to the preparation or submission of this brief.

As the nation's official student voice, consisting of undergraduate, graduate and professional students in colleges and universities across the country, USSA has an important and substantial interest in this case.[3] *Amicus* submits this brief to express to the Court its strong belief, based on the experience of its millions of members, that a student body that is both academically qualified and broadly diverse provides invaluable educational, social and professional benefits, and that an admissions program such as that adopted by UT will advance those compelling interests.

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[2] USSA's membership includes State and System-wide Student Associations, direct member campuses and student organizations.

[3] The White House, the Department of Education and Congress consistently pursue the advice of USSA regarding the effects of policies and legislation on matters of higher education and the daily lives of students.

SUMMARY OF ARGUMENT

Nine years ago, the Supreme Court recognized that public institutions of higher education have a compelling government interest in a diverse student body that permits them to consider race and ethnicity as one, non-predominant factor among many in admissions. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). The Court noted the "important and laudable" benefits stemming from a diverse student body, which *Amicus* believes are even more "important and laudable" in today's more diverse America.

Amicus is uniquely situated to comment on the value of diversity in higher education today as its student body members both experience the benefits of diversity and suffer from its absence. Studies published after the decision in *Grutter* have confirmed what the Court recognized and *Amicus* knows as a matter of fact—that students benefit in at least three ways from greater diversity both in and out of the classroom. *First*, student body diversity exposes students to a robust exchange of ideas which promotes better learning outcomes. *Second*, diversity prepares students to become civic leaders. *Third*, diversity better prepares students as professionals to meet the challenges of a multicultural workforce in an increasingly global economy.

Amicus believes that *Grutter* is, and must remain, good law as the Fifth Circuit held. If the Fifth Circuit judgment is reversed, public institutions of higher education will fail to attract a critical mass of racially diverse students. College students nationwide will be deprived of experiencing the full "diffusion of knowledge and opportunity" that should be available through public institutions of higher education (*Grutter*, 539 U.S. at 331) and the diverse learning environment and rich exchange of ideas they need to maximize their opportunities for civic leadership and professional success. As the Court recognized in *Grutter*, access to education "must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America." *Id.* at 332-33.

ARGUMENT

I. PROMOTING DIVERSITY IN HIGHER EDUCATION IS A COMPELLING GOVERNMENT INTEREST

UT's admissions program complies with Supreme Court precedent establishing diversity as a compelling government interest. For nearly 35 years, the Court has upheld the principle that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." ***Regents of the Univ. of Cal. v. Bakke***, 438 U.S. 265, 320 (1978). In the narrowest opinion supporting that judgment, Justice Powell concluded that "the attainment of a diverse student body" was, in the context of "an institution of higher education," a compelling government interest. *Id.* at 311-12. *Bakke* was followed twenty-five years later by *Grutter*, in which the Court held that a public university "has a compelling interest in attaining a diverse student body" to promote "cross-racial understanding," "break down racial stereotypes," enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders and avoid placing minority students in the role of being expected to serve as "spokespersons" for their race, as is more likely to happen when they are not part of a critical mass of students of their own race. *Grutter*, 539 U.S. at 319-320, 330-33. To achieve these ends, colleges and universities may consider, as one factor among many, racial or ethnic origin in seeking to "enroll[] a 'critical mass' of underrepresented minority students." *Id.* at 316.

The underlying premise of *Grutter*, that achieving diversity in institutions of higher education is a compelling state interest, was reiterated four years later by a majority of the court in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, wherein Justice Kennedy in his pivotal concurring opinion concluded:

> This nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise,

> may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.

551 U.S. 701, 797-798 (2007).

UT's undergraduate admissions program is entirely consistent with this precedent. The program embraces diversity along many lines, as required under *Bakke*, and it satisfies the standard set forth in *Grutter* because it is "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317). The plan also passes muster under the standard articulated by Chief Justice Roberts in *Parents Involved* because it requires individualized consideration of each applicant's background and achievements, employs a very broad notion of diversity, is targeted to achieve demonstrable educational benefits, and is designed to cure the inadequacy of UT's race-neutral admissions process which failed in its goal of achieving a critical mass of diversity. *Parents Involved*, 551 U.S. at 722-23.

II. A DIVERSE STUDENT BODY IMPARTS INVALUABLE EDUCATIONAL, CIVIC AND PROFESSIONAL BENEFITS TO STUDENTS SEEKING A HIGHER EDUCATION

In *Grutter*, the Court recognized that diversity improves students' learning experiences, directly ensures that students are prepared "for work and citizenship" and serves as "a training ground for" leaders. 539 U.S. at 331, 332. Indeed, the Court has repeatedly acknowledged the "overriding importance of preparing students for work and citizenship, describing higher education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Id.* at 331 (quoting *Plyler v Doe,* 457 U.S. 202, 221 (1982)).

Today's college-age students are part of a generation for which the importance of diversity in higher education has never been greater. They are more diverse than the general population,[4] more diverse than the same age group was even 10 years ago,[5] and they will emerge into a workforce that is more diverse than any past generation's.[6] Yet, because of residential segregation, large numbers of America's young people have been and will continue to be deprived of any opportunity for cross-racial interaction in schools at the elementary and secondary level.[7]

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[4] U.S. Census Bureau Statistical Abstract of the United States: 2012 (131st ed. 2011), *available at* http://www.census.gov/prod/2011pubs/12statab/pop.pdf.

[5] *Id.*

[6] Jeremy S. Hyman & Lynn F. Jacobs, *Why Does Diversity Matter at College Anyway?*, US NEWS & WORLD REPORT, Aug. 12, 2009, http://www.usnews.com/education/blogs/professors-guide/2009/08/12/why-does-diversity-matter-at-college-anyway.

Institutions of higher education thus have a critical role to play in providing the opportunity for a diverse education that is necessary to college students' future success in the workplace and as citizens and leaders. In "an increasingly diverse workforce and society," students who have reaped the educational benefits of diversity will be better equipped to succeed, and to assume leadership roles in commerce, the military, civic society and government. *Grutter*, 539 U.S. at 330-31 (citation omitted). *Amicus* recognizes from the personal experiences of its members the need for and advantage of such.

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[7] *See* Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 312, 324 (2006) (describing restricted exposure of white students to black students, and vice-versa, in Texas schools); *see also* Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* (The Civil Rights Project/Proyecto Derechos Civiles at UCLA), 3 (Jan. 2009), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf ("Fifty-five years after the *Brown* decision, blacks and Latinos in American schools are more segregated than they have been in more than four decades.").

A. Diversity Contributes to a Wide, Robust Exchange of Ideas That Improves Students' Learning Experiences

It is widely accepted that "the business of a university [is] to provide that atmosphere which is most conducive to speculation, excitement and creation" and that atmosphere is best promoted by a diverse student body. *Bakke*, 438 U.S. at 312. The force of these observations is greatest at the undergraduate level. *Id.* at 314. As the researchers Nida Denson and Mitchell J. Chang noted in their report *Racial diversity matters: The impact of diversity-related student engagement and institutional context*:

> [U]ndergraduates are typically at a developmental stage where they are freer to explore new ideas, social roles, and relationships. Combining this developmental moment with a racially diverse environment that exposes students to surroundings that are dissimilar or incongruent with their home environments raises the potential for deeper and more critical thinking.

AM. EDUC. RES. J., 46(2), 322, 326 (2009).

The point is simple and indisputable: each student's racial or ethnic background inevitably shapes, in various ways, the experiences and perspectives that student brings to both campus life and the classroom. The Court acknowledged as much in *Grutter*, when it said: "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333 (O'Connor, J.). Thus, students of different racial and ethnic backgrounds will bring to a university experiences, outlooks and ideas that enrich the rest of the student body and better equip all graduates to contribute their service in commerce, civic society and the military. The exchange and sharing of experiences among college students during the developmental stage considered most essential to the advancement of critical thinking is a key aspect of what makes a diverse student body a compelling educational interest of a college or university.[8]

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[8] A vast amount of empirical data demonstrates that campus and classroom diversity positively affects students' academic and social experiences. *See* Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, THE REVIEW OF HIGHER EDUCATION, 30(2), 185-196 (Winter 2007) (hereinafter the "Hurtado Study") (concluding that students who experienced positive informal interactions with diverse peers scored higher on tests designed to measure the complexity of their thinking, their cultural and social awareness and their ability to see things from someone else's perspective); Lisa M. Landreman, *et al.*, *A Phenomenological Study of the Development of University Educators' Critical Consciousness*, J. C. STUDENT DEV., 48(3), 275-295 (2007) (increasing diversity on campus, especially when coupled with initiatives that encourage discussion of different and opposing points of view, contributes significantly to the learning process); Mitchell J. Chang, *et al.*, *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45

Stories told by several students of diverse racial backgrounds illustrate the point. Take for example the story told by Max L., a rising senior at the University of Wisconsin ("UW").[9] Max grew up on a working farm in a small, nearly all white town in Wisconsin. After the September 11 terrorist attacks, Max became concerned about the scapegoating of Muslims in the United States. When he was accepted to UW, Max thought he had requested to live on a dorm floor for students interested in international issues. Instead, he was placed on the multicultural floor where he was one of three white students amongst nearly 50 students on the floor. The experience changed his life – for the better. By living and learning alongside people different from him, Max began to think about the world in a different way. Max is confident that his experience on the multicultural floor has prepared him to succeed at almost any workplace. As a fifth

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RES. HIGHER EDUC. 529, 530 (2004) (noting that frequent interactions with diverse peers leads to a greater openness to diverse perspectives and a willingness to challenge one's own beliefs); Sylvia Hurtado, *Benefits and Barriers: Racial Dynamics of the Undergraduate Experience*, *in* THE NEXT TWENTY-FIVE YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA, 196-207 (David L. Featherman, *et al.* ed. 2010) (concluding that informal interaction with diverse peers affect all students intellectual engagement and academic skill and noting further that "such learning cannot solely be acquired through a diversity-oriented curriculum in the absence of a diverse peer group").

[9] *See* USSA site, http://savecampusdiversity.org (last visited Aug. 13, 2012) (posting six personal stories of USSA members).

generation UW student, Max also suspects he had an advantage in the admissions process because he was (as his admission file stated) a "legacy" student. Max challenges the notion that "legacy" status, but not a broader, more inclusive approach to diversity, may be an appropriate consideration in the admissions process.

Also compelling is the story of Perla R., a senior at Loyola University Chicago.[10] In one particular class called "Sociology of Chicago", Perla described firsthand her unique and personal experiences derived from living on the South Side of Chicago as a Mexican American, thereby dispelling the stereotypical views held by a number of her classmates. Afterwards, several students approached Perla to learn more about her experiences, and thereby broaden their own knowledge and perspective. Perla strongly believes that without diversity in the classroom students are prevented from hearing different opinions and ideas borne from diverse experiences, and as a result, *all* students suffer. The benefits Perla recognizes from her own experience is amplified throughout college classrooms across the country.[11]

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[10] *Id.*

[11] Similar are the stories of four other students: Ryan K., Molly L., Libby W.B. and Tynisha S. Ryan is a sophomore at the University of California at Santa Cruz. His educational experience suffers due to the lack of diversity at the top tier of the California higher educational system. As a white male student double majoring in Latin American/Latino and Feminist studies, Ryan selected his majors because they offer a

Amicus believes that an admissions program that considers an applicant's athletic or musical abilities, her geographic origin, or his language

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strong analysis of critical race and gender issues. However, with so little racial diversity, Ryan believes he is missing out on a critical piece of his training by not being exposed to different perspectives that could benefit him in his envisioned career as a community organizer. Molly is a senior political science and sociology major at Brown University. Like Perla, she confronted racial and class stereotypical views from other students. In her case, it was the assumption that Asians are a monolithic community most closely having attained the socioeconomic and educational levels of successful whites. Molly, a Southeast Asian, was able to educate her classmates as to the wide range of socioeconomic statuses, income and educational levels of the many Asian communities in the United States. Libby, a rising senior at UW, recognizes the benefits of diversity from a slightly different angle. Although she grew up in a small, homogeneous town in Northern Connecticut where less than five percent of her high school classmates were minorities, at UW Libby has been involved in numerous student organizations. She now serves in the student government and on the board of directors for both USSA and the United Council of UW Students. Her experiences with student organizing taught her that: "You get better input and reach better decisions in a diverse group. Groups with different kinds of people are more creative and innovative." Last but not least is the story of Tynisha, a senior political science major at Howard University, who was valedictorian of her high school class. In deciding which college she would attend, Tynisha visited many schools. After being dismayed by the absence of a critical mass of diverse students on many of those campuses, and in some instances not seeing *any individuals of color*, she elected not to attend those schools for fear that they were not inclusive or committed to ensuring her success and development. This deprived her and the students at those schools of the benefits of greater diversity. *Id.*

skills, but not his or her racial or ethnic background, fails to promote the compelling government interest of a diverse student body. *Amicus* supports instead the type of admission decisions that result from a full assessment of students as individuals – taking into account the academic strength of each applicant's record and an individualized, holistic review of the many ways in which the individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of a college or university.

In the dynamic learning environment of an institution of higher education, there is simply no substitute for the active participation of a critical mass of students of every race and ethnicity. A reading assignment may bear witness to the experiences of diverse people, but it cannot apply those experiences to questions and issues that arise in discussion. Textbooks may raise challenging questions but cannot compare with the exchange of viewpoints elicited in an actual discussion among students of different races and ethnicities, who when challenged with unfamiliar perspectives and ideas of their peers, are forced to question their own assumptions and develop a more informed understanding of the issues of the day. The consideration of race and ethnicity as one factor in the admissions process is necessary and permissible to achieve this compelling goal.

Ralph Waldo Emerson presciently said it best in his *American Scholar* essay written more than 175 years ago: "Colleges . . . can only highly serve us when they aim not to drill, but to create; when they gather from far every ray of various genius to their hospitable halls, and by the concentrated fires, set the hearts of their youth on flame."[12] Diversity in higher education teaches students to open themselves to the world's "various genius," and to ignite not only their own, but also the imaginations of their peers.

B. Diversity Prepares Students For Civic Leadership

The Court recognized in *Grutter*, that "universities . . . represent the training ground for a large number of our Nation's leaders" and "if the dream of one Nation, indivisible, is to be realized," "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential." *Grutter*, 539 U.S. at 332. "[T]o cultivate a set of leaders with legitimacy in the eyes of the citizenry . . . the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity." *Id. Amicus* believes that a racially diverse student body assists in the goals of educating students to comprehend and reach informed views on issues of public import, engage in the deliberative aspect of democracy and support and lead the communities in which we all live. By gaining exposure to peers with differing backgrounds and experiences, students will become better informed voters, jurors, school board and neighborhood association members, civic and military leaders and generally more engaged participants in their communities and in public affairs. As a majority of the Court recognized in *Grutter*: the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation." *Id.* at 324 (quoting *Bakke*, 438 U.S. at 315).

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[12] Ralph Waldo Emerson, *The American Scholar*, A Keynote Address delivered before the Phi Beta Kappa Society at Cambridge (Aug. 31, 1837), *reprinted in* NATURE; ADDRESSES AND LECTURES, 75 (J. Munroe, 1849).

Amicus agrees with the Court's observation. American cities, suburbs and small towns are all facing complex problems that can only be solved with innovative approaches and alliances that cut across racial and ethnic lines. Among other compelling issues, communities must seek to provide affordable health care and housing, restore the environment, protect fiscal health, respond to natural disasters, increase economic opportunity, support veterans and military families and tutor and mentor underprivileged children. Better solutions depend on engaging all parts of the community to raise awareness, promote policy solutions and mobilize public investment. Unquestionably, college students already exposed to a diverse learning environment will be in the best position to build on and apply their experiences to successfully engage in bettering their own communities, as well as those that may be farther afield but more in need.[13]

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[13] *See* Hurtado Study at 191 (finding that students who experienced positive informal interactions with diverse peers had increased "democratic sensibilities, including their

A compelling analogy can be made with the Court's conclusion in *Grutter* regarding the importance of diversity in the military. Just as the Court found a highly qualified, racially diverse military corps of officers "essential to the military's ability to fulfill its principle mission to provide national security" (*Grutter*, 539 U.S. at 331) (citation omitted), so too must it find a highly qualified, racially diverse civilian corps of civic leaders essential to sustain our democracy. And just as the Court found it essential for the military to "train and educate a highly qualified, racially diverse officer corps in a racially diverse setting" (*id.*), so too must it find it essential for American colleges to train and educate a highly qualified, racially diverse civil leadership corps in a racially diverse setting. *Amicus,* which represents college students who aspire to be among the nation's future civic leaders, strongly believes that the interests of its members are best served by a racially diverse student body.

C. Diversity Develops in Students the Necessary Skills to Succeed in a Global Workforce

As dozens of leading American businesses that filed *amicus* briefs in the *Grutter* case made clear,

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pluralistic orientation, interest in poverty issues, and concern for the public good"); Patricia Gurin, *et al.*, *The Benefits of Diversity in Education for Democratic Citizenship*, J. SOC. ISSUES, 60(1), 17, 24-26 (2004) (participation in a multicultural education program promotes "democratic sentiments" that better enable students to participate in a "heterogeneous and complex society").

the benefits that flow from a diverse student body in higher education are "not theoretical but real" and "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints." *Grutter*, 539 U.S. at 330.[14] For example, the joint *amicus* brief submitted by sixty-five leading businesses—including major companies such as General Electric Company, General Mills, Inc., The Dow Chemical Company, Johnson & Johnson, The Procter & Gamble Company, and Xerox Corporation—explained that workers at all levels of an institution must have the skills to work well with diverse individuals, and that the ability to elicit different ideas and creatively combine them to reach solutions at work is an important proficiency that must be fostered through teaching future workers in a diverse educational environment.[15]

For most students, college is the last stop before entering the workforce. Their future professional contacts will undoubtedly include individuals as diverse as our nation. Higher education, therefore, has a vital role in ensuring that future workers, managers, and owners are adequately equipped with the skills necessary to meet the increasing challenges of a global workforce: communication, team-building, problem-solving, analytical thinking and global consciousness. *Amicus* believes these skills can only be developed by experiencing real relationships with individuals of a wide variety of racial backgrounds.

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[14] Social scientists have come to the same conclusion. *See* Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society?: Campus Diversity and Cross-Cultural Workforce Competencies*, HARVARD EDUC. REV., 78(4), 615, 617 (Winter 2008) (finding that students' exposure to racial diversity during college benefited their post-college cross-cultural workforce competencies that Fortune 500 companies seek in their employees).

[15] Brief for *Amici Curiae* 65 Leading American Businesses in Support of Respondents, at 7 (Feb. 18, 2003), *Grutter v. Bollinger* (No. 02-241).

The consistent message students hear from guidance counselors, employers interviewing on campus, and management at part-time jobs and internships, is that innovation and business success thrive in an inclusive culture that values diverse ideas, leverages unique perspectives and invites everyone to achieve collaborative success. Today's college students are reminded repeatedly that their performance will be measured by their ability to lead teams of people with different perspectives, communicate and work well with individuals from diverse backgrounds or experiences, address the needs of diverse employees and customers in an effective manner and promote an inclusive workplace sensitive to different world views and cultural perspectives and free of judgments and stereotypes. Ensuring exposure, during the formative college years, to students of diverse racial backgrounds will have a profound impact on their ability to succeed in today's global workforce.

* * * *

Amicus curiae is convinced, and compelling evidence demonstrates, that a diverse student body imparts invaluable educational, social and professional benefits, both for its student members and for the country as a whole.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The University of North Carolina at Chapel Hill ("UNC" or "University") is the nation's oldest public university.[2] As a flagship public institution, generously supported by North Carolina's General Assembly, it embraces a mission far broader than providing rigorous education to individual students. UNC must assess the multiple challenges facing the State and region—economic, social, legal, medical, educational, and political—and prepare thousands of graduates in every generation to meet those challenges.

UNC alumni have long taken roles as leaders in all areas of public life, both in the State and beyond. During the seventy years before the Civil War, the University produced one United States president, a vice president, twenty governors, eight senators, forty-one members of the House of Representatives, and "innumerable numbers of judges, state legislators, and justices of the peace."[3] Since that time, a flow of remarkably talented graduates have left UNC to become governors, authors, journalists, judges, legislators, playwrights, among other distinguished careers[4]. Yet in the era of rigid racial segregation stretching from the late 19th century until well into the middle of the 1960s, UNC, like virtually every Southern college and university, excluded all African Americans and Native Americans.[5] Only when confronted with litigation did UNC begin to desegregate. In 1955, the year after this Court's *Brown* decision, brothers Ralph and LeRoy Frasier and John Brandon became its first African American undergraduates.[6] Even a decade later, only a handful of African Americans had ever set foot, as students, onto the Chapel Hill campus.

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[1] Letters from the parties, consenting generally to the filing of brief by *amici curiae,* are on file with the Court. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party. No entity other than the *amicus curiae* made a monetary contribution to the preparation or the submission of the brief.

[2] William S. Powell, *The First State University* 4–10 (3d ed. 1992). The University was authorized by the North Carolina Constitution of 1776 and chartered in 1789. It first opened its doors to students in 1795. *Id.*

[3] James L. Leloudis, *Schooling the New South: Pedagogy, Self, and Society in North Carolina, 1880-1920* 50 (1996). *See also* William K. Boyd, 2 *History of North Carolina: The Federal Period 1783-1860* 362–63 (1919).

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[4] The University's many distinguished graduates have included Taylor Branch, Erskine Bowles, David Brinkley, Mary Sue Coleman, Lawrence Ferlinghetti, Sallie Krawcheck, Charles Kuralt, David Sentelle, Paul Wellstone, and Thomas Wolfe. See http://en.wikipedia.org/wiki/List_of_University_of_North_Carolina_at_Chapel_Hill_alumni

[5] A post-Reconstruction era amendment to the North Carolina Constitution of 1868, art. 9, § 2, provided: "And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race." This section was not abolished until the Court's decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See* John V. Orth, *The North Carolina State Constitution: A Reference Guide* 145 (1993). Over a century later, a federal court noted that, as of 1970, "the states of Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia were operating segregated systems of higher education in violation of Title VI". *Adams v. Richardson*, 351 F. Supp. 636, 637–38 (D.D.C. 1972). See Harry T. Edwards, *A New Role for the Black Law Graduate—A Reality or an Illusion?*, 69 MICH. L. REV. 1407, 1409 (1971) (reporting U.S. Census data showing that in 1970, despite a population of over 8.8 million, there were only 393 African American lawyers, combined, in the southern states of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Tennessee, and Virginia).

Thanks to the national dialogue in the 1960s over civil rights, the Civil Rights Act of 1964, significant changes in leadership and attitudes within the State and at UNC, as well as this Court's guidance, the University began to undertake, slowly at first but with increasing speed, a program to open its doors to students of all racial and ethnic backgrounds.[7] In so doing, UNC sought not only to redeem its past legacy of exclusion but to build a future educational training ground that would nurture all of the State's most talented individuals to serve the State's unfolding needs.

These transformative changes—and similar steps to broaden admissions by colleges and universities across North Carolina—led to an unparalleled expansion in the overall educational attainment of the State's residents and an enriched educational environment in which cross-cultural understandings have been nurtured. The presence of a larger, multi-racial pool of well-trained college graduates has, in turn, helped the State flower as a national center for banking, high-tech pharmaceutical and technology research, and electronics innovation. The Research Triangle in North Carolina now lures corporations and research facilities from around the world, principally because of its outstanding pool of college-trained workers and the proximity of highly sophisticated research universities open to all of the State's most talented youth.[8]

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[6] William A. Link, *William Friday: Power, Purpose, and American Higher Education* 82-83 (1995).

[7] Throughout this brief, to avoid redundancy, *amicus* will refer to diversity by race, ethnicity, and national origin as "racial diversity."

The University knows that its present and future prospects depend upon drawing students with a broad range of talents from every source—from the remotest counties of its mountainous west, from its easternmost Outer Banks, and from every school in between.[9] In so doing, it individually considers each potential student's talents and academic achievements, character, and initiative in surmounting family and community circumstances, including poverty and/or attendance at substandard K-12 schools. As part of this holistic review, UNC has found that some careful and limited consideration of race is indispensable in fulfilling its mission.

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[8] *See generally* Rick L. Weddle, *Research Triangle Park: Evolution and Renaissance* 2-9 (2006), http://www.rtp.org/sites/default/files/RTP_History_0.pdf.

[9] In that spirit, the UNC School of Law, in 2003, with the University's approval, filed an *amicus* brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003), urging continued approval of the practices sanctioned by Justice Powell in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and citing many of the goals eventually held to be constitutionally compelling interests in Justice O'Connor's majority opinion. Since that time, along with the vast majority of public colleges and universities, the University has continued to admit entering classes of promising students after holistic consideration of their individual promise, with race as one among a myriad of potential considerations.

As a flagship state university, UNC believes that the freedom to recruit and enroll a diverse student body is necessary to fulfill its educational mission and its core commitments to the State and its future. This conviction is based on more than untested belief; the University has strong empirical evidence of the positive value of bringing students from differing racial backgrounds into its classrooms, its dormitories, and its extra-curricular activities. Any holding that would foreclose its ability to consider race in admissions would undercut decades of Supreme Court precedents and establish a new standard of review that would prohibit UNC and other public institutions of higher education—long recognized as special marketplaces of ideas—from making their own determinations about who will be successful students. To confirm the wisdom and utility of the Court's traditional jurisprudence in this area and to warn of the troubling implications of Petitioner's argument to the contrary, constitute our interest in this case.

SUMMARY OF ARGUMENT

UNC's mission is to serve as a center for research, scholarship, and creativity, and to turn a diverse community of students into the next generation of leaders. To develop this diverse community and meet the growing needs and interests of the State, UNC has carried out its program of undergraduate admissions in faithful response to *Regents of the University of California v. Bakke* and, more recently, *Grutter v. Bollinger*. It has done so contextually, mindful not only of its obligation to individual students, but also of its wider obligation to provide the State of North Carolina with well-prepared graduates who can lead in this increasingly diverse society. Although the number of undergraduate applicants to UNC has grown from 10,397 in 1978 to 29,501 in 2012, UNC's admissions process remains highly nuanced and multi-faceted, considering more than forty factors in eight broad areas to make selections for an incoming class of approximately 4,000 undergraduates. The process is far from mechanistic; not only are no rigid numerical formulae applied, but every student's file is read by multiple readers. Race is never a basis for classifying or separately considering applicants.

The University's commitment to individualized, holistic admissions practices relies upon internal evaluations and social scientific evidence about the positive impact of such practices. For example, a vast, soon-to-be-published empirical study, completed by Professors Charles E. Daye and A.T. Panter (UNC) Walter R. Allen (UCLA) and Linda F. Wightman (UNC-Greensboro) of the Educational Diversity Project ("the EDP Study"), explores three overlapping ways in which racial diversity produces positive, measurable, educational differences.[10] The EDP Study's evidence reinforces, with extensive quantitative data, key insights that the University has long observed first-hand: that outstanding students from diverse backgrounds can come to campus, thrive academically, enrich the experience of their fellow students, and go forth to become leaders in vital areas of state life.

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[10] *See* Charles Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. __ (forthcoming 2012), *available at* http://ssrn.com/abstract=2101253. The study used a random sample of 6,100 students from a random sample of 50 ABA-approved law schools, with high minority student representation, followed over three years.

Prompted by its dual commitment to excellence as one of the world's great research universities and to the mission of improving society, UNC bears the burden to assure a steady flow of talented doctors, lawyers, pharmacists, nurses, public health officials, elementary and secondary teachers, business leaders, scientists, entrepreneurs, political leaders, and judges—all of whom will need to be comfortable working in racially diverse settings. This is a compelling state interest of the highest order. Any university that cannot provide its 21st century undergraduates with ample exposure to the multiracial settings in which they will spend their professional lives will have failed them and the broader society that sorely needs their professional expertise.

In sum, the University's nuanced consideration of race as one factor among many is grounded in its academic judgment that racial diversity improves the education of all UNC students while building a stronger state, nation and world. Both UNC's choice of an educational mission and its judgment that students from different racial backgrounds best serve that mission constitute exercises of the academic freedom that Justice Powell acknowledged in *Bakke* as a special concern of the First Amendment. The University's considered judgment concerning the selection of its students should be afforded, as Justice Powell instructed and Justice Kennedy later affirmed in his *Grutter* dissent, "wide discretion" due to the "countervailing constitutional interest" of the First Amendment,[11] which should continue to be recognized by the Court.

The petitioner's exceedingly narrow reinterpretation of the Equal Protection Clause would undermine the constitutional foundation on which UNC and other public institutions of higher education have built for nearly two generations. Since *Bakke* in 1978, UNC and most public universities have been constitutionally supported in considering race as a limited, though important, factor, among scores of others, when making admissions decisions. Public universities have undertaken this consideration in measured fashion, with no apparent societal destruction or documented educational decline, free from the serious threat of federal litigation from disappointed eighteen-year-old applicants or their parents.

Yet petitioner presses the Court for a radical new regime in which universities brave enough to consider race as a factor in admissions must first commission recurrent social science studies to assess the necessity, effectiveness, and impact of their practices—assembling *prima facie* evidence that would require evaluation of scores of factors in tens of thousands of applications over many years. Even armed with such studies, public universities would need to stand on constant watch to defend themselves, in federal court, against disappointed applicants willing to claim that the denials of their individual applications turned upon the use of race. This regime would inaugurate a new era of educational "strike suits," in which only the richest, or bravest, or most foolhardy colleges would continue to consider race, even to advance institutional and societal goals that many embrace in the greatest good faith.

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[11] *Grutter*, 539 U.S. at 370 (Kennedy, J., dissenting) (citing *Bakke*, 438 U.S. at 313).

As a consolation, petitioner assures the Court that all will be well by pointing to Texas's top 10% automatic admissions practice, which ostensibly achieves the diversity deemed desirable by universities in a "race neutral" manner. Yet whatever the value of such a system in Texas, its adoption in North Carolina would assure racial diversity only by (1) depriving UNC of the judgment of its wisest and most experienced admissions officials in selecting 80% or more of each entering class; (2) using rigid mathematical formulae to identify entrants, both white and non-white; (3) lowering the overall quality of UNC's entering freshman classes; and (4) implicitly allowing gamesmanship by anxious parents who might well search for weaker school districts in which to enroll their high school juniors or seniors to improve their "top ten percent" chances of college admission.[12]

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[12] *See, e.g.*, Julie Cullen, Mark C. Long & Randall Reback, *Jockeying for Position: Strategic High School Choice Under Texas' Top Ten Percent Plan* 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 16663, 2011) (reporting that, among Texas high school students with the opportunity to choose, as many as 25% enroll in a different, less competitive high school in order to improve their chances of being in the top

Before accepting this invitation to abandon *Bakke* and *Grutter*, diminish the academic freedoms of universities, and transform admissions practices nationwide, the Court should ask what, short of truly "compelling interests," presently motivates universities from coast to coast—public and private, religious and secular, coeducational and single-sex, elite doctoral research universities and regional four-year colleges—to include some modest consideration of race in their otherwise very different admissions systems? Why would hundreds of boards of trustees, led by leaders of business, industry, and public life—each of whom owes deep fiduciary duties to their respective institutions—persist in supporting admissions officials who seek diverse student bodies, if not for their genuine conviction that this diversity affords meaningful educational benefits to the schools and their graduates?[13]

Yet to petitioner, neither the good faith judgment of these trustees nor the vast experiences of the thousands of officials who administer America's universities day-to-day, appear to matter

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ten percent upon graduation, and adding that they "typically displace minority students from the top ten percent pool").

[13] Beyond college administrators and trustees, UNC has evidence that its students highly value diversity in their undergraduate experience. Each year UNC surveys every admitted first-year student to ask why they have accepted or declined its offer of admission. One question reads: "How important a factor was diversity in choosing the school you will attend?" In 2011, 48 percent of those who responded said diversity was "Very important" (13 percent) or "Important" (35 percent); only 19 percent said it was "Unimportant (13 percent) or "Very unimportant" (6 percent).

much. Instead, petitioner urges the Court to deviate from its clearly established precedents and embrace a newly hewn constitutional standard that would create an impregnable, one-size-for-all judicial rule, designed to be "fatal in fact," indeed, destined to ban, in practice, all use of race by any college admissions official ever again.

In justification, petitioner invokes unspecified harms "'to the entire body politic,'" warning of a "'very real' danger" of "racial classification[s that are] merely the product of unthinking stereotypes or a form of racial politics."[14] But there is no convincing evidence to support this cry of havoc. UNC itself earnestly seeks to avoid harm to the body politic. It condemns racial stereotypes and racial politics. It longs for a time in which race will no longer matter, when no consideration of race will be necessary in college admissions. Yet UNC knows first-hand, from the daily experience of its skilled educators, that this time has not yet arrived. To the contrary, it believes that rigid judicial decrees forbidding all consideration of race in college admissions would inadvertently bring far greater societal harms and invite far more widespread racial stereotyping than the narrowly tailored, good-faith use of the practice at which petitioner takes dead aim.

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[14] Pet'r's Br. 33 (internal citation omitted).

ARGUMENT

I. THE UNIVERSITY OF NORTH CAROLINA AND OTHER PUBLIC UNIVERSITIES HAVE A COMPELLING STATE INTEREST IN PREPARING STUDENTS FOR A DIVERSE SOCIETY AND ASSURING A POOL OF STRONG STATE LEADERS BY ADMITTING UNDERGRADUATES DRAWN FROM EVERY BACKGROUND

A. The University Has Developed an Individualized, Holistic Review of Applicants as Its Narrowly Tailored Approach to Prepare Graduates for the State's Diverse Future

For more than 160 years, from the day UNC opened its doors to its first undergraduate student in 1795 until the mid-1950s, African American and Native American families knew that those selfsame doors were firmly closed to even their brightest children. Both during slavery and the long era of strict educational segregation that followed the Civil War, although African American communities constituted some 21-36% of the State's population, and although these communities desperately needed university-trained teachers, doctors, lawyers, social workers, nurses, pharmacists, and business leaders, these families derived minimal assistance from UNC, except on terms circumscribed by the State's white majority.

In the early 1930s, the NAACP began to challenge this long pattern of exclusion in North Carolina, taking up the case of Thomas Hocutt, an African American graduate of the North Carolina

College for Negroes who had been denied admission to the UNC School of Pharmacy.[15] Hocutt lost his case, and it was not until 1951 that the NAACP, through counsel Thurgood Marshall, again sued the University, this time on behalf of young Floyd McKissick and three other African American students who sought admission to the UNC School of Law. Under this Court's newly announced principle in *Sweatt v. Painter*,[16] McKissick and his fellow plaintiffs eventually prevailed in the United States Court of Appeals for the Fourth Circuit and became the first post-baccalaureate students admitted to University.[17] Four years later, on the heels of this Court's pivotal ruling in *Brown v. Board of Education*, the first cohort of African American male undergraduates were admitted to the University, albeit with reduced privileges and benefits. The first African American woman was not admitted until 1963.

The following two decades witnessed continuing efforts to transform UNC from an all-white institution into one that reflects our diverse society. In 1977, in *Adams v. Richardson*, the United States District Court for the District of Columbia ruled that North Carolina and five other Southern states would lose federal funding until they complied with Title VI of the Civil Rights Act of 1964 by increasing enrollment of black students in historically white colleges and universities.[18] After being threatened a second time in 1979 with a cutoff of federal funding for lack of progress, the consolidated UNC system entered into a consent decree that spelled out a specific plan for desegregating all of its sixteen constituent campuses.

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[15] Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* 155-158 (1975).

[16] 339 U.S. 629 (1950).

[17] *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951), *cert. denied*, 341 U.S. 951 (1951). *See* William D. Snider, *Light on the Hill: A History of the University of North Carolina at Chapel Hill* 247 (1992).

Thereafter, through firm leadership and responsive administrative action, UNC rapidly became a more racially diverse campus.[19] In recent years, guided now by its affirmative desire to enhance the educational experience of all students and to strengthen leadership of the region, UNC has pursued admissions practices that welcome to Chapel Hill the finest students from every background, nurturing them, pushing them to grow, and sending them forth to serve as effective leaders.[20]

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[18] 351 F.Supp. 636 (D.D.C. 1972)

[19] *See, e.g.*, Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 499 (2005) ("As of the fall of 2003, the . . . highest ranked universit[y], not including the Ivy League, with the largest enrollment[] of black undergraduates [was] UNC-Chapel Hill[.]") (citing *Leaders and Laggards: Rankings of Black Enrollments at the Nation's 50 Highest-Ranked Universities*, J. BLACKS HIGHER EDUC., Autumn 2003, at 76). *See generally* Charles E. Daye, *People: African-American and Other Minority Students and Alumni*, 73 N.C. L. REV. 675, 686–92 (1995) (identifying the 1970s as "a new era" at UNC Law in terms of welcoming minority students and faculty); *accord* William B. Aycock, *An Evolving Institution: The Deanship of Robert Gray Byrd (1974-79)*, 73 N.C. L. REV. 622, 623–24 (1995).

B. The University's Admission Practices Offer a Fair and Individualized Assessment of Each Applicant in Which Consideration of Race Plays a Modest Though Useful Role

Ranked the fifth best public university in the country, the University has carefully crafted admissions policies that in 2011 selected an entering class of 3,960 students from a pool of 29,486 applicants.[21] UNC has reviewed its admissions policies several times in the years since the *Grutter* decision, each time deciding that diversity is an essential part of the undergraduate experience. To achieve diversity in a fair and individualized manner, each applicant is assessed using more than forty criteria, grouped in the areas of academic performance, academic program, standardized testing, extracurricular activity, special talent, essay, background, and personal criteria.

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[20] UNC has been repeatedly recognized for its efforts in recruiting and retaining minority students. For example, UNC is among the top 100 U.S. colleges and universities awarding undergraduate degrees to minority students, according to a 2011 issue of *Diverse: Issues in Higher Education* magazine. UNC was also "2nd among major U.S. universities in the percentage of African-American students in the 2008 first-year class, according to *The Journal of Blacks in Higher Education*. Carolina had held the No. 1 spot for six of the previous nine years. Black students made up 10.8 percent of the entering class in 2008." *See Facts About Carolina*. UNC News (Feb. 2012), http://uncnews.unc.edu/content/view/30/97/.

[21] As part of the admissions process, applications are randomly assigned among UNC Admissions staff. Each application is read by at least two admissions officers. Periodically, applications are read by committees formed of six to seven admissions officers to assure consistency in decision-making and opportunities for additional consideration.

Race may be considered if the applicant chooses to provide such identifying information,[22] but only as an additional 'plus' factor in this comprehensive review. Applicants are never separated into different racial groups.[23] There are no raw number or percentage goals that the University is working to achieve. While the University consults census data about the racial makeup of the State's population, it does not seek proportionality in its entering classes. Instead, the comparison is used as a rough way to assess whether the University is fostering a scholarly community that allows students to learn from classmates whose backgrounds, experiences, and perspectives will help them prepare for the challenges they will someday face as leaders. Consistent with *Grutter*, the University believes that enrolling a "critical mass" of non-white students helps ensure that no student feels singled out as merely a token of his or her race. When known, an applicant's race is always viewed in the context of the entire application, mindful of all the contributions a student might make.

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[22] This demographic information is requested but not required. Students are encouraged to describe a range of background factors to help UNC understand the multiple contexts in which each student lives, including, for example, languages spoken at home, interruptions in secondary school enrollment, occupation or education level of parents or guardians, and whether other family members have attended the University.

[23] *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1,* 551 US 701, 706 (2007) (Kennedy, J., concurring) (contending that school districts should be "free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race").

The University's multi-faceted holistic review is also the means by which "individual assessment is safeguarded through the entire process."[24] The process eschews the "numerical concept of critical mass," which Justice Kennedy warned "has the real potential to compromise individual review."[25] The consideration of an applicant's race as a non-predominant part of the whole person recognizes that "critical mass" is principally a qualitative, not a quantitative, value. The University's individualized admissions process has been refined through ongoing internal research, review and revision, prompted by its compelling educational interest in achieving meaningful diversity, in assembling the strongest possible entering class, and in respecting diversity's appropriate scope and limits.[26]

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[24] *Grutter*, 539 U.S. at 392–93 (Kennedy, J., dissenting).

[25] *Id.* at 389.

[26] In a 2010 article reflecting on racial diversity in higher education, former Justice Sandra Day O'Connor called for more research and analysis of this critical educational and constitutional issue. Sandra Day O'Connor & Stewart L. Schwab, *Affirmative Action in Higher Education over the Next Twenty-five Years: A Need for Study and Action*, in *The Next Twenty-Five Years: Affirmative Action in Higher Education in the United States and South Africa*, 58, 58–73 (David L. Featherman et al. eds., 2010).

This approach has been vindicated by outside analysis which has affirmed that UNC admissions officials are exceptionally skilled in applying this individualized process. In a 2007 analysis of admissions and graduation rates at colleges and universities nationwide, William Bowen, a labor economist and former president of Princeton, found that students admitted to UNC but enrolling elsewhere graduated at higher rates than students with similar high school test scores and grade-point averages who had not been admitted.[27] The differences in performance were consistent and in some cases dramatic; students who had been admitted to UNC graduated at rates 15 percentage points higher than those denied admission at UNC who enrolled in another research university. Such large differences among similarly-credentialed students—students whose scores and grades would have rendered them indistinguishable in a formulaic approach to admissions—vindicates the exceptional effectiveness, at least in North Carolina, of using holistic admissions review rather than any rigid mathematical or mechanical formula, such as the Texas Top Ten Percent Plan.

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[27] Interview with *Stephen Farmer, UNC Vice Provost for Enrollment and Undergraduate Admissions*, in Chapel Hill, NC (May 24, 2012).

C. The University Has Strong Empirical Evidence That a Racially Diverse Collegiate Setting Substantially Benefits Its Students and Helps Fulfill Its Broader Mission to the State

UNC offers its undergraduates a series of educational experiences that benefit them and the larger society they eventually join. Over four years, undergraduates are introduced to sophisticated ideas in science, mathematics and the humanities. They are also invited to reflect on the past, the present, and their society's deepest values and commitments. Through a wide range of extra-curricular activities – student government, school newspapers, public service organizations, ROTC, athletics, and band -- UNC deliberately provides opportunities for students to engage in socially useful activities and to learn to cooperate with others from different racial and ethnic backgrounds. These too are crucial educational moments, and they build skills upon which most graduates will rely throughout their adult lives.

But can the benefit of this broad exposure to diversity in various contexts and settings be quantified? One recently completed and published meta-analysis, the EDP Study,[28] initiated in 2002, demonstrates a clear positive relationship between racial diversity and educational benefit.[29] The EDP Study has analyzed two empirical questions in a law school setting: (1) do students differ by race in significant ways upon admission; and, if so, (2) do these differences provide unique educational benefits to students, to the institutions they attend, or to society?[30]

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[28] The EDP study, conceived in the era of *Grutter,* focuses on law school students. However, the study's findings that students of different races bring differences to their educational settings, and that these differences offer positive educational benefits to all students, has direct implications for undergraduates and others in higher education settings.

The EDP Study examines the first question by looking at students according to six "diversity construct" areas: (1) personal background (race, gender, geographic origin, marital status, religion/spirituality, education, work experience); (2) family background (socio-economic status, family size, culture, traditions); (3) experience (positive and negative life experiences that might influence a student's perspective); (4) educational expectations (predispositions that students bring to curricular interpretations, classroom dialogues, and co-curricular interactions); (5) career goals and aspirations (including reasons for pursuing higher education); and (6) perspectives (differences in values, beliefs, political orientation).[31]

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[29] *Id.* at 48-53, 74-76.

[30] *Id.* at 7.

[31] The study's authors note: "It has been persuasively argued that a group of students whose members hold different beliefs about what is important, worthy, beautiful and good in life will be more likely to discover for themselves the depth and interminability of the disputes in which human beings find themselves entangled than a group of students whose members share values that are homogenous within the group." *Id.* 19-20 & n. 50. (citing Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 Fla. L. Rev. 861 (2000). Justice Powell made this same observation in *Bakke*: "People

The EDP Study examines the second question—the impacts of diversity on educational settings—through a tripartite structure derived from *Grutter.*[32] First it considers diversity's 'direct impacts' (the individual domain); it next considers 'derivative impacts' (the institutional domain); and finally, 'mediated impacts' (the societal domain). Direct impacts enhance individual students' educational experiences.[33] Derivative impacts prompt an increased range of activities and programs on campus, and enhance the University's concomitant reputation, stature and ranking.[34] Mediated impacts enhance the ability of students to succeed later in life, in diverse communities, and to contribute meaningfully to society.

To focus on just one example, a university might set a goal to "achieve a mix of students who will respect and learn from each other." Accomplishing this goal would have a direct impact in the individual domain by advancing learning among students; it would have a derivative impact by

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do not learn very much when they are surrounded only by the likes of themselves." *Bakke*, 438 U.S. at 312 n.48 (quoting William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977). He then went further, noting that "it is not too much to say that 'the nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 313 (quoting Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

[32] *Grutter*, 539 U.S. at 329–33.

[33] *Id.* at 50-51.

[34] *Id.* at 51.

enhancing the university as a place in which students can learn; and it would have a mediated impact on society by improving students' learning and preparing students to succeed in a diverse society and global world.[35]

The detailed, longitudinal analysis of the EDP Study reaches important conclusions that support UNC's careful and judicious consideration of race in its admissions process. The analysis also confirms, through empirical statistical data, UNC's conclusion, recognized by the *Grutter* majority, that racial diversity can be a compelling governmental interest. The EDP Study additionally supports the continuing need to utilize affirmative means to achieve meaningful, educationally beneficial diversity.

The EDP Study's conclusions were intuitively recognized by this Court as early as 1950, when Chief Justice Vinson noted in *Sweatt v. Painter* that "[f]ew students. . . would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views . . . . With . . . a substantial and significant segment of society excluded, we cannot conclude that the education offered . . . is substantially equal to that" in a racially diverse setting.[36]

This is the key insight about the value of educational diversity. The "contribution of diversity" that Justice Powell described in *Bakke*, includes those "experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."[37] Justice Powell clearly saw the value of race-conscious college admissions, not just as a backward-facing remedial effort but as a forward-looking interest in building a competent, college-trained future work force. As reaffirmed in *Grutter* and demonstrated empirically in the EDP Study, a holistic admissions process in which race plays some modest role remains the most effective, if not indeed the only realistic and workable, way to achieve the full measure of meaningful diversity that will serve UNC's compelling interests to educate, train and best serve the people of North Carolina.[38]

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[35] The EDP Study at 52-53. Table 12 (p. 54) analyzes goals. Table 13 (p. 55) analyzes actions. Table 14 (p. 56) analyzes outcomes.

[36] 339 U.S. 629, 634 (1950).

D. The State of North Carolina Has Substantially Benefited From a Flow of Well-Trained University Graduates Educated in Racially Diverse Settings

UNC's experience has been that racial diversity offers more than lifelong, transformative educational benefits to individual graduates. Thousands of the State's corporations and small businesses, its hospitals and schools, its legislative chambers and courtrooms, now count on UNC graduates who are better prepared for public or private life because of college experiences which have taught them to thrive in interracial and multi-ethnic settings. In recent decades, UNC has sent scores of alumni, broadened by their campus experiences, into important professional or business positions in the State of North Carolina.[39]

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[37] *Bakke*, 438 U.S. at 314.

[38] The EDP Study contains many additional findings that are pertinent to the Court's consideration of this case. We commend it to the Court's careful attention.

In the field of law alone, the University has provided the State with five of its eight most recent governors, all seven of its current members of the North Carolina Supreme Court, and its first African Americans serving as Associate Justice and Chief Justice of the North Carolina Supreme Court, its first African American federal district judge, its first Native American state judge, many non-white State legislators, judges, federal and state prosecutors, a university chancellor, and an array of African American state and local bar leaders, as well as

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[39] Among UNC's living alumni who have earned degrees, the following self-reported, UNC Alumni Office data suggest how many have moved into important professional or business positions in the State of North Carolina in recent decades:

Lawyers/Attorneys:	4953	(959-nonwhite)
CEOs:	324	(17-nonwhite)
Executive Directors:	503	(42-nonwhite)
Teachers:	4458	(319-nonwhite)
Nurses:	2572	(243-nonwhite)
Pharmacists:	3247	(190-nonwhite)
Presidents:	2983	(111-nonwhite)

Email from Roger Nelsen, UNC Director of Alumni Records and Information Systems, to Catherine Pierce, UNC School of Law Assistant Dean for Policy (June 26, 2012, 9:38 a.m.) (on file with Catherine Pierce).

many prominent private firm practitioners and corporate directors.[40]

This is not the parochial experience of UNC alone. Briefs filed by corporations, military officials and others in *Grutter*, as the Court knows, have attested to the special and irreplaceable skills that graduates of racially diverse colleges bring to the nation's corporate workplaces, its armed forces, and to American political and economic life.

II. PETITIONER'S PROPOSED REVISION OF *BAKKE* AND *GRUTTER* WOULD CREATE A NEW, STRICTER STANDARD FOR UNIVERSITY ADMISSIONS THAT WOULD UNDO DECADES OF SUPREME COURT JURISPRUDENCE, MATERIALLY WEAKEN THE EDUCATION OFFERED BY UNC AND OTHER PUBLIC UNIVERSITIES, AND DIMINISH THE CAPACITY OF THEIR GRADUATES TO WORK AND LEAD EFFECTIVELY IN THE 21st CENTURY

A. Petitioner's Proposal Would Jettison Three Decades of Jurisprudence and Erect a New, Effectively Impregnable Barrier To the Consideration of Race in Undergraduate Admissions

Petitioner proposes a new version of the Court's traditional two-pronged "strict scrutiny" test under the Equal Protection Clause that would tighten each of its elements, thereby creating a doctrinal barrier high enough to condemn any limited use of race by the respondents. Indeed, petitioner's "super-strict-scrutiny" would likely bar consideration of race by virtually every public university or governmental actor in any future context, except in remediating an adjudicated wrongdoing.

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[40] *See generally*, Charles E. Daye, *African-American and Other Minority Students and Alumni*, 73 N.C. L. Rev. 675, 681-704 (1995).

The Court has never before accepted such an absolute position. To the contrary, it has offered assurance as recently as *Grutter*, that "strict scrutiny is not 'strict in theory but fatal in fact,'" and, that "not all [governmental uses of race] are invalidated by it."[41] The *Grutter* Court stressed that "[c]ontext matters," and that strict scrutiny should be seen as a device "designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context."[42]

In the very context now under consideration—higher education— *Grutter* recognized "a compelling interest in attaining a diverse student body."[43] In so doing, the Court deferred to the University of Michigan Law School's "educational judgment that such diversity is essential to its educational mission."[44] This approach also recognized the important First Amendment rights of public universities, "in keeping with [its] tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[45] The Court cited earlier cases invoking that principle, including Justice Powell's opinion in *Bakke.*[46] Justice Powell in turn had looked to Justice Frankfurter, who laid the constitutional groundwork for a claim of educational autonomy in 1957, citing among a university's 'four essential freedoms' the choice of "who may be admitted to study."[47] Justice Powell's "wide discretion" naturally evolved into what Justice O'Conner meant by the term "deference" in *Grutter.* Such discretion (or deference), however, does not weaken, but rather informs, strict scrutiny.

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[41] *Grutter*, 539 U.S. at 326–27 (2003) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)).

[42] *Id.* at 327.

[43] *Id.* at 328.

[44] *Id.*

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[45] *Id.* at 328.

[46] *Id.* at 328–29 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Board of Curators of Univ. of Mo. v. Horowitz*, 235 U.S. 78, 96 n.6 (1978); and *Bakke*, 438 U.S. at 319 n.53).

[47] Justice Powell explained: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the 'four essential freedoms' that constitute academic freedom: 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted) (internal quotation marks omitted)).

The *Grutter* majority concluded that student diversity was a compelling interest only after assessing diversity's specifically identified benefits to the Law School—including the promotion of better learning outcomes, an increase in cross-racial understanding, better preparation of students for an increasingly diverse workforce and society, better preparation for professional responsibilities, and the cultivation of leaders with legitimacy in the eyes of the citizenry.[48] Finding those benefits to be "substantial,"[49] the Court held that they sufficed to justify a cognizable "compelling interest" in student body diversity.[50]

Turning to the "narrow tailoring" branch of strict scrutiny, *Grutter* reemphasized that this test was not meant to forestall, in practice, all race-conscious actions by a governmental actor, but instead "to ensure that 'the means chosen fit th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'"[51] Furthermore, the Court emphasized that context *also* counts when assessing narrow tailoring: "[T]he contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."[52] While no quota system is ever appropriate, the Court declared that narrow tailoring is *not* violated when "a university . . . consider[s] race or ethnicity . . . as a 'plus' in a particular applicant's file, without insulat[ing] the individual from comparison with all other candidates for the available seats."[53]

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[48] *Grutter*, 539 U.S. at 330–32.

[49] *Id.* at 330.

[50] Justice Kennedy's opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, similarly concluded that the consideration of race can be part of a compelling governmental interest. He wrote that "parts of the [plurality] opinion . . . imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account." 551 U.S. 701, 787 (2007) (Kennedy, J., concurring). Moreover, "the plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,' is not sufficient to decide these cases." *Id.* at 788 (quoting plurality opinion, 551 U.S. at 748).

Finally, in analyzing a claim identical to the primary one now made by petitioner, *Grutter* rejected the contention that the Michigan plan was not narrowly tailored simply because race-neutral means might have been substituted:

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[51] *Grutter*, 539 U.S. at 333 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (internal quotation marks omitted)).

[52] *Id.* at 333–34.

[53] *Id.* at 334 (internal quotation marks omitted). That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race the defining feature of the application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. *Id.* at 336–37.

> Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.[54]

The Court specifically rejected an idea that a law school might be required to consider a race-neutral lottery system to select among its applicants, since to do so would "require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."[55] Thus good-faith consideration of race-neutral alternatives does not require admissions officials to substitute a mechanical formula for a system based on individual consideration of all applicants, so long as that consideration is narrowly tailored to achieve the compelling interest of assembling a diverse student body.

Petitioner would turn the strict scrutiny regime re-affirmed in *Grutter* on its head. First, she proposes a new dichotomy, not recognized in *Grutter*, to circumscribe radically the legitimate goals a university might pursue, suggesting that the Court has endorsed diversity only in support of a school's "inward-facing concerns", not any "outward-facing" concerns about the relationship between its classes and the broader needs of society.[56] However, the Court recognized and accepted such concerns in *Grutter*, specifically: (1) Michigan's desire to create diversity to "prepare[] students for an increasingly diverse workforce and society;"[57] (2) its desire to "better prepare[] [students] as professionals;"[58] and (3) its desire "to cultivate a set of leaders with legitimacy in the eyes of the citizenry" so that the "path to leadership," from the law school to the larger society, would be "visibly open to talented and qualified individuals of every race and ethnicity."[59]

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[54] *Id.* at 339.

[55] *Id.* at 340.

Second, with absolutely no attention to "context," petitioner proposes to import the "strong basis in evidence" rule – a demand for an exceptionally rigorous factual inquiry limited heretofore by the Court to public contracting, public employment, and Section 5 voting cases – into the very different world of higher education.[60] In these other contexts, where the question is whether particular local or regional actors should be allowed to exercise race-conscious choices for quasi-remedial purposes, the Court has rightly called for a close evidentiary examination of whether the announced needs are sufficiently 'compelling' to justify what might easily become a political 'spoils system.'

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[56] Pet'r's Br. 26.

[57] *Grutter*, 539 U.S. at 330.

[58] *Id.*

[59] *Id.* at 332.

[60] Petitioner quotes Justice Kennedy in support of her contention that a strong basis in evidence is required. In fact, Justice Kennedy's dissent in *Grutter* made a far more nuanced point by demanding *not* a "strong basis in evidence" but only some "empirical evidence." *Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting). As Justice Kenndy's comments highlight, the strong basis in evidence test is more appropriately suited to the remedial model of diversity in employment and contracting cases, not the forward focused, compelling interest model of diversity recognized in higher educational contexts.

In the realm of higher education, by sharp contrast, the Court in *Grutter* – after extensively examining the educational justifications for racial diversity– reached a broad legal conclusion that there indeed exists a "compelling interest in a diverse student body."[61] *Grutter* identified multiple, overlapping compelling interests, none of them 'remedial,' none limited to Michigan Law School alone, but all instead founded in the educational objective to create positive learning conditions that benefit all students and the societies they will eventually service. While careful evidentiary scrutiny remains appropriate in evaluating whether different colleges and universities have in fact tailored their diversity policies lawfully, the underlying lawfulness of student diversity itself has become, in *Grutter*, a binding principle of law that surely need not be relitigated in every subsequent case. For student diversity to be declared "compelling" at Michigan but not at Michigan State, permissible at Berkeley but not at UCLA, would be irrational, given the common goals virtually all institutions of higher education share.

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[61] *Grutter*, 539 U.S. at 329; *see also id.*, 330-33.

Third, petitioner levels a Goldilocks-like complaint against the University of Texas at Austin's plan under the narrow tailoring branch, sometimes suggesting that Texas' consideration of race is "too large" since "race is a factor in admission, placement, or both for every in-state undergraduate applicant,"[62] and at other times complaining that Texas's consideration is too small, since "UT's use of race has had an infinitesimal impact on critical mass in the student body as a whole,"[63] Tellingly, petitioner never concedes a context in which racial consideration would be "just right," and instead argues implicitly that use of race is never permissible. In effect, petitioner would require a policy approach with a degree of precision rarely if ever attainable in the real world.

B. Requiring UNC and Other Public Universities to Adopt an Ostensibly 'Race-Neutral' Alternative Such As the Texas Ten Percent Plan Would Weaken the Overall Strength of UNC's Entering Classes, Exclude Some of the Strongest Applicants, and Undermine Its Compelling Interest in Achieving Meaningful Diversity

What would happen if UNC were required to end its flexible, holistic admissions practice in favor of a mechanical, ostensibly "race-neutral" system, such as the Texas Ten Percent Plan, to attain diversity? One answer is clear: many of UNC's brightest and most promising future students, both white and non-white, would be denied admission. Indeed, the UNC Admissions Office has calculated the impact of such a change on the class entering the University in the fall of 2012. Drawing on extensive, individualized data on all high school seniors across the State, it calculates that imposing a Top Ten Percent plan in 2012 would increase by only 1% the overall percentage of non-white and underrepresented students who would enroll at Chapel Hill (from 15% to 16%).

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[62] Pet'r's Br. 8.

[63] Pet'r's Br. 10 (citation omitted) (internal quotation marks omitted).

Yet that choice would simultaneously depress almost every other indicator of academic quality. For example, average entering SATs in the fall of 2012 would decline by more than 50 points, from 1317 to 1262. Predicted first-year GPA averages among freshman students would dip from 3.26 to 3.16. Moreover, applicants who did not rank in the top 10% of their high school classes, would face far fiercer competition for the few open seats after the top 10% had been selected. The UNC Admissions Offices estimates that a non-top 10% student who applied to the University would see her chances of admission reduced from 31% (under UNC's present individualized, holistic system) to 10% (under a Top Ten Percent system).

In effect, reliable data suggest that a Top Ten Percent plan would be a significantly less satisfactory admissions system for UNC in most respects. The University would experience a negligible, 1% increase in non-white students, bought through a 56 point average decline in average SAT scores, a 0.10 point fall in predicted first year GPAs, and a far narrower window of opportunity for admission among white and non-white applicants who were *not* in the top 10% of their high school classes. Many of the non-white and white students UNC most wanted to enroll could not be admitted.

Were the state's schools and school districts all equally strong and their populations evenly distributed by race, a Top Ten Percent policy might have far less devastating educational effect. Yet in 2012, North Carolina school districts are characterized (as are school districts in many other states) by wide educational disparities and inequities well-documented over the past eighteen years during the State's ongoing school finance/school adequacy litigation, *Leandro v. State.*[64] Because of these disparities, any top 10% admissions policy in North Carolina would create a disturbing irony: less-well-prepared white and non-white graduates from the State's under-financed and low-performing high schools would displace, in UNC's entering classes, many other highly-qualified "second 10%" graduates from some of the state's stronger and more competitive high schools, resulting in a less selective and less well-rounded class in conflict with the University's mission and in contravention of the University's First Amendment rights to determine for itself who is admitted to study.

Under such a system, UNC anticipates that many of the new "automatic admits" would quickly find themselves educationally lost amid the faster pace of Chapel Hill—flocking to remedial courses to overcome their relatively weak secondary school education and facing increasingly difficult challenges to reach graduation. At the same time, UNC would be obliged to reject other white and non-white applicants with far better academic preparation – familiar with advanced geometry and calculus, acquainted with biochemistry, veterans of a string of Advanced Placement courses -- simply because they had not made the rigid top 10% cut in one of North Carolina's stronger school districts.

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[64] 346 N.C. 336, 488 S.E.2d 249 (1997).

In fact, after analyzing the entering credentials of several recent classes at UNC, the Admissions Office has found another basis for concern about a "Top Ten Percent" approach. Among the cohort of the 391 first year students who made the Dean's List in the spring of 2012, 82, or 21%, had been outside the top 10% of their high school classes. In addition, among the 12 UNC undergraduate students who were named Fulbright Scholars in 2011–2012, five ranked outside the top 10% of their high-school graduating class. Among the graduating seniors inducted into Phi Beta Kappa in the fall of 2010, nearly 15%, ranked outside the top 10% of their high school graduating classes. These Phi Beta Kappa graduates and Fulbright Scholars included recipients of campus, state, and national postgraduate fellowships, as well as several university-wide awards for leadership and service. None of them would have qualified for automatic admission under the Texas Ten Percent Plan.

CONCLUSION

Each year, especially since the 1970s, UNC and thousands of other American colleges and universities have brought into close proximity—often for the first time in their lives—large numbers of racially diverse students. They have lived together in dormitories, eaten together in student cafeterias, worked together on student newspapers and politicked together in student government. They have played together on athletic fields, learned together in classrooms, and socialized together in clubs and organizations. After graduation, they have become part of a more racially diverse American workforce, a more racially heterogeneous military and officer corps, a more racially inclusive political system, and indeed, a more diverse judiciary.

The special mission of public colleges and universities to train and sustain this multi-racial society constitutes a compelling interest of the very highest sort. The individualized, holistic review of every applicant's file, with consideration afforded to dozens of factors—race being only a modest consideration among them—is the most narrowly tailored means to assure both diversity and a high quality of successful applicants, white and non-white.

Higher education, especially in residential settings, does far more than transmit facts and data to willing learners. At least since the founding of the residential colleges at Oxford and Cambridge, great universities have been among the most effective means to infuse, into its most talented youth, society's deepest values and goals. In every generation, colleges convey powerful, implicit instruction, including powerful messages about "who counts," and who does not. It is indispensable to UNC's missions and, we earnestly believe, the future of the State and the nation, for 21st century collegians to learn the lessons that diversity teaches.

UNC urges the Court to adhere to the judgment reached in *Grutter* in 2003, presaged by Justice Powell's influential opinion in *Bakke* in 1978, intuitively recognized by Chief Justice Vinson in *Sweatt* in 1950, and followed by UNC and most American institutions of higher education ever since. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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August 9, 2012

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 11-345

In The
Supreme Court of the United States

◆

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

◆

BRIEF OF THE HONORABLE ALLEN B. WEST, MEMBER OF CONGRESS AND LIEUTENANT COLONEL, UNITED STATES ARMY (RET.), AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

◆

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Allen B. West is a retired Lieutenant Colonel in the United States Army who currently serves as a Member of the United States House of Representatives.[1] Lt.Col. West earned a Bachelor's degree in political science from the University of Tennessee (1983); a Master's degree in political science from Kansas State University (1986); and a Master's degree in military arts and science from the U.S. Army Command and General Staff College (1997). Lt.Col. West was elected to Congress in November 2010 representing the State of Florida's Twenty-Second Congressional District. Among other assignments, he serves as a Member of the House Armed Services Committee. Before retiring from active duty, Lt.Col. West served as Commander 2nd Battalion 20th Field Artillery 4th Infantry Division (Task Force "Deep Strike"). In that position, he led a force of approximately six hundred fifty men involved in combat operations in Iraq. He held this position of leadership in 2002-2003 and retired in 2004 following twenty-two years of service. Lt.Col. West's awards and decorations include the Bronze Star, Meritorious Service

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[1] In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and his counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

Medal (with two oak leaf clusters), Army Commendation Medal (with three oak leaf clusters and one valor device), numerous service ribbons and both the Air Assault Badge and Master Parachutist's Badge.

◆

SUMMARY OF ARGUMENT

To borrow the precise language used by Thurgood Marshall as counsel for Petitioners in *Brown v. Bd. of Education*, 347 U.S. 483 (1954), Respondents in this proceeding, the University of Texas, *et al.*, have "no power under the Fourteenth Amendment to use race as a factor in affording educational opportunities to its citizens."[2] Notwithstanding this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003),[3] this principle applies with full force to any effort to use race or ethnicity as factors in the selection and advancement of our Nation's military personnel.[4]

---

[2] Brief for Appellants at 5 in *Brown v. Bd. of Education*, 347 U.S. 483 (1954), cited in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 31 (Kurland & Casper, eds., 1975).

[3] R. Lawrence Purdy, counsel for *Amicus Curiae*, served as one of the trial and appellate counsel for Petitioners in *Grutter, supra*, and its companion case, *Gratz, et al. v. Bollinger, et al.*, 539 U.S. 244 (2003). He is the author of a law review article discussing the legal and procedural history of *Grutter*. *See* R. Lawrence Purdy, *Prelude:* Bakke *Revisited*, 7 TEX. REV. L. & POLITICS 313 (Spring 2003). Mr. Purdy is a 1968 graduate of the United States Naval Academy and a veteran of the Vietnam War. He previously published a response to the "retired officers' brief" (*infra* note 13) filed in support of respondents in both *Grutter* and *Gratz*. *See* R. Lawrence Purdy, *Operation Racial Preferences: What the U.S. military doesn't need*, NATIONAL REVIEW ONLINE (May 28, 2003), http://www.nationalreview.com/articles/207050/operation-racial-preferences/r-lawrence-purdy.

Race-conscious policies do not advance – in fact, they harm – the most compelling of all governmental interests: protecting and defending our Nation's security. This is true whether practiced by colleges and universities (which, together with the Nation's military academies, produce the majority of the commissioned officers in our country's military), or by the military itself in the selection and advancement of its officer and enlisted personnel.

To further this compelling interest, the U.S. government has been committed, since 1948, to insuring that members of its armed forces receive equal treatment and opportunity without regard to race or ethnicity.[5]

Today, however, placing heavy reliance on the "diversity" rationale adopted in *Grutter*, a recent congressional commission[6] has suggested that the equal

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[4] As Yale law professor Steven L. Carter observed, "most philosophers still hold the view that *a principle, in order to be a principle, must be applied universally and impartially* – that is, must actually be applied to all the cases that it fits, with no exceptions for partisan considerations." STEVEN L. CARTER, INTEGRITY 48 (1996) (emphasis added).

[5] Exec. Order No. 9981, 3 CFR 722 (1948) signed by Harry S. Truman on July 26, 1948.

[6] The Military Leadership Diversity Commission ("MLDC") was established as part of the National Defense Authorization

(Continued on following page)

opportunity-inspired mandate of the past no longer requires military leaders to treat all service members the same.[7] The commission encourages military leadership to become color-conscious rather than color-blind; and it criticizes long-standing efforts to assimilate service members into cohesive units without regard to race or ethnicity, suggesting instead that racial differences should be "leveraged" as opposed to suppressed.[8] Such statements would have been unthinkable prior to the decision in *Grutter*.

In order to further the federal government's compelling interest to protect and defend our Nation's security, the United States of America must assure the members of its armed forces that our Nation is now, and shall forever remain, committed to the principle that no service member will be subjected to racial discrimination; and, further, that a service member's race will play no role, positively or negatively, in his or her selection and advancement.

◆

Act for Fiscal Year 2009. Its final report, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, was delivered to President Barack Obama on March 15, 2011 ("MLDC Final Report"). A copy of the MLDC Final Report is available at http://mldc.whs.mil/.

[7] *Id.* at 18.

[8] *Id.*

ARGUMENT

SINCE 1948 IT HAS BEEN AN ESSENTIAL PRINCIPLE THAT THERE SHALL BE EQUALITY OF TREATMENT AND OPPORTUNITY FOR ALL PERSONS IN THE UNITED STATES ARMED SERVICES WITHOUT REGARD TO RACE, COLOR OR NATIONAL ORIGIN

1. The Use of Race-Conscious Policies In Pursuit of A Non-Remedial Interest, Like The Interest In "Diversity" Approved in *Grutter v. Bollinger, et al.*, 539 U.S. 306 (2003), Violates the Principle of Equal Opportunity for Military Personnel First Inspired by President Truman's Historic Executive Order 9981.

"The U.S. Armed Forces became a deliberately inclusive organization in 1948, when President Harry S. Truman issued his historic Executive Order 9981 that called for 'equality of treatment and opportunity for all persons in the armed services.'"[9] In his Executive Order, President Truman captured the essence of the principle necessary to further our Nation's *compelling interest* to protect and defend our country's security. He described it as follows:

> [I]t is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense.[10]

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[9] *Id.* at vii.

[10] Exec. Order No. 9981, *supra* note 5.

It was the Commander-in-Chief's effort, long overdue, to guarantee equal treatment and opportunity to the thousands of minority men and women who, notwithstanding being denied basic civil rights in many parts of our country, had served bravely and honorably in its defense during World War II. President Truman's words ring as true today as when he first issued his Order in 1948. Importantly, he went on to emphasize that this equality of treatment and opportunity was premised on the military's elimination of any consideration of race:

> It is hereby declared to be the policy of the President that there shall be *equality of treatment and opportunity* for all persons in the armed services *without regard to race, color, . . . or national origin.*[11]

Yet, as the parties approach this Court in 2012, and based in part on this Court's 2003 holding in *Grutter*,[12] race has been all-but-fully reinserted as a factor in the treatment of, and the opportunities being offered to, members of today's armed services. Placing reliance on *Grutter*, the U.S. military is being pushed by partisans in the race-preference battles[13] to adopt race-based policies that extend far beyond what even *Grutter* condoned. Today's military leadership is being encouraged, if not directed, to institute race-conscious policies designed to achieve pure racial balancing within the Nation's armed forces.[14] No decision of this Court has ever suggested that the Constitution permits the use of suspect racial classifications for this purpose. All, including *Grutter*, prohibit it.[15]

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[11] *Id.* (emphasis added).

[12] The MLDC's recommendations seeking to achieve racial balance within the military and, in particular, within its officer corps, relies in part on this Court's decision in *Grutter*, while, at the same time, "differentiating diversity from equal opportunity." *See* MLDC Issue Paper #20, Definition of Diversity: *Services' Processes for Developing Definitions of Diversity and Diversity Policy Statements* (Mar. 2010) at 2, 4, 6; copy available at http://mldc.whs.mil/index.php/issuepapers.

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[13] The Vice Chairman of the MLDC previously served as the lead *amicus* in a brief filed in support of the openly race-conscious admissions policies at issue in both *Grutter* and *Gratz*. *See* Brief for Lt.Gen. Julius W. Becton, Jr., et al. as *Amici Curiae*, cited in *Grutter, supra*, 539 U.S. at 331 ("retired officers' brief"). Serving on the MLDC were others who strongly supported the University of Michigan's race-conscious policies.

[14] *See, e.g.*, "**Recommendation 5** . . . develop a standard set of strategic metrics and benchmarks to track progress toward the goal of having a . . . 20-30 year pipeline that yields (1) an officer and enlisted corps that *reflects the eligible U.S. population* . . . * * * **Recommendation 18** . . . The Services . . . should conduct annual 'barrier analyses' to review *demographic diversity patterns* across the military life cycle, starting with accessions [and should include] . . . accession *demographics* [and] retention, command selection, and promotion rates by race/ethnicity . . . [and] identification of persistent, group-specific deviations . . . * * * **Recommendation 20** . . . The Secretary of Defense must ensure that all qualified candidates (including racial/ethnic minorities and women) have been considered for the nomination of every 3- and 4-star position. If there are no qualified racial/ethnic minority and/or female candidates, then a statement of explanation should be made in the package submitted to the Senate for the confirmation hearings." MLDC Final Report, *supra* note 6, at 125-26, 129-30 (emphases added). Moreover, the threat is implicit but very real to any commander who fails to offer a list of "qualified" candidates that includes sufficient numbers of the sought after racial/ethnic groups in order to satisfy demographically-based goals. *See, e.g.*, *id.* at xviii.

This development can be seen in the MLDC's report, expressed in language that would have been all-but-unimaginable prior to *Grutter*:

> . . . [A]lthough good diversity management rests on a foundation of fair treatment, *it is not about treating everyone the same*. This can be a difficult concept to grasp, especially for leaders who grew up with the [Equal Opportunity]-inspired mandate to be . . . color blind. . . . Blindness to differences, however, can lead to a culture of assimilation in which differences are suppressed rather than leveraged.[16]

Encouraged by the adoption of the non-remedial "diversity" rationale in *Grutter*, heavy emphasis is being placed on the race and ethnicity of the Nation's military personnel[17] with military leaders seemingly being encouraged to leverage rather than suppress these irrelevant differences. In short, the MLDC's recommendations – in the context of race and ethnicity – are a detour from the milestones marked in *Brown* (1954), in Dr. King's "I Have A Dream" speech (1963),[18] in the language of Title VI of The Civil Rights Act of 1964 ("Civil Rights Act"),[19] and far removed from the principle originally set forth in President Truman's 1948 Executive Order.[20]

---

[15] *Grutter, supra*, 539 U.S. at 329-30 ("[An] interest . . . 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin' . . . would amount to *outright racial* balancing, *which is patently unconstitutional.*" (emphasis added) (citations omitted)).

[16] MLDC Final Report, *supra* note 6, at 18.

[17] *See, e.g.*, Military Leadership Diversity Commission Issue Paper #1: Definition of Diversity, *How We Define Race and Ethnicity Categories for MLDC Research* (Nov. 2009); copy available at http://mldc.whs.mil/ index.php/issuepapers.

These steps backward are fundamentally at odds with the hard-fought victories achieved after decades of military devotion to the color-blind principle inherent in the equal opportunity-inspired mandate. In fact, adherence to the principle encapsulated in the language of the Civil Rights Act has made possible the extraordinary advances within the military achieved by dedicated and talented Americans of every race and ethnicity.

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[18] Coretta Scott King (ed.), THE WORDS OF MARTIN LUTHER KING, JR. 95 (1983) ("I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.").

[19] 42 U.S.C. §2000d (2006) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[20] Not only are MLDC's suggestions inexplicable, they directly conflict with the earlier observation that, "Individuals expect to be promoted *not* on the basis of their background or heritage but on the basis of the Services' standards of excellence and performance." MLDC Final Report, *supra* note 6, at 12-13 (emphasis added).

This principle – *equal opportunity* (without regard to race or ethnicity) – is captured by the words of two distinguished Americans separated by nearly a century. The first quote comes from Mary Church Terrell, an early black graduate of Oberlin College. In a speech given to the National American Women's Suffrage Association, Ms. Terrell concluded with this thought:

> With courage born of success achieved in the past, with a keen sense of the responsibility which we shall continue to assume, we look forward to a future large with promise and hope. *Seeking no favors because of our color*, nor patronage because of our needs, *we knock at the bar of justice asking an equal chance.*[21]

The year was 1898.

Almost one hundred years later, United States Senator Joseph Lieberman (the Democrat candidate for Vice-President in 2000) had this to say about policies that provide favorable treatment to persons based on their color:

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[21] Mary Church Terrell (1863-1954) was the daughter of former slaves. She earned bachelors and masters degrees in the 1880s from Oberlin College. She later worked in the suffrage movement and helped found the Colored Women's League and the NAACP. *See* Mary Church Terrell, *Samples of great rhetoric from the past*, MINNEAPOLIS STAR-TRIBUNE, Aug. 12, 2002, at A15 (emphasis added).

> You can't defend policies that are based on group preferences as opposed to individual opportunities . . . [t]hey're patently unfair . . . *Not only should we not discriminate against somebody, we shouldn't discriminate in favor of somebody* based on the group they represent.[22]

To the above, we can add similar words written by two recent and highly distinguished members of our Nation's defense team. Penned when each generally was free from the politics that, unfortunately, too often surround issues of race, and at a time when neither was being nudged by partisans on either side of the debate over race-conscious policies, each man offered separate, unambiguous statements expressing opposition to the sorts of race preference policies at issue in both *Grutter* and *Fisher v. Univ. of Texas at Austin, et al.*, 631 F.3d 213 (5th Cir. 2011).

The first in point of time comes from General Colin Powell (USA, Ret.) who served as Chairman of the Joint Chiefs of Staff under Presidents George H. W. Bush and William J. Clinton; and later as Secretary of State under President George W. Bush. In his autobiography published after his retirement from the Army, General Powell stressed the importance of properly defining "affirmative action." His definition is fully consistent with the concept of "affirmative action" originally described by President John F. Kennedy in a 1961 Executive Order. President Kennedy's use of the phrase "affirmative action" was explicitly intended to remove – rather than add – race as a factor in government employment and contracting.[23] When writing his autobiography, General Powell unquestionably shared President Kennedy's view about the inappropriateness of allowing "affirmative action" to metastasize into preferential treatment. Powell's words could not be more clear:

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[22] Stuart Taylor, "Gore-Lieberman: Racial Preferences Forever?" THE NATIONAL JOURNAL (Sept. 4, 2000) (emphasis added). Senator Lieberman also said, "The current system of group preferences has to end. *They were only* intended to be temporary, *aimed at combating racism*. But it's actually fueling division between the races." *Id.* (emphasis added); copy available at http://www3.nationaljournal.com/members/buzz/2000/openingargument/09042000.htm.

> The debate over affirmative action has a lot to do with definitions. If affirmative action means programs that provide equal opportunity, then I am all for it. *If it leads to preferential treatment, . . . I am opposed.* I benefited from equal opportunity and affirmative action in the Army, but I was not shown

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[23] "WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; . . . The contractor will take *affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.*" *See* Exec. Order No. 10925, 3 CFR 448 (1961), signed by John F. Kennedy on March 6, 1961 (emphasis added).

> preference. . . . Affirmative action in the best sense promotes equal consideration, not . . . discrimination. Discrimination "for" one group means, inevitably, discrimination "against" another; and *all discrimination is offensive.*[24]

General Powell, of course, is right. All discrimination is offensive; and poisonous to our military. It is a view widely shared within our Nation's armed forces. For example, based on a 2004 survey of U.S. Army personnel, 56% of the Army officers surveyed opposed race-preference type programs with only 18% supporting them.[25] Indeed, contrary to the *pro* "race preferences" position expressed in the "retired officers' brief" filed in the Michigan cases (*see, supra* note 13), the same 2004 data – obtained the year after *Grutter* was decided – showed that "Senior officers [were] most opposed, with 60% against and 15% in support of such programs."[26]

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[24] COLIN POWELL, MY AMERICAN JOURNEY 591-92 (1995) (emphasis added). Northwestern University Professor Charles Moskos, observed that, "An emphasis on standards [for college admissions, employment, or military promotion] can work only if it goes hand in hand with *a true commitment to equal opportunity* and vice versa. . . . *In preferential treatment, those standards are suspended; that is, quotas are adopted to favor individuals on the basis of their membership in groups rather than on the basis of merit*. . . . [M]ajorities of both blacks and whites consistently oppose the latter." Charles Moskos, *Affirmative Action in the Army: Why it Works*, *in* THE AFFIRMATIVE ACTION DEBATE 231 (George E. Curry, ed., 1996) (emphasis added).

[25] The survey defined these programs as "programs which make special efforts to help minorities get ahead." JASON K. DEMPSEY, OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS 64 (2010). Of the officers surveyed, 39% were "White," 32% "Hispanic," 24% "Black," with 5% "Other." *Id.* at 209.

Another eminent member of our Nation's defense team who demonstrated a commitment to equal opportunity is former Secretary of Defense Robert M. Gates. Dr. Gates enjoyed a long career in government, ending with his recent service as the Secretary of Defense under Presidents George W. Bush and Barack Obama. Prior to being appointed in 2006 as the twenty-second Secretary of Defense, Dr. Gates (beginning in 1999) served as dean of the George Bush School of Government and Public Service at Texas A&M University, an institution with a strong tradition of producing men and women who serve our Nation in uniform. Three years later Dr. Gates was named president of the University. Under President Gates' leadership, Texas A&M was perhaps the most principled flagship university in the Nation when it came to evaluating each applicant on the basis of his or her individual merit while at the same time eschewing race as a criterion. Coming on the heels of the decision in *Grutter,* when many schools accepted *Grutter*'s license to adopt race-conscious admissions policies, President Gates issued a statement that "students at Texas A&M should be admitted on personal merit – and *on no other basis*."[27] He also added an important commitment, emphasizing outreach and recruitment, that captured the essence of affirmative action in its best sense:

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[26] *Id.* at 64. The opposition to race preference policies is not limited to our military. Americans in every walk of life overwhelmingly reject – and find inconsistent with fundamental American principles – the use of race when it comes to guaranteeing equal opportunity to our fellow citizens. *See, e.g.*, PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE 25-27, 102 (1997). *See also* Washington Post/Kaiser/Harvard Poll (March 8 – April 22, 2001) (92% of all respondents including 86% of African-American respondents stated that "hiring, promotion, and college admissions should be based strictly on merit and qualifications other than race or ethnicity"); Zogby International *Report on Academic Life Survey* (April 7, 2000) (77% of college students opposed the use of race preferences in admissions and "at least two-thirds of African-Americans agreed with the majority that fairness and standards should prevail over ethnic diversity in admissions"); and New York Times/CBS Poll (Dec. 6-9, 1997) ("[A] majority of Americans . . . oppose the idea of making hiring and admissions decisions based on race."). Website addresses for each poll cited, above, are included in the Table of Authorities.

> Texas A&M will make new and significant efforts to encourage minority students to apply for admission to the University. . . . However, apart from quantitative admissions decisions (e.g., the top 10% law), the decision on whether to admit a student will be made on an individual basis, taking into account personal achievement, merit and leadership potential. Every student who is at Texas A&M must know, now and in the future, that he or

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[27] *Statement of Texas A&M President Robert M. Gates 12/03/03*; copy available at http://tamunews.tamu.edu/archives/article.php?articleid=16035&month=12&year=2003.

> she and all students here have been admitted on personal merit.[28]

The *equal opportunity mandate* described in the words and actions of General Powell and Dr. Gates has a long history in the military. For example, in 1969 the Department of Defense issued its first Human Goals Charter ("DOD Charter") which explicitly recognized respect for *diversity*.[29] The DOD Charter was, and remains, fully consistent with equal opportunity principles. From the outset it was understood that the very meaning of the word *diversity* was associated with the principle of equal opportunity – *not* racial preferences. To quote from the MLDC's 2011 report:

> For some – especially those who grew up before and during the civil rights movement – the word [*diversity*] conjures up the fight against racial segregation and inequality. For those Americans, *diversity policies and*

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[28] *Id. See also* Peter Schmidt, *A New Route to Racial Diversity: Texas A&M raises minority enrollments without race-conscious admissions*, The Chronicle of Higher Education (Jan. 28, 2005) at 22 ("While many other colleges, including some staunch advocates of race-conscious admissions, were suffering declines in their minority enrollment, Texas A&M's numbers were way up.").

[29] *See* Dept. of Defense Human Goals Charter (Jul. 24, 1998) ("DOD Charter"); copy available at http://www.defense.gov/news/newsarticle.aspx?id=43191. *See also* MLDC Final Report, *supra* note 6, at 27-29.

> *programs are another name for equal opportunity (EO) programs,. . . .*[30]

Building on the importance of equal opportunity without regard to race or ethnicity, the most recent version of the DOD Charter sets forth the essential steps believed necessary to accomplish the country's compelling interest to protect and defend the Nation's security. In relevant part, it provides that:

> *OUR Nation was founded on the principle that the individual has infinite dignity and worth.* The Department of Defense, which exists to keep the Nation secure and at peace, must always be guided by this principle.[31] . . .
>
> THE defense of the Nation requires a well-trained volunteer force, military and civilian, regular and reserve. To provide such a force, we must increase the attractiveness of a career in the Department of Defense so that service members and civilian employees will feel the highest pride in themselves, their

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[30] MLDC Final Report, *supra* note 6, at 11 (emphasis added).

[31] Consistent with this foundational principle of the DOD Charter is the following: "The fundamental premise of our society is that *each person is equally 'diverse' exactly because of her equality before God and the law*. . . . Thus, the starting basis is one of equality, not of separately assigned categories that are used to measure diversity. From that starting point, every person's experiences are 'diverse' from those of every other." *Grutter v. Bollinger, et al.* ("*Grutter II*"), 288 F.3d 732, 792 (6th Cir. 2002) (Boggs, Circuit Judge, dissenting) (emphasis added).

> work, their organization, and their profession.
>
> THE ATTAINMENT OF THESE GOALS REQUIRES THAT WE STRIVE
>
> *   *   *
>
> TO make military service . . . *a model of equal opportunity for all regardless of race, color, sex, religion, or national origin*; . . .[32]

No plainer set of statements can be imagined to describe the importance of adhering to a policy of equal opportunity that neither permits nor condones racial discrimination of any kind. Indeed, the men and women who today volunteer to serve our country and have "grown up under the protection of [equal opportunity] laws and regulations,"[33] have a right to assume their treatment will at all times lawfully be based upon traditional equal opportunity principles. Thus, they have a right to expect equal treatment consistent with the equal protection clause of the Fourteenth Amendment, the express language of the Civil Rights Act, and the promises contained within the DOD Charter. The "diversity" rationale adopted in *Grutter*, if applied to our military personnel, would fundamentally violate this guarantee of equal opportunity.

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[32] DOD Charter, *supra* note 29 (emphasis added).

[33] MLDC Final Report, *supra* note 6, at 11.

2. The Guarantee of Equal Opportunity Is Indispensable to A Military Unit's Cohesion and Critical to Military Effectiveness and Our National Security.

The corrosive impact on our Nation's security of instituting any policy *contrary* to the *guarantee of equal treatment and opportunity without regard to race* cannot seriously be questioned.

This uncontroverted observation was, in fact, fully acknowledged in the "retired officers' brief" cited in *Grutter*.[34] That brief, which included a heavy focus on the tumultuous racial divisions that simultaneously were convulsing not only our military but our entire nation during the Vietnam War era,[35] acknowledged that "policies combating discrimination are essential to good order, combat readiness, and military effectiveness."[36] In fact, the "retired officers' brief" made this point not once, but twice:

> Racial conflict within the military during the Vietnam era was a blaring wakeup call to the fact that *equal opportunity is absolutely indispensable to unit cohesion, and therefore*

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[34] *See* retired officers' brief, *supra* note 13, at 14 ("[M]ilitary effectiveness depends heavily upon unit cohesion.").

[35] *See generally id.* at 13-17, 28-29.

[36] *Id.* at 12.

> *critical to military effectiveness and our national security.*[37]

Yet, today, this fact is being ignored with the military being encouraged to adopt race-based policies that inevitably lead to different treatment based on a service member's race.[38]

Increasingly lost in the fog of *Grutter*'s "diversity" rationale is the "essential" principle set forth in President Truman's Executive Order 9981, to wit: the need to insure that every person who desires to serve is guaranteed an *equal opportunity* to do so irrespective of his or her race or ethnicity.

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[37] *Id.* at 17 (emphasis added) (internal quotes and citations omitted).

[38] The poisonous effects of using national origin as criteria for military advancement can be seen in the writings of the young George Washington. In 1757, after he had concluded that British authorities, aghast at the thought of an American-born provincial advancing too far in the King's Army, had blocked a commission he had earned through his performance during the French and Indian War, Washington contemplated leaving military service altogether. He lamented, "it is not to be wondered at, if, under such peculiar circumstances, I should be sick of a service, which promises so little of a soldier's reward." *See* LETTER FROM GEORGE WASHINGTON TO THE EARL OF LOUDOUN, *reprinted in* THE WRITINGS OF GEORGE WASHINGTON, VOL. II 228-29 (Jared Sparks, ed., 1834). Over 250 years later, Washington's lament is addressed in the MLDC Final Report, *supra* note 6, at xvi ("The performance of the Nation's military is tied to the individual's belief that he or she will be treated fairly regardless of his or her background.").

3. The Bitter Fruit of *Grutter*.

Of all the statements describing the multitudinous dangers associated with the use of race-conscious policies – among them anger, resentment, stigma and the rejection of the fundamental American principle of equal opportunity without regard to race or ethnicity – perhaps none is more apt than this from Justice Clarence Thomas, writing in dissent in *Grutter*:

> The Constitution abhors classifications based on race, not only because those classifications can harm favored races[39] or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. Purchased at the price of immeasurable human suffering, the equal

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[39] For additional examples of the harm that can occur to "favored races," *see* Robin Wilson, *The Unintended Consequences of Affirmative Action: A Controversial Study from Unlikely Sources Asks Why College Faculties Lack Diversity*, THE CHRONICLE OF HIGHER EDUCATION (Faculty Vol. 49:21) at A10 (Jan. 31, 2003). In Ms. Wilson's article, Dr. Claude M. Steele, an expert designated by the University of Michigan in *Grutter* (later withdrawn as a witness by the University's lawyers on the eve of testifying) expressed concern over the potential effect of observations set forth in a book by Stephen Cole and the late Elinor Barber, INCREASING FACULTY DIVERSITY (2003). Dr. Steele was quoted as saying, "I think Sandra Day O'Connor's law clerks are going to read [the Cole/Barber study] and they'll say, 'Look at this. Here's a real thorough study, and it is arguing that affirmative action is harming these kids.'"

> protection principle reflects our nation's understanding that such classifications ultimately have a destructive impact on the individual and our society.[40]

Justice Thomas' powerful words are directly applicable to the men and women serving in our Nation's armed forces. He added this coda:

> For the immediate future . . . the majority [in *Grutter*] has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause.[41]

Justice Anthony Kennedy, who also criticized the race-conscious policy upheld in *Grutter*, offered words equally apt to the potential harm to our military personnel when race is inserted into the selection process:

> Preferment by race, when resorted to by the State, *can be the most divisive of all policies*, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.[42]

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[40] *Grutter, supra*, 539 U.S. at 353-54 (Justice Thomas, concurring in part and dissenting in part) (citations, quotations, omitted).

[41] *Id.* at 378.

[42] *Id.* at 388 (Justice Kennedy, dissenting) (emphasis added).

While there no doubt are many words that describe the evil of using race as a factor in governmental decision-making, Justice Kennedy may have picked the perfect descriptive when it comes to our military: "corrosive."[43] He concluded that the "unhappy consequence [of the failure to apply strict scrutiny to the use of race condoned in *Grutter*] will be to perpetuate the hostilities that proper consideration of race is designed to avoid," a perpetuation he asserted "would be the worst of all outcomes."[44]

The "harmony and mutual respect among all citizens that our constitutional tradition has always sought"[45] is critical when it comes to furthering our government's compelling interest to protect and defend our Nation's security. Race-conscious programs like the one narrowly approved in *Grutter* are antithetical to that critical goal.

One final point. The MLDC has recommended for Service-wide adoption the following definition of *diversity*:

> *Diversity* is all the different characteristics and attributes of individuals that are consistent with Department of Defense core values, integral to overall readiness and mission

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[43] *Id.* at 394.

[44] *Id.*

[45] *Grutter, supra,* 539 U.S. at 395 (Justice Kennedy, dissenting).

> accomplishment, and reflective of the Nation we serve.[46]

Setting aside whether any sense can be made of this proposed definition, it is absolutely clear that race and ethnicity have nothing to do with Department of Defense "core values." DOD's core values are *duty, integrity, ethics, honor, courage, loyalty, leadership, professionalism, and technical know-how*.[47] Everyone wearing a uniform must live by them. It is a singular devotion to these core values irrespective of a service member's race or ethnicity that is critical to DOD's "overall readiness and mission accomplishment."

Second, the concluding phrase, "reflective of the Nation we serve," is nothing more than an invitation to use whatever means are necessary to effect racial balancing within the military. The text of the MLDC's report and its policy recommendations make this goal clear.[48]

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[46] *See* MLDC Final Report, *supra* note 6, at xiv.

[47] Dept. of Defense 101, http://www.defense.gov/about/dod101/aspx; *also cited in* MLDC Final Report, *supra* note 6, at 132.

[48] "The Commission found that top military leaders are representative neither of the population they serve nor of the forces they lead. The extent to which racial/ethnic minorities . . . are underrepresented varies across the Services,. . . ." MLDC Final Report, *supra* note 6, at xvi. "The Commission's recommendations include that DoD and the Services . . . require accountability for recruiting from underrepresented demographic groups, . . . * * * and persistent accountability for achieving the goals of diversity and inclusion." *Id.* at xvii. These recommendations

(Continued on following page)

In the end, it is impossible to square the MLDC's multiple concessions that the military must provide "equal opportunity for all"[49] without regard to one's race or ethnicity with the commission's race-focused recommendations and its incongruous statement that "it is *not* about treating everyone the same."[50] This is the sad and bitter fruit of *Grutter*.

◆

CONCLUSION

Fifteen years after General Powell expressed his unambiguously negative view of preferential treatment, it was once again given a human face by retired Army Major General Alfredo Valenzuela. In testimony given before the MLDC on January 14, 2010, General Valenzuela offered this:

> [My dad] told me one thing when he came back from World War II . . . we all wear green . . . we all bleed red, . . . there is no difference and don't let ethnicity play a role.[51]

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seem directed at one goal only: the achievement of racial balancing within the military.

[49] *See, e.g.*, MLDC Final Report, *supra* note 6, at xix.

[50] *Id.* at 18 (emphasis added).

[51] Transcript of testimony of Maj.Gen. Alfredo Valenzuela (USA, Ret.) given to the MLDC (Jan. 14, 2010) at 41. A copy is available at http://mldc.whs.mil/download/documents/Transcripts/10.../0114mldc.pdf.

Lt.Col. West concurs with the observations of both General Powell and Major General Valenzuela's father.

This fact remains unchanged, as it has since President Truman issued his Executive Order in 1948: Neither race nor ethnicity has a legitimate role to play in determining how opportunities, promotions, benefits and privileges are awarded within the U.S. military.

In the end, the principle prohibiting racial discrimination in the public sphere, as unanimously laid down in *Brown*[52] and statutorily affirmed in the Civil Rights Act, should be fully re-embraced as the governing principle for every policy affecting our military personnel.

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Respectfully submitted,

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[52] "*[R]acial discrimination in public education is unconstitutional*. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle." *Brown v. Bd. of Educ.* ("*Brown II*"), 349 U.S. 294, 298 (1955) (emphasis added).